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SERVIZIO STUDI

LA RETROATTIVITÀ DELLA LEGGE NELLA GIURISPRUDENZA DELLA CORTE EUROPEA DEI DIRITTI DELL'UOMO

Tomo Secondo: Pronunce rese nei confronti di altri Paesi

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B. PRONUNCE RESE NEI CONFRONTI DI ALTRI PAESI

Retroattività della legge “civile”

Artt. 6 § 1 della Convenzione (equo processo)
e 1 del Protocollo n. 1 (diritto al rispetto dei beni)

In materia previdenziale

Sentenza del 27 maggio 2004, sez. I, causa OGIS-INSTITUT STANISLAS, OGEC ST. PIE X ET BLANCHE DE CASTILLE c. Francia (in particolare, par. 56-72)

En l'affaire OGIS-Institut Stanislas, OGEC St. Pie X et Blanche de Castille et autres c. France,

La Cour européenne des Droits de l'Homme (première section), siégeant en une

chambre composée de :
MM. C.L. Rozakis, *président*,
J.-P. Costa,
Mme F. Tulkens,
M. E. Levits,
Mme S. Botoucharova,
MM. A. Kovler,
V. Zagrebelsky, *juges*,
et de M. S. Nielsen, *greffier de section*,

Après en avoir délibéré en chambre du conseil les 3 avril 2003 et 6 mai 2004,

Rend l'arrêt que voici, adopté à cette dernière date :

PROCÉDURE

1. A l'origine de l'affaire se trouvent deux requêtes (nos 42219/98 et 54563/00) dirigées contre la République française et introduites par un organisme de gestion d'un établissement d'enseignement privé, l'institut Stanislas, et par cinquante-six organismes de gestion d'établissements catholiques (OGEC) (« les requérants »).

2. Le requérant de la requête no 42219/98 avait saisi, le 7 juillet 1998, la Commission européenne des Droits de l'Homme (« la Commission ») en vertu de l'ancien article 25 de la Convention de sauvegarde des Droits de l'Homme et des Libertés fondamentales (« la Convention »). La requête a été transmise à la Cour européenne des Droits de l'Homme (« la Cour ») le 1er novembre 1998, date d'entrée en vigueur du Protocole no 11 à la Convention (article 5 § 2 du Protocole no 11).

3. Les requérants de la requête no 54563/00 avaient saisi le 27 janvier 2000 la Cour en vertu de l'article 34 de la Convention.

4. Le requérant de la requête no 42219/98 est représenté par Me F. Wagner, avocat au barreau de Nice. Les requérants de la requête no 54563/00 sont représentés par Mes C. Pettiti et P. Tiffreau, avocats au barreau de Paris. Le gouvernement français (« le Gouvernement ») est représenté par son agent, M. R. Abraham, Directeur des Affaires Juridiques au Ministère des Affaires Etrangères.

5. Les requérants alléguaient la violation des articles 6 § 1 de la Convention et 1 du Protocole no 1 pris isolément et combinés à l'article 14 de la Convention.

6. Les requêtes ont été attribuées à la troisième section de la C 52 § 1 du règlement). Au sein de celle-ci, la chambre chargée d'examiner l'affaire (art de la Convention) a été constituée conformément à l'article 26 § 1 du règlement.

7. Le 1er novembre 2001, la Cour a modifié la composition de ses sections (article 25 § 1 du règlement). Les présentes requêtes ont été attribuées à la première section ainsi remaniée (article 52 § 1).

8. La chambre a décidé de joindre les requêtes (article 42 § 1 du règlement).

9. Par une décision du 3 avril 2003, la chambre a déclaré les requêtes recevables.

10. Tant les requérants que le Gouvernement ont déposé des observations écrites

sur le fond de l'affaire (article 59 § 1 du règlement).

EN FAIT

I. LES CIRCONSTANCES DE L'ESPÈCE

A. La genèse des affaires

11. Les requérants gèrent chacun, dans le cadre d'un contrat d'association avec l'Etat, un établissement d'enseignement privé. Leur objet statutaire est d'assurer l'entretien et la gestion de ces établissements ainsi que la gestion de tout ce qui se rapporte à l'éducation et à l'enseignement confié à des maîtres.

12. Le régime applicable aux établissements d'enseignement privés découle de la loi du 31 décembre 1959, dite loi Debré, qui pose le principe de la liberté de l'enseignement (article 1er) avec participation des pouvoirs publics à leur financement. Ainsi, dans le cadre de contrats d'association passés avec l'Etat, la prise en charge de la rémunération des maîtres et des cotisations sociales y afférentes incombe à celui-ci. Cette loi, et notamment son article 15, fut modifiée par une loi du 25 janvier 1977, dite loi Guermeur, qui a limité l'obligation de l'Etat, en posant le principe de « l'égalisation des situations » entre les maîtres de l'enseignement privé sous contrat et les maîtres titulaires de l'enseignement public, notamment pour ce qui a trait aux mesures sociales ; cette égalisation devait être progressivement conduite et réalisée dans un délai maximum de cinq ans. Un décret pris en Conseil d'Etat devait fixer la part dont l'Etat avait la charge pour assurer cette égalisation.

13. Cependant, en vertu d'une convention collective nationale du 14 mars 1947, dont les dispositions furent rendues obligatoires par une loi du 29 décembre 1972, les maîtres du secondaire des établissements privés bénéficièrent du régime national interprofessionnel de retraite complémentaire et de prévoyance des cadres. A ce titre, ces établissements furent tenus de verser une cotisation égale au taux de 1,5 % de la tranche de la rémunération inférieure au plafond de la sécurité sociale des cadres, destinée à être affectée en priorité à la couverture sociale du risque décès et, accessoirement, en complément de prestations de sécurité sociale pour les risques de maladie et d'invalidité.

14. Par ailleurs, la règle de l'égalisation conduisit à l'adoption du décret du 28 juillet 1960 qui fixa, à l'article 6, le principe selon lequel les charges sociales et fiscales afférentes aux rémunérations perçues par les maîtres contractuels et auxiliaires incombent à l'Etat. En outre, par un décret du 8 mars 1978, l'Etat s'engagea à accorder des prestations de prévoyance aux maîtres des écoles privés, en parité avec les enseignants du secteur public.

15. Toutefois, les établissements privés n'ayant pas été soustraits au versement des cotisations, des organismes de gestion engagèrent un recours contre l'Etat tendant à obtenir sa condamnation au remboursement de celles-ci. Ce faisant, se posa notamment la question de la compatibilité de la règle de « l'égalisation » avec le versement de cette cotisation prévu par l'article 7 de la Convention collective de 1947.

16. Par un jugement du 29 juillet 1986, le tribunal administratif de Nantes, rejeta la demande présentée par l'un de ces organismes, l'OGEC de la Baugerie, d'annuler la décision implicite par laquelle le Préfet de Loire-Atlantique avait refusé de faire droit au remboursement de la part des cotisations sociales versées. Par des requêtes des 24 novembre 1986 et 24 mars 1987, l'OGEC la Baugerie sollicita du Conseil d'Etat l'annulation de ce jugement. 17. Par un arrêt du 15 mai 1992, le Conseil d'Etat fit droit à la demande en considérant : « qu'en l'absence de décret en Conseil d'Etat, limitant le remboursement de ces cotisations (...) pour assurer l'égalisation des situations prévue à l'article 15 de la loi du 31 décembre 1959, l'organisme est en droit de prétendre au remboursement par l'Etat de l'intégralité des sommes dont il a fait l'avance au titre de ces cotisations, alors même que les avantages qui sont la contrepartie de la cotisation au taux unique de 1,5 % fixé à l'article 7 de la convention collective excéderaient ce qui est nécessaire pour réaliser cette égalisation. »

18. Il posa ainsi le principe du droit au remboursement intégral des cotisations dont l'avance avait été faite par les organismes de gestion au taux de 1,5 %, en l'absence de décret fixant la part dont l'Etat avait la charge en vertu de la règle de l'égalisation.

19. A la suite de cette décision, les OGEC sollicitèrent, à l'échéance quadriennale, le remboursement des cotisations. Le tribunal administratif de Rennes fit droit à la demande de l'OGEC de Cesson-Sévigné, par un jugement du 22 juin 1994, conformément au principe posé précédemment par l'arrêt du Conseil d'Etat. Les contentieux se multipliant sur l'ensemble du territoire, le législateur intervint afin de combler le vide juridique mis en évidence par l'arrêt du Conseil d'Etat et limiter ces remboursements.

20. Le décret du 23 août 1995 fixa le principe du versement par l'Etat, à compter du 1er novembre 1995, d'un complément de capital décès afin d'assurer la règle de l'égalisation.

21. Dans le cadre des travaux préparatoires de la loi de finances pour 1996, le rapporteur général de la commission des finances du Sénat rédigea un rapport, sur le problème de la détermination des sommes dues par l'Etat aux OGEC : « (...) L'exécution de cet arrêt de principe [du 15 mai 1992] a donné lieu, entre l'Etat et ses partenaires de l'enseignement privé, à de longues discussions. Pendant ce temps, les contentieux et les jugements condamnant l'Etat s'accumulaient, et le risque financier total atteint actuellement une somme estimée entre 600 et 800 millions de francs (...).

L'article 67 du présent projet de loi a pour objet de régler la situation antérieure à l'entrée en vigueur du décret (...) du 23 août 1995, soit le 1er novembre 1995. (...) pour cette période, et sans porter préjudice aux decisions de justice passées en force de chose jugée, l'Etat ne sera tenu de rembourser que la fraction de la part patronale des cotisations de prévoyance des cadres des établissements privés correspondant aux prestations nécessaires pour assurer l'égalisation de leur situation avec celle des fonctionnaires de l'Etat. Ainsi pour les contentieux qui n'ont pas encore été définitivement tranchés, et qui portent sur une somme que l'on peut estimer aux environs de 400 millions de francs, l'Etat ne devrait pas s'acquitter de la totalité des sommes représentant le 1,5 % mais seulement de la fraction de ce pourcentage nécessaire pour assurer la parité, ce qui représente une économie non négligeable sur des condamnations contentieuses dont l'issue ne fait guère de doutes (...). Le Gouvernement devra nécessairement s'appuyer sur un pourcentage, pour déterminer les sommes qu'il doit rembourser (...). Or, ce pourcentage n'est pas encore fixé (...). Cet article est donc, en l'état inapplicable et suppose, à défaut d'un accord dont le gouvernement pourrait s'inspirer, l'intervention d'un décret fixant la part du 1,5 % qui revient à l'Etat. Faute de quoi, on peut craindre que le juge administratif ne condamne l'Etat, comme par le passé, à s'acquitter de la totalité du 1,5 % (...). »

22. En vertu des dispositions de l'article 107 de la loi du 30 décembre 1995, le législateur posa le principe selon lequel, s'agissant de la période antérieure au 1er novembre 1995, le taux de remboursement applicable aux procédures non définitivement jugées, devait être fixé par un décret pris en Conseil d'Etat. Le décret du 16 juillet 1996 fixa le taux à 0,062 %.

23. Le Ministre de l'éducation nationale interjeta appel, devant la cour administrative d'appel de Nantes, du jugement du 23 janvier 1996, par lequel le tribunal administratif de Caen avait condamné l'Etat à verser à l'OGEC de Saint Sauveur-le-Vicomte la somme équivalente à l'intégralité de la part patronale de la cotisation dont l'organisme avait fait l'avance de 1990 à 1993 et pendant les neuf premiers mois de 1994. Cette cour sollicita l'avis contentieux du Conseil d'Etat sur la question de la compatibilité de l'article 107 de la loi du 30 décembre 1995 avec les articles 6 et 14 de la Convention ainsi que l'article 1er du Protocole no 1.

24. Le Commissaire du Gouvernement, dans ses conclusions, exprima son opinion notamment dans les termes suivants : « (...) Pour tirer les conséquences de votre décision du 25 mai 1992, le gouvernement a pris deux mesures.

Pour la période postérieure au 1er novembre 1995, le décret du 23 août 1995 limite les engagements financiers de l'Etat aux seules mesures imposées par l'égalisation des situations (...)

Pour la période antérieure au 1er novembre 1995, l'Etat a voulu circonscrire les conséquences financières de votre décision de 1992. L'Etat a décidé de rembourser aux OGEC la seule part de cotisation nécessaire à l'égalisation des situations. L'article 107 de la loi du 30 décembre 1995 (...) a fourni au pouvoir réglementaire, sous réserve des décisions de justice passées en force de chose jugée, le support juridique autorisant une mesure rétroactive. Le décret (...) du 16 juillet 1996 a fixé à 0,062 % la part de cotisation (...) nécessaire à la parité. (...) ce taux (...) est 24 fois inférieur à celui

de 1,5 % que l'Etat devait rembourser (...) L'article 107 modifie les droits que les requérants pensaient tenir de votre décision du 25 mai 1992 (...). En effet, l'intervention de [cet] article (...) illustre incontestablement le fait qu'une partie, l'Etat, a les moyens de modifier rétroactivement les données d'un litige en cours. Vous avez à apprécier si cette intervention est, en l'espèce, une atteinte au caractère équitable du procès (...). Nous vous proposons de dire que l'article 107 (...) n'a pas porté atteinte au droit à un procès équitable (...). Ici y a-t-il intérêt à faire échapper l'Etat à un remboursement de 850 millions de francs qui résulterait de l'application générale du remboursement au taux de 1,5 % alors que l'application du principe de parité prévu dans la loi de 1959 modifiée ne conduit qu'à un remboursement de 35 millions, cette différence n'étant que la conséquence de l'abstention du gouvernement à prendre en temps utile le décret nécessaire à la fixation du taux pertinent ? (...) L'article 107 peut aussi trouver un fondement d'intérêt général dans la nécessité de faire cesser un enrichissement sans cause des établissements privés dû à la carence du pouvoir réglementaire. Cet effet d'aubaine entraînant des distorsions importantes entre les établissements scolaires, il était d'intérêt général de le faire cesser, fût-ce rétroactivement. (...) La loi est intervenue alors que la plupart des litiges étaient en cours d'examen par le juge de première instance, et le grand nombre d'établissements scolaires concernés montre qu'il n'y avait pas de volonté de nuire à certains d'entre eux mais de faire échec aux espoirs illégitimes de créanciers de l'Etat.

On pourrait même dire que cette intervention du législateur était nécessaire pour rétablir l'équité. L'article 107 est une loi de validation un peu particulière. C'est une intervention du législateur [qui a] pour objet (...) de fixer rétroactivement le montant d'une obligation de l'Etat à l'égard de personnes privées. (...) La loi du 30 décembre 1995 est l'expression de la volonté du législateur de faire prévaloir sa volonté initiale détournée de la carence du pouvoir réglementaire. En 1992, le juge administratif n'a fait que dire le droit tel qu'il résultait de cette carence, qui empêchait le juge de déterminer le montant exact de la créance des établissements. Le législateur n'avait d'autre solution que d'autoriser l'intervention d'une mesure rétroactive, fixant le montant de la dette de l'Etat pour une période écoulée.

Aucune atteinte à un droit n'a été méconnue, les droits des établissements n'étant pas issus de votre décision du 25 mai 1992 mais de la loi du 31 décembre 1959 et notamment de son article 15 énonçant le principe d'égalisation.

L'article 107 de la loi de 1995 est venu mettre fin à une ambiguïté du droit applicable et l'intérêt général autorisait le législateur à agir rétroactivement.

(...) Les litiges (...) sont seulement relatifs au montant d'une créance ; il [s'agit] pour l'Etat de tirer les conséquences de votre décision de 1992 qui mettait à sa charge l'intégralité d'un remboursement tout en reconnaissant que seule une partie était due mais que son montant devait être fixé par le gouvernement (...).»

25. Le 5 décembre 1997, l'Assemblée du Contentieux du Conseil d'Etat rendit

un avis dont les dispositions pertinentes se lisent comme suit : « Le litige est relatif aux relations financières entre l'Etat et l'organisme de gestion d'un établissement privé sous contrat (...). Il a pour objet une contestation portant sur des droits et des obligations de caractère civil au sens de l'article 6 de la Convention. (...) Les dispositions [de l'article 107] ont pour objet non de réduire rétroactivement les obligations financières de l'Etat à l'égard des organismes de gestion (...), mais d'en réaffirmer l'étendue telle qu'elle a été définie par les prescriptions de l'article 15 (...) et de permettre ainsi un règlement des dettes de l'Etat (...).

L'article 107 (...) qui ne fait pas obstacle au droit des organismes de gestion de demander compensation des conséquences du retard mis par le gouvernement à prendre les mesures nécessaires à une exacte application des prescriptions de l'article 15 (...) ne peut être regardé comme portant atteinte au principe du droit à un procès équitable (...). »

26. Le Conseil d'Etat fut ensuite saisi de la question de la légalité du décret du 16 juillet 1996 et, notamment, de sa conformité au principe d'égalisation posé à l'article 15 de la loi Debré modifiée. Par un arrêt du 8 avril 1998, il rejeta les requêtes présentées par l'institut Stanislas et d'autres organismes de gestion, en statuant comme suit : « Considérant qu[e] (...) l'Etat n'est tenu de

supporter les charges sociales légalement obligatoires afférentes aux rémunérations des maîtres de l'enseignement privé que dans la mesure où le taux des cotisations n'excède pas ce qui est nécessaire pour assurer l'égalisation des situations entre ces maîtres et les maîtres titulaires de l'enseignement public ; qu'il ressort des pièces du dossier que pour fixer, par le décret attaqué, le taux de prise en charge par l'Etat des cotisations patronales acquittées par les organismes de gestion des établissements d'enseignement privés sous contrat, au titre de l'assurance-décès dont bénéficient les maîtres de l'enseignement privé ayant un statut de cadre, le gouvernement a retenu la valeur moyenne, sur une période de quatre ans et compte tenu du nombre annuel de décès de cadres du secteur privé chaque année, de la différence entre, d'une part, le montant du capital-décès, correspondant à un an de traitement moyen indiciaire, servi par l'Etat et, d'autre part, le montant du capital-décès correspondant à trois mois de rémunération moyenne mensuelle dans la limite du plafond, servi par le régime général de la sécurité sociale ; que le taux de prise en charge obtenu au terme de ce calcul s'élevant à 0,062 %, le gouvernement n'a pas méconnu les prescriptions de l'article 4 de la loi du 31 décembre 1959 modifiée en retenant ce taux (...). »

B. La procédure intentée par l'organisme ayant introduit la requête no 42219/98

1. Saisine préalable du préfet des Alpes-Maritimes

27. Par lettre du 23 novembre 1995, le requérant, se fondant sur l'article 15 de la loi Debré modifiée, sollicita du préfet le remboursement intégral des cotisations pour la période courant du 1er janvier 1990 au 31 octobre 1995. Le silence gardé par le préfet pendant quatre mois valut décision de rejet.

2. Procédure en référé devant le tribunal administratif de Nice

28. Le 20 mai 1996, le requérant déposa une requête devant le tribunal administratif de Nice tendant à se voir allouer une provision. Il alléguait le défaut de contestation sérieuse de l'obligation à la charge de l'Etat en se fondant sur l'arrêt du Conseil d'Etat du 25 mai 1992.

29. Par une ordonnance du 27 juin 1996, le tribunal rejeta la demande. Il considéra notamment que : « Le législateur a décidé que l'obligation de remboursement par l'Etat des cotisations (...) serait égale à la part de cotisation nécessaire pour assurer l'égalisation (...) que cette part serait fixée par décret en Conseil d'Etat, mettant ainsi obstacle (...) à l'application de la jurisprudence de la Haute juridiction administrative (...) que dans le cadre juridique ainsi fixé, en l'absence de publication du décret (...) prévu par l'article 107, la somme due à l'organisme ne peut être déterminée (...). »

3. Procédure au fond tendant au remboursement des cotisations

30. Par une requête enregistrée le 20 mai 1996, le requérant sollicita du tribunal, d'une part, l'annulation de la décision implicite de rejet du préfet et, d'autre part, la condamnation de l'Etat au remboursement intégral desdites cotisations avec intérêts au taux légal ainsi qu'au paiement d'une indemnité à titre de dommagesintérêts.

31. Par un jugement du 31 décembre 1997, le tribunal ne fit qu'en partie droit à la demande. Il se prononça notamment en ces termes : « (...) qu'[il] ne peut prétendre au remboursement des cotisations (...) qu'à hauteur de 0,062 % (...) au titre des périodes concernées ; que la somme allouée à ce titre doit porter intérêts aux taux légal à compter du 23 novembre 1995, date de réception de sa demande préalable par le préfet des Alpesmaritimes (...). »

32. Par une requête enregistrée le 7 juillet 1998, le requérant sollicita, de la cour administrative d'appel de Marseille, l'annulation de ce jugement. Elle rejeta cette demande par un arrêt du 29 juin 1999.

C. Les procédures intentées par les organismes ayant introduit la

requête no 54563/00

1. Procédures intentées par l'association d'éducation populaire Saint-Pie X et 39 autres organismes requérants

a) Procédure devant le tribunal administratif de Rennes et la cour

administrative d'appel de Nantes (groupe A)

33. Le 25 avril 1995, les requérants sollicitèrent du préfet du Finistère le remboursement intégral des cotisations versées à compter du quatrième trimestre de l'année 1992 jusqu'à 1994. Le silence gardé par le préfet emporta décision implicite de rejet.

34. Par des requêtes enregistrées au plus tard le 24 octobre 1995, les requérants saisirent le tribunal administratif de Rennes d'une demande tendant, d'une part, à l'annulation de la décision implicite de rejet et, d'autre part, à la condemnation de l'Etat au remboursement intégral des cotisations avec intérêts au taux légal à compter de la demande préalable.

35. Par des jugements du 30 décembre 1996, le tribunal administratif de Rennes fit partiellement droit à leur demande. Les requérants obtinrent le remboursement sollicité à hauteur du taux de 0,062 % tel que fixé par les dispositions combinées du décret du 16 juillet 1996 et de l'article 107 de la loi du 30 décembre 1995.

36. Le 7 juillet 1997, les requérants interjetèrent appel devant la cour administrative d'appel de Nantes, alléguant la violation des articles 6 § 1 et 14 de la Convention et de l'article 1er du Protocole no 1.

37. Par des arrêts du 30 décembre 1997, la cour administrative d'appel de Nantes confirma les jugements du 30 décembre 1996.

b) Procédure devant le tribunal administratif de Caen et la cour administrative d'appel de Nantes (groupe B)

38. Le 16 décembre 1994, les requérants sollicitèrent du préfet de leur département le remboursement intégral des cotisations versées. Le silence gardé par le préfet fit naître une décision implicite de rejet.

39. Par des requêtes enregistrées le 24 mai 1995, les requérants saisirent le tribunal administratif de Caen d'un recours tendant, d'une part, à l'annulation de la décision implicite de rejet et, d'autre part, à la condamnation de l'Etat au remboursement intégral des cotisations avec intérêts au taux légal à compter de la demande préalable.

40. Par des jugements du 23 janvier 1996, le tribunal administratif de Caen fit droit à la demande des requérants au remboursement intégral des cotisations

versées conformément au principe posé par l'arrêt du Conseil d'Etat de 1992.

41. Le 5 mars 1996, le ministre de l'Enseignement interjeta appel devant la cour administrative d'appel de Nantes.

42. Par des arrêts du 30 décembre 1997, la cour administrative d'appel considéra que l'Etat n'était tenu au remboursement des cotisations qu'à hauteur du taux de 0,062 %.

c) Procédure devant le Conseil d'Etat (groupes A et B)

43. Les 27 mars, 20 avril, 28 juillet et 10 août 1998, les requérants se pourvurent devant le Conseil d'Etat.

44. Au soutien de leur pourvoi, ils invoquèrent notamment la violation des articles 6 et 14 de la Convention et de l'article 1er du Protocole no 1 par l'article 107 de la loi du 30 décembre 1995 et le décret du 16 juillet 1996. A cet égard, les requérants soutinrent qu'en vertu des dispositions de la convention collective du 14 mars 1947 et, en l'absence de décret en Conseil d'Etat limitant le remboursement aux prestations nécessaires pour assurer l'égalisation des situations prévue par l'article 15 de la loi Debré modifiée, ils étaient en droit de prétendre au remboursement de l'intégralité des sommes dont ils avaient fait l'avance, alors même qu'il n'était pas établi que les avantages qui étaient la contrepartie de la cotisation au taux unique de 1,5 % tel que fixé par l'article 7 de la convention collective excéderait ce qui était nécessaire pour réaliser cette égalisation. Enfin, ils soutinrent que les dispositions litigieuses avaient pour objet de réduire rétroactivement les obligations financières de l'Etat envers les organismes d'établissements privés.

45. Par des arrêts du 28 juillet 1999, le Conseil d'Etat considéra que les moyens invoqués par les requérants n'étaient pas de nature à permettre l'admission du pourvoi.

2. Procédure suivie par l'OGEC Blanche de Castille et 15 autres organismes requérants (département des Alpes-Maritimes)

a) Procédure au fond tendant au remboursement des cotisations versées

46. Le 20 décembre 1994, les requérants sollicitèrent du préfet des Alpes-Maritimes le remboursement intégral des cotisations sociales versées. Le silence gardé par le préfet pendant quatre mois fit naître une décision implicite de rejet.

47. Le 19 juin 1995, les requérants saisirent le tribunal administratif de Nice aux fins d'obtenir, d'une part, l'annulation de la décision implicite de rejet et, d'autre part, la condamnation de l'Etat au remboursement intégral des cotisations avec intérêts au taux légal à compter de la demande préalable.

48. Par des jugements du 31 décembre 1997 et 16 juin 1998, le tribunal fit partiellement droit à la demande de remboursement des cotisations. Les requérants obtinrent le remboursement sollicité à hauteur du taux de 0,062 % fixé par le décret du 16 juillet 1996.

49. Le 3 juillet 1998, ils interjetèrent appel devant la cour administrative d'appel de Marseille. Ils contestèrent l'application des dispositions de l'article 107 de la loi du 30 décembre 1995 et alléguèrent la violation des articles 6 § 1 et 14 de la Convention et de l'article 1er du Protocole no 1. Ils estimèrent, d'une part, que l'Etat ne pouvait, par des lois de circonstances rétroactives, s'ingérer dans le cours normal de la justice dans le but d'influencer le dénouement d'un litige. Ils considérèrent, d'autre part, que les dispositions de l'article 107 de la loi du 30 décembre 1995 portaient atteinte à leurs biens constitués par leur droit de créance détenu sur l'Etat tel que reconnu par l'arrêt du Conseil d'Etat du 15 mai 1992. Enfin, ils estimèrent que ces dispositions étaient discriminatoires, car ells avaient pour effet de créer une inégalité de traitement entre les organismes selon la date de saisine des juridictions administratives.

50. Par des arrêts du 29 juin 1999, la cour administrative d'appel de Marseille confirma les jugements attaqués et, se fondant sur l'avis du Conseil d'Etat du 5 décembre 1997, rejeta les griefs tirés de la violation des articles 6 § 1 et 14 de la Convention et de l'article 1er du Protocole no 1. Les arrêts furent signifiés les 28 et 29 juillet 1999.

51. Les requérants renoncèrent à former un pourvoi en cassation compte tenu de ce que les moyens dont ils entendaient se prévaloir devant le Conseil d'Etat avaient été jugés par ce dernier, dans un arrêt du 30 décembre 1998, comme n'étant pas de nature à permettre l'admission du pourvoi intenté par un autre organisme de gestion, l'association augeronne d'éducation populaire.

b) Procédure en référé

52. Le 19 juin 1995, les requérants saisirent le juge des référés du tribunal administratif de Marseille d'une demande tendant à l'allocation d'une provision, en alléguant le défaut de contestation sérieuse de l'obligation à la charge de l'Etat.

53. Par ordonnance du 6 septembre 1995, le juge des référés fit droit à la demande d'allocation d'une provision. Il considéra notamment que : « (...) l'Etat doit supporter définitivement la charge correspondante tant que le Gouvernement n'aura pas déterminé par voie réglementaire, sous le contrôle du juge, la proportion des cotisations versées nécessaire pour atteindre l'égalisation prévue à l'article 15 de la loi du 31 décembre 1959 (...)

(...) l'obligation dont l'organisme requérant poursuit l'exécution ne peut être regardée comme sérieusement contestable (...). »

54. Le 26 septembre 1995, le ministre de l'Education nationale déposa un recours tendant à l'annulation de l'ordonnance.

55. Par ordonnance du 2 février 2000, le président de la troisième chambre de la cour administrative d'appel de Lyon constata, compte tenu du jugement du tribunal administratif de Nice du 31 décembre 1997, que le recours en annulation était devenu sans objet.

II. LE DROIT INTERNE PERTINENT

A. Article 107 de la loi du 30 décembre 1995 n° 95-1346 portant loi de Finances pour 1996

« Sous réserve des décisions de justice passées en force de chose jugée, les obligations de l'Etat, tendant au remboursement aux [OGEC] de la cotisation sociale afférente au régime de retraite et de prévoyance de cadres institué par la convention collective du 14 mars 1947 et étendu par la loi no 72-1223 du 29 décembre 1972 portant généralisation de la retraite complémentaire au profit des salariés et anciens salariés, sont égales à la part de cotisation nécessaire pour assurer l'égalisation des situations prévue par l'article 15 de la loi no 59-1557 du 31 décembre 1959 sur les rapports entre l'Etat et les établissements d'enseignement privés, modifiés par la loi no 77-1285 du 27 novembre 1977 ; cette part est fixée par décret en Conseil d'Etat. »

B. Article 1er du décret du 16 juillet 1996 nº 96-627

« Pour l'application de l'article 107 (...) la part de cotisation afférente au régime de retraite et de prévoyance des cadres nécessaire pour assurer l'égalisation des situations prévues à l'article 15 (...), est fixé à 0,062 p. 100 de la rémunération brute inférieure au plafond fixé pour les cotisations de sécurité sociale au titre des périodes concernées. »

EN DROIT

I. SUR LA VIOLATION ALLÉGUÉE DE L'ARTICLE 6 § 1 DE LA CONVENTION

56. Les requérants (requêtes no 42219/98 et no 54563/00) estiment que par l'adoption de l'article 107 de la loi du 30 décembre 1995, le législateur est intervenu afin de modifier l'issue des procédures auxquelles l'Etat était partie, rompant ainsi l'égalité des armes. Ils invoquent l'article 6 § 1 de la Convention dont les dispositions pertinentes sont ainsi libellées : « Toute personne a droit à ce que sa cause soit entendue équitablement (...) par un tribunal (...), qui décidera (...) des contestations sur ses droits et obligations de caractère civil (...). »

A. Les observations des parties

1. Observations présentées dans la requête no 42219/98

57. Le requérant estime que la loi de validation est intervenue alors qu'il avait déjà introduit un recours juridictionnel, puisqu'il avait déjà clairement fixé le contentieux, dans une première lettre du 16 décembre 1994 adressée au préfet des Alpes Maritimes.

Il considère que l'article 107 de la loi du 30 décembre 1995 est incompatible avec les dispositions édictées par l'article 6 § 1 de la Convention. Il explique, ensuite, que l'objet de cet article était de rompre l'égalité entre les parties et que l'interposition du pouvoir législatif a eu pour effet de rompre l'égalité des armes, alors même que les droits acquis avaient été constatés par le juge administratif et qu'ils avaient été mis en oeuvre dans le cadre de procédures juridictionnelles engagées. Il estime que ledit article, tout en précisant que les obligations de l'Etat sont égales à la part des cotisations nécessaires pour assurer l'égalisation des situations prévues, ne va pas au-delà des dispositions de la loi Debré. Le décret litigieux aboutit à une violation du principe d'égalité, dans la mesure où il réduit la part de cotisations à la charge de l'Etat à 0,062 % de la rémunération brute, pour la période antérieure au 1er novembre, alors que le Conseil d'Etat, pour la même période, avait mis à la charge de l'Etat la totalité de la cotisation au taux de 1,5 %.

Il expose que cet article a établi une discrimination entre les OGEC selon l'état de la procédure contentieuse les concernant, alors qu'il n'existe aucune différence objective suffisante entre les établissements ayant obtenu des décisions de justice définitives antérieures à la loi de finances litigieuse et d'autres établissements, d'une nature telle que le taux soit réduit à ce point. Par ailleurs, le requérant considère que l'équité de la procédure implique le droit à la sécurité juridique, principe reconnu par l'ordre juridique communautaire. Enfin, il sollicite le bénéfice de la jurisprudence de la Cour dans l'affaire des Raffineries Grecques du 9 décembre 1994.

58. A titre liminaire, le Gouvernement considère que la question de la légitimité de l'intervention du pouvoir législatif ne se pose pas dans cette requête, car la loi du 30 décembre 1995 était intervenue alors que l'autorité administrative était saisie d'une demande de remboursement, mais avant que ne débute la phase juridictionnelle du litige par la saisine dudit tribunal administratif de Nice, le 20 mai 1996.

Se référant aux affaires *Zielinski et Pradal & Gonzalez et autres c. France* [GC], nos 24846/94 et 34165/96 à 34173/96, CEDH 1999-VII, et *Organisation nationale des syndicats d'infirmiers libéraux (O.N.S.I.L.) c. France* (déc.), no 39971/98, CEDH 2000-IX, le Gouvernement rappelle, à cet égard, que ce qui est susceptible de poser un problème au regard de l'article 6 § 1 de la Convention c'est « l'ingérence du pouvoir législatif dans l'administration de la justice » et qu'une validation législative influant sur un litige futur dont les juridictions ne sont pas encore saisies à la date de l'adoption de la loi n'est pas susceptible d'être critiquée au regard de l'article 6 § 1 de la Convention. Il estime en conséquence que dans cette procédure, l'article 6 § 1 de la Convention ne peut avoir été méconnu du fait de l'intervention de la loi du 30 décembre 1995 et conclut au rejet de cette requête comme étant manifestement mal fondée.

2. Observations présentées dans la requête no 54563/00

59. Les requérants se réfèrent au principe, énoncé le 28 octobre 1999 dans l'affaire *Zielinski et Pradal & Gonzalez et autres c. France*, précitée, relatif aux « impérieux motifs d'intérêt général ». Ils exposent que les 800 millions invoqués par le Gouvernement étaient acquis au bénéfice des 2 000 OGEC qui allaient agir devant les juridictions nationales, dès lors que le Conseil d'Etat, dans l'arrêt du 15 mai 1992, avait considéré que c'était du fait de l'article 15 de la loi Debré modifiée que les OGEC étaient fondés à demander l'intégralité du remboursement des cotisations versées. Ils estiment que la créance des OGEC, dès lors qu'une disposition réglementaire ne venait pas la limiter, était bien de la totalité du remboursement de la cotisation de 1,5 %. Ils ajoutent que l'Etat ne peut se prévaloir de sa propre carence, dans l'élaboration des normes législatives et réglementaires, pour soutenir que s'il n'était pas intervenu par une loi rétroactive, il aurait dû payer une somme supérieure à la créance des OGEC. Soulignant que les 850 millions ne constituent qu'une faible somme au regard du budget de l'Education Nationale, ils considèrent que le seul but légitime de cette intervention législative ne pouvait être que financier.

Eu égard à l'« impérieux motif d'intérêt général » invoqué par le Gouvernement, les requérants soulignent que la cotisation de 1,5 % pesant sur les OGEC résulte d'une obligation mise à leur charge par la loi du 29 décembre 1972 et estiment que le Gouvernement aurait dû faire disparaître cette charge lorsqu'il a pris des mesures pour appliquer le principe d'égalisation. Ils estiment que le Gouvernement ne peut pas invoquer le fait que les régimes de protection sociale des secteurs privés et publics diffèrent pour soutenir que l'Etat n'avait pas à prendre en charge la totalité des cotisations. Rappelant que l'article 6 du décret du 28 juillet 1960, modifié par l'article 1er du décret du 23 août 1995, précise que « l'Etat supporte les charges sociales et fiscales obligatoires incombant à l'employeur (...) », ils affirment que l'article 15 de la loi Debré modifiée, en posant le principe d'égalisation, a induit une exonération de charges sociales incombant aux OGEC pour les enseignants. Ils exposent que l'Etat a commis une erreur dans le cadre de son pouvoir réglementaire, lorsqu'en prenant le décret du 8 mars 1978 pour étendre aux enseignants sous contrat les mêmes prestations prévoyance que les enseignants du public, il n'a pas exempté les OGEC de la cotisation de 1,5 % obligatoire, instituée par la loi du 29 décembre 1972. Ainsi, l'Etat a créé une discrimination entre les enseignants du public et ceux des établissements privés en soumettant inutilement ces derniers à deux obligations, en contradiction avec la loi Guermeur. Ils estiment qu'il était facile à l'Etat de faire valoir que, dès lors qu'il assurait une prestation au travers de la couverture des enseignants publics étendue aux enseignants du privé, il n'avait pas à rembourser la partie de la cotisation de 1,5 % offrant les mêmes prestations. C'est pour cette raison que l'Etat n'aurait pris aucun décret. Cependant le Conseil d'Etat, quatorze ans après la loi du 25 novembre 1978, a jugé qu'à défaut de décret il résultait des dispositions législatives antérieures que la cotisation de 1,5 % devait être remboursée en totalité. Cela signifie que l'Etat était tenu de rembourser l'intégralité de la cotisation prévoyance cadre (1,5 %) aux OGEC et pas seulement partiellement, du simple fait de la loi Debré et du décret de 1960. Ils estiment que le Gouvernement ne peut faire valoir que l'intervention du législateur avait pour objet de garantir le respect de sa volonté initiale, dès lors qu'il l'avait lui-même mise à mal en soumettant les enseignants du privé à une double protection, tout en la laissant supporter aux OGEC. Ils estiment se trouver dans l'obligation de financer une discrimination créée par l'Etat. Ils considèrent, en conséquence, qu'ils ne se trouvaient pas dans la même situation que les requérants dans l'affaire *National & Provincial Building Society, Leeds Permanent Building Society et Yorkshire Building Society (Building*

Societies) c. Royaume-Uni, arrêt du 23 octobre 1997, *Recueil des arrêts et décisions* 1997-VII. Ils ajoutent qu'aucune réforme n'était annoncée. Ils estiment que, même si un motif d'intérêt général existait en l'espèce, il ne présentait pas de caractère impérieux, puisque l'Etat avait bénéficié de cette situation pendant quinze ans alors que les OGEC n'ont pu agir en remboursement que sur quatre ans. Ils estiment également qu'il n'y a pas eu de rapport raisonnable de proportionnalité. Ils affirment, d'une part, que le législateur n'était pas tenu d'intervenir rétroactivement puisque les conséquences étaient très limitées. Ils affirment, d'autre part, que l'absence alléguée de conséquences excessives pour les OGEC n'est pas un critère à retenir pour admettre ou non la violation de l'article 6 § 1 de la Convention, puisqu'ils avaient un droit à réclamer le remboursement de la totalité et n'avait pas la possibilité de présenter des recours indemnitaires en raison du préjudice subi par la tardiveté avec laquelle l'administration a fixé la part des cotisations. Ils allèguent, finalement, que l'intervention du législateur n'était pas proportionnée : leurs procédures étaient en cours lorsque le législateur est intervenu et ils étaient certains d'obtenir gain de cause du fait de l'arrêt du Conseil d'Etat du 15 mai 1992. Ils ajoutent que la « prévisibilité » de cette intervention, qui visait individuellement chaque OGEC dont la procédure était en cours, ne valait que pour l'avenir et non pour le passé. Finalement, ils invoquent un arrêt du 24 avril 2001 de la Cour de cassation, qui a condamné les interventions législatives rétroactives en appliquant la jurisprudence de la Cour. Ils estiment que c'est parce que cette jurisprudence n'était pas connue du Conseil d'Etat à l'époque où il rendit son avis que les requérants n'ont pas obtenu gain de cause. 60. Le Gouvernement ne conteste pas le fait que la loi Debré a influencé le sort des contestations en cours, en fondant la décision rendue par le tribunal administratif (OGEC Blanche de Castille et 15 autres) ou en conduisant à la remise en cause en appel d'une décision rendue en première instance (OGEC Saint Pie X et 39 autres).

Il considère, cependant, que la validation litigieuse est conforme aux exigences posées par la jurisprudence de la Cour. Il fait valoir, tout d'abord, que la validation législative poursuivait un but légitime. Il affirme que la situation prévalant avant l'intervention de la loi de validation présentait un risque financier très important puisque l'arrêt du Conseil d'Etat du 15 mai 1992 revenait en réalité à condamner l'Etat à débourser 815 millions de francs de plus que ce qu'il ne devait réellement aux OGEC. Mais, il ajoute que la validation législative n'a pas tant été mise en oeuvre pour sauvegarder les finances publiques que pour assurer le respect de la volonté du législateur dans la gestion des rapports financiers entre l'Etat et lesdits établissements et pour éviter la constitution de situations discriminatoires. Il souligne que cette nécessité d'assurer le respect de la volonté du législateur en matière de participation de l'Etat au financement de la protection sociale des maîtres de l'enseignement privé constituait un impérieux motif d'intérêt général justifiant le recours à une loi de portée rétroactive. Il soutient que l'intention du législateur était, lorsqu'il a posé le principe d'égalisation prévu à l'article 15 de la loi Debré, d'assurer une identité de contribution de l'Etat aux avantages sociaux bénéficiant aux enseignants des établissements tant publics que privés. La structure des régimes de protection sociale des secteurs privé et public étant différente, il résultait d'un tel système que, s'agissant d'une cotisation telle que celle versée à l'AGIRC au taux de 1,5 %, la part supportée par l'Etat devait être fixée de façon à mettre les employeurs privés dans une situation identique à celle de l'Etat employeur. Le retard pris dans l'adoption des décrets fixant le taux de participation de l'Etat a mis le juge administratif, saisi de demandes en ce sens, dans l'impossibilité de calculer le montant des remboursements auxquels les requérants pouvaient prétendre. Alors même qu'il était conscient que l'Etat n'était pas tenu au remboursement intégral des cotisations versées, le Conseil d'Etat n'a eu d'autre solution que d'ordonner, faute de meilleure solution, la restitution de la totalité des cotisations réclamées. Cette solution ouvrit à l'ensemble des établissements d'enseignement privés la possibilité de prétendre au remboursement de l'intégralité de leurs cotisations à l'AGIRC, dans des conditions tout à fait contraires au principe d'égalisation. Cette situation appelait une réaction du législateur afin d'assurer le respect de la volonté exprimée à l'article 15 de la loi Debré. Selon le Gouvernement, cette situation s'apparente à celle du législateur dans l'affaire *Building Societies c. Royaume-Uni*, précitée. Il estime qu'en plus, dans la présente affaire, l'intervention du législateur a permis de prévenir la creation de situations discriminatoires entre les établissements d'enseignement publics et privés. Il précise que sans cette intervention ces derniers auraient bénéficié d'un effet d'aubaine, contraire à la volonté du législateur. Il en conclut qu'il existait un impérieux motif d'intérêt public au sens de la jurisprudence de la Cour. Le

Gouvernement affirme, ensuite, qu'il existait un « rapport raisonnable de proportionnalité » entre le but visé et les moyens employés par le législateur. Il estime, d'une part, que l'intervention du législateur était le seul moyen adapté pour remédier à la situation mise en lumière par l'arrêt du Conseil d'Etat du 15 mai 1992. Il soutient, d'autre part, se référant à l'arrêt du 8 avril 1998 du Conseil d'Etat, que la validation n'a pas eu de « conséquences excessives » pour les requérants puisqu'elle n'a fait que chiffrer le montant de la créance des OGEC, dans le respect du principe d'égalisation, et ne les a privés d'aucun droit. Il considère, par ailleurs, que le dispositif contenu dans l'article 107 de la loi litigieuse n'a pas privé les requérants du droit d'être indemnisés du préjudice subi en raison du retard pris par l'administration pour fixer la part des cotisations à la charge de l'Etat, puisqu'ils pouvaient présenter un recours indemnitaire dirigé contre l'Etat afin d'en obtenir la réparation. Il estime, enfin, que les modalités d'intervention de la loi de validation ne traduisent aucune « disproportion dans les moyens choisis », puisqu'elle a exclu de son champ d'application les décisions de justice passées en force de chose jugée et n'a porté que sur des litiges qui étaient pendants, soit en première instance, soit en appel. Il insiste, en outre, sur le fait que cette validation était largement prévisible et qu'en raison même de la rédaction de l'arrêt du Conseil d'Etat du 15 mai 1992, les requérants ne pouvaient ignorer qu'ils n'avaient pas de droit au remboursement intégral des cotisations versées à l'AGIRC. Au surplus, compte tenu du nombre de recours contentieux pendants devant les juridictions administratives et représentant le risque financier exposé, le Gouvernement considère que les requérants, à l'instar des building societies, ne pouvaient être surpris par l'adoption de la loi de validation. Il estime donc qu'il n'a pas porté atteinte à la confiance légitime que les requérants avaient pu mettre dans leurs recours. Le Gouvernement expose, finalement, que la validation fut uniforme et que la démarche du législateur ne fut pas guidée par l'identité des requérants mais tendit à régler de la même façon la situation de l'ensemble des établissements concernés. Au regard de l'ensemble des considérations exposées, le Gouvernement estime que le grief tiré de la violation de l'article 6 § 1 de la Convention est manifestement mal fondé.

B. L'appréciation de la Cour

61. La Cour réaffirme que si, en principe, le pouvoir législatif n'est pas empêché de réglementer en matière civile, par de nouvelles dispositions à portée rétroactive, des droits découlant de lois en vigueur, le principe de la prééminence du droit et la notion de procès équitable consacrés par l'article 6 s'opposent, sauf pour d'impérieux motifs d'intérêt général, à l'ingérence du pouvoir législatif dans l'administration de la justice dans le but d'influer sur le dénouement judiciaire du litige (*Raffineries grecques Stran et Stratis Andreadis c. Grèce*, arrêt du 9 décembre 1994, série A no 301-B, p. 82, § 49 ; *Papageorgiou c. Grèce*, arrêt du 22 octobre 1997, *Recueil des arrêts et décisions* 1997-VI, p. 2288, § 37 ; *Buildings Societies c. Royaume-Uni*, précité, p. 2363, § 112).

62. En ce qui concerne la requête no 42219/98, la Cour constate que le requérant a sollicité du préfet, dès le 23 novembre 1995, le remboursement des cotisations litigieuses en se fondant sur les dispositions de l'article 15 de la loi Debré modifiée et a formellement introduit un recours devant le tribunal administratif le 20 mai 1996. Or, la Cour rappelle que, selon le droit interne, la réclamation préalable auprès de l'administration est une phase indispensable à tout contentieux et que le silence gardé par le préfet pendant quatre mois valait décision implicite de rejet. Le requérant ne pouvait, dès lors, introduire un recours devant la juridiction administrative avant l'échéance de ces quatre mois. En conséquence, dès lors que cette phase dite « pré-contentieuse » a constitué une condition *sine qua non* pour déclencher la phase judiciaire proprement dite, la Cour considère, contrairement à l'affaire *O.N.S.I.L. c. France* précitée, que la procédure était déjà née lorsque la loi du 30 décembre 1995 a été adoptée et que le litige portait depuis le 23 novembre 1995 sur le droit objet de la contestation (voir, *mutatis mutandis, Duclos c. France*, arrêt du 17 décembre 1996, *Recueil* 1996-VI, § 54 et *Kadri c. France* (déc.), no 41715/98, 26 septembre 2000, non publiée).

63. La Cour doit donc rechercher si les mesures prises par le législateur pour fixer le taux de remboursement des cotisations sociales versées par les OGEC et modifier l'issue des procédures en cours (requêtes nos 42219/98 et 54563/00) dirigées contre l'Etat défendeur s'analysent en une violation du principe de l'égalité des armes. Pour ce faire, elle tiendra compte de toutes les circonstances de la cause et examinera de près les raisons que l'Etat défendeur a avancées pour justifier l'intervention qui a pu se produire dans plusieurs procédures pendantes par suite des effets

rétroactifs de l'article 107 de la loi du 30 décembre 1995 et de son décret d'application pris le 16 juillet 1996 (*Building Societies c. Royaume-Uni*, précité, § 107).

64. En l'espèce, les requérants saisirent les juridictions administratives, suite à l'arrêt du Conseil d'Etat du 15 mai 1992, et sollicitèrent le remboursement intégral des cotisations litigieuses. Pour l'un d'eux, la validation législative intervint alors que la procédure était dans sa phase pré-contentieuse, pour d'autres requérants, elle intervint alors que la juridiction de première instance ne s'était pas encore prononcée au fond, et pour le troisième groupe de requérants, la loi intervint alors que l'instance était pendante en appel. Les requérants n'avaient donc pas encore obtenu un jugement leur reconnaissant le droit à remboursement intégral. L'article 107 de la loi du 30 décembre 1995 avait pour but, officiellement reconnu, de régler financièrement ces contentieux, dans lesquels l'Etat était partie, et de modifier l'issue des procédures en cours. Effectivement, en raison de cette intervention législative, les requérants ne purent obtenir le remboursement sollicité qu'à hauteur du taux de 0,062 %, au lieu de celui de 1,5 % escompté.

65. La Cour note que le droit au remboursement ne fut pas atteint dans sa substance par l'intervention législative mais que seul son taux fut remis en cause en vertu du principe de l'égalisation des situations posé à l'article 15 de la loi Debré modifiée. La Cour estime, dès lors, que la question se pose de savoir si, à l'origine, les requérants pouvaient légitimement prétendre au remboursement intégral des cotisations.

66. Elle souligne d'emblée le fait que l'arrêt du 15 mai 1992 avait déterminé le *quantum* du remboursement litigieux par « défaut », en raison de « l'état de la législation en vigueur à l'époque ». Elle estime, dès lors, que les requérants ne pouvaient ignorer, eu égard au principe de l'égalisation des situations, que l'Etat n'était pas tenu de rembourser les cotisations au taux de 1,5 % et que ce taux n'avait été retenu par le Conseil d'Etat que pour des considérations d'ordre pragmatique et pour combler un vide en l'absence d'un décret fixant la part de la cotisation à la charge de l'Etat.

67. Ainsi, les circonstances de la cause ne sont pas identiques à celles de l'affaire *Zielinski et Pradal & Gonzalez et autres c. France* précitée. En effet, dans cette affaire, les juridictions internes avaient été saisies afin de faire appliquer strictement un protocole d'accord, signé entre les syndicats et les organismes publics de sécurité sociale, qui avait force de loi entre les parties. L'intervention du législateur avait eu pour but d'entériner la position soutenue par l'administration devant les juridictions, alors qu'en l'espèce, le législateur est intervenu pour remédier à une faille technique du droit, soulignée par le Conseil d'Etat dans son arrêt du 15 mai 1992. Dès lors, les motifs que ces deux interventions législatives sous-tendent se distinguent, de même que leurs effets.

68. La Cour constate, par contre, que la présente affaire se rapproche de l'affaire *Building Societies c. Royaume-Uni* précitée, dans laquelle l'intervention du pouvoir législatif se justifiait par des « motifs d'intérêt légitime », dans le but ultime de réaffirmer l'intention initiale du Parlement à l'égard de toutes les sociétés de construction dont les exercices comptables s'achevaient avant le début de l'exercice fiscal, sans tenir compte des procédures judiciaires pendantes. La Cour avait d'ailleurs estimé que, par ces procédures, les sociétés de construction avaient tenté « d'exploiter la situation vulnérable où se trouvaient les pouvoirs publics après le dénouement de la procédure Woolwich 1 et de court-circuiter l'adoption d'une législation devant remédier aux vices constatés » (*Building Societies c. Royaume-Uni*, précité, § 109).

69. En l'espèce, la Cour estime que le but de l'intervention législative était d'assurer le respect de la volonté initiale du législateur de ne prendre en charge lesdites cotisations sociales que dans la limite du principe d'égalisation posé par l'article 15 de la loi Debré modifiée. Elle ajoute que les requérants ne peuvent valablement invoquer la possibilité, dans le cadre d'une procédure, de se prévaloir d'un « droit » techniquement imparfait ou déficient sans que, au nom du respect de l'équité de la procédure, le législateur puisse intervenir pour préciser les conditions d'obtention de ce droit et ses limites. Or, en l'espèce, c'est précisément ce qu'a fait le législateur à l'égard de tous les OGEC se trouvant sur le territoire national et non seulement à l'égard des requérants : il a légiféré afin de combler un vide juridique constaté par le Conseil d'Etat dans son arrêt du 15 mai 1992 et exploité par les requérants, notamment, lorsqu'ils ont saisi les juridictions administratives. La Cour insiste sur le fait que les requérants ont tenté de bénéficier d'un effet d'aubaine dû à la

carence du pouvoir réglementaire et ne pouvaient valablement escompter que l'Etat resterait inactif face à une nouvelle demande de remboursement intégral.

70. La Cour estime, en conséquence, que les requérants, en saisissant les juridictions administratives, ne pouvaient pas légitimement prétendre au remboursement intégral des cotisations. Elle ajoute qu'il ressort de l'avis contentieux du Conseil d'Etat, rendu le 5 décembre 1997, que les requérants pouvaient obtenir réparation d'un éventuel préjudice causé par cette carence étatique.

71. Comme elle l'a observé plus haut (§ 61), la Cour se soucie particulièrement des risques inhérents à l'emploi d'une législation rétroactive qui a pour effet d'influer sur le dénouement judiciaire d'un litige auquel l'Etat est partie. Elle rappelle par ailleurs que dans des litiges opposant des intérêts de caractère privé, l'exigence de l'égalité des armes implique l'obligation d'offrir à chaque partie une possibilité raisonnable de présenter sa cause dans des conditions qui ne la placent pas dans une situation de net désavantage par rapport à son adversaire (*Dombo Beheer B.V. c. Pays-Bas*, arrêt du 27 octobre 1993, série A no 274, p. 19, § 33, et *Raffineries grecques,* précité, p. 81, § 46). L'article 6 § 1 de la Convention ne saurait toutefois s'interpréter comme empêchant toute ingérence des pouvoirs publics dans une procédure judiciaire pendante à laquelle ils sont parties (*Building Societies v. Royaume-Uni*, précité, § 112). Elle note que dans le cas d'espèce, l'ingérence due à l'article 107 de la loi du 30 décembre 1995 revêtait un caractère beaucoup moins radical que celle qui l'avait conduit à constater un manquement à l'article 6 § 1 de la Convention dans l'affaire *Raffineries grecques Stran et Stratis Andreadis c. Grèce,* précitée. Dans cette affaire, les requérants disposaient d'un jugement définitif et exécutoire contre l'Etat, alors que dans la présente espèce, les procédures engagées n'avaient pas dépassé le stade de l'appel. D'ailleurs, le législateur souhaitait, en fixant le taux de remboursement des cotisations sociales et en modifiant l'issue des procedures engagées, combler le vide juridique déjà mentionné et rétablir la parité et l'égalité des situations des enseignants travaillant dans des établissements privés et des établissements publics. De surcroît, les requérants avaient tenté, en engageant les procédures dont l'issue a été modifiée par l'adoption de la loi du 30 décembre 1995 et du décret du 16 juillet 1996, de profiter d'une aubaine et avaient ou auraient dû avoir conscience que l'Etat tenterait de son côté de remédier au vide juridique mis en évidence par le Conseil d'Etat.

72. Pour les raisons qui précèdent, la Cour estime que l'intervention du législateur, parfaitement prévisible, répondait à une évidente et impérieuse justification d'intérêt général. Elle en conclut que les requérants ne peuvent pas, dans ces conditions, légitimement se plaindre d'une atteinte au principe de l'égalité des armes.

Il n'y a donc pas eu violation de l'article 6 § 1 de la Convention.

II. SUR LA VIOLATION ALLÉGUÉE DE L'ARTICLE 1 DU PROTOCOLE No 1

73. Les requérants de la requête no 54563/00 estiment avoir été privés de leur droit de créance sur l'Etat au remboursement intégral des cotisations sociales versées sur la base du droit alors en vigueur et tel que consacré par l'arrêt du Conseil d'Etat de 1992. Ils soutiennent que l'adoption de l'article 107 a constitué une ingérence dans leur droit de propriété contraire à l'article 1er du Protocole no 1 de la Convention dont les dispositions pertinentes sont ainsi libellées : « Toute personne (...) morale a droit au respect de ses biens. Nul ne peut être privé de sa propriété que pour cause d'utilité publique et dans les conditions prévues par la loi et les principes généraux du droit international.

Les dispositions précédentes ne portent pas atteinte au droit que possèdent les Etats de mettre en vigueur les lois qu'ils jugent nécessaires pour réglementer l'usage des biens conformément à l'intérêt général ou pour assurer le paiement des impôts ou d'autres contributions ou des amendes. »

A. Les observations des parties

74. Les requérants exposent qu'ils n'avaient pas seulement une « espérance » mais un bien consistant en une somme d'argent destinée à rembourser les cotisations versées, ce droit de créance résultant de la loi de 1977 et pouvaient, selon l'arrêt du 15 mai 1992 du Conseil d'Etat, en l'absence de future loi rétroactive, demander le remboursement total des cotisations sociales versées sur la

base du droit alors en vigueur. Ils font valoir qu'il n'était pas question d'utiliser une faille juridique, mais seulement de se voir appliquer le principe défini par la loi, qui était le remboursement total pour le passé à défaut de décret limitant ce remboursement. Ils considèrent que leurs observations concernant l'article 6 § 1 de la Convention peuvent être transposées au titre de l'article 1er du Protocole no 1.

75. Le Gouvernement expose tout d'abord que les requérants n'ont jamais été titulaires d'un « bien », au sens strict du terme, comme par exemple une decision de justice définitive constatant l'existence d'une créance qu'ils auraient détenue sur l'Etat.

Il affirme ensuite qu'ils ne justifient pas non plus d'une « espérance légitime » de voir se concrétiser une créance par une décision de justice, qui peut être regardée comme un « bien » au sens de l'article 1er du Protocole no 1. Il estime, en effet, qu'eu égard à l'article 15 de la loi Debré modifiée, les requérants pouvaient légitimement prétendre, à la date de l'introduction de leurs réclamations, au remboursement de la seule partie des cotisations acquittées nécessaire au respect du principe d'égalisation, qui n'était destiné qu'à assurer une identité de contribution de l'Etat aux avantages sociaux bénéficiant aux enseignants. Pour autant, la loi n'a jamais posé le principe d'une prise en charge intégrale par l'Etat desdites cotisations.

Il considère, dès lors, que la prétention des requérants n'était légitime que pour autant qu'elle était limitée à la partie des cotisations versées en méconnaissance du principe d'égalisation, comme rappelé dans l'arrêt du 8 avril 1998 du Conseil d'Etat, et que l'arrêt du 15 mai 1992 n'a pas pu créer, à leur profit, une quelconque espérance légitime de remboursement intégral des cotisations sociales versées.

Il estime que les requérants, en réclamant le remboursement de la totalité des cotisations sociales, tentaient d'exploiter une faille juridique et que cette démarche ne pouvait s'analyser en une « espérance légitime » au sens de l'article 1 du Protocole no 1 et par voie de conséquence en un bien.

Il souligne que la loi du 30 décembre 1995 n'a eu ni pour objet ni pour effet de faire disparaître la créance des requérants ou de diminuer les obligations financières de l'Etat mais s'est bornée à permettre un règlement des dettes de l'Etat conforme à la volonté du législateur, provisoirement déformée par la carence du pouvoir réglementaire. Dès lors, il considère que les requérants ne peuvent pas se prétendre titulaires d'un bien au sens de l'article 1er du Protocole no 1 de la Convention.

Le Gouvernement expose que si la Cour devait néanmoins considérer que les organismes ont été privés de leurs biens, la dépossession en cause ne pourrait être tenue pour contraire à l'article 1 du Protocole no 1, eu égard aux considérations d'intérêt général sur lesquelles repose la validation legislative exposées plus haut.

B. L'appréciation de la Cour

76. Selon la jurisprudence de la Cour, l'article 1 du Protocole n° 1, qui garantit en substance le droit de propriété, contient trois normes distinctes (voir, notamment, *James et autres c. Royaume-Uni*, arrêt du 21 février 1986, série A n° 98-B, pp. 29-30, § 37) : la première, qui s'exprime dans la première phrase du premier alinéa et revêt un caractère général, énonce le principe du respect de la propriété ; la deuxième, figurant dans la seconde phrase du même alinéa, vise la privation de propriété et la soumet à certaines conditions ; quant à la troisième, consignée dans le second alinéa, elle reconnaît aux Etats contractants le pouvoir, entre autres, de réglementer l'usage des biens conformément à l'intérêt général. La deuxième et la troisième, qui ont trait à des exemples particuliers d'atteintes au droit de propriété, doivent s'interpréter à la lumière du principe consacré par la première.

77. La Cour rappelle ensuite qu'une « créance » peut constituer un « bien » au sens de l'article 1 du Protocole n° 1, à condition d'être suffisamment établie pour être exigible (*Raffineries grecques Stran et Stratis Andreadis c. Grèce*, précité, p. 84, § 59).

78. En l'espèce, la Cour note que l'article 15 de la loi Debré modifiée pose le principe de l'égalisation de la situation des maîtres de l'enseignement privé sous contrat avec celle des maîtres titulaires de l'enseignement public et que ce principe impose à l'Etat de prendre en charge les

cotisations versées par les OGEC au titre des régimes de protection sociale propres aux salariés du secteur privé, dans la limite de la règle de parité. Il en résulte donc une créance certaine, du moins dans son principe sinon dans son *quantum*, contre l'Etat au bénéfice des requérants.

79. Pourtant, comme le relève le Conseil d'Etat dans son arrêt du 15 mai 1992, la loi Guermeur avait précisé que les modalités de calcul de la participation étatique, soit le taux de remboursement à la charge de l'Etat des cotisations versées par les OGEC, seraient fixées par voie réglementaire. Dès lors, la part des cotisations sociales dont l'Etat avait la charge pour assurer l'égalisation des situations des enseignants n'était pas fixée en l'absence de décret pris en Conseil d'Etat ; et le montant de la créance des OGEC n'était pas déterminé. Les créances des requérants n'étant donc pas liquides, ils ne pouvaient pas en obtenir le paiement par l'Etat tant que le taux de cette prise en charge étatique n'avait pas été déterminé, c'est-à-dire tant qu'un décret en Conseil d'Etat n'avait pas été pris ou tant qu'un tribunal n'avait pas, par défaut, fixé le montant de leur créance.

80. Sans se prononcer catégoriquement sur le point de savoir si de telles créances revendiquées par les requérants peuvent à juste titre passer pour un bien, la Cour est prête à partir de l'hypothèse de travail que les requérants possédaient des biens sous la forme de droits acquis à remboursement qu'elles cherchaient à exercer devant les juridictions administratives. Ce faisant, la Cour note que les arguments invoqués par les requérants à l'appui de leur thèse selon laquelle ils avaient des biens sont indissociables de leurs griefs selon lesquels ils en ont été indûment privés. La Cour acceptera que l'article 1 du Protocole no 1 est applicable afin de déterminer s'il y a eu ingérence dans les créances des requérants et, dans l'affirmative, si cette ingérence se justifiait en l'occurrence.

81. La Cour note que l'intervention législative rétroactive jouait sans conteste d'une manière qui s'analysait en une ingérence dans la jouissance des biens des requérants. En prenant pour hypothèse de travail que les créances dont il s'agit étaient assimilables à des biens au sens de l'article 1 du Protocole no 1, elle n'aperçoit aucune raison de parvenir à la conclusion contraire. Elle va donc rechercher si cette ingérence se justifiait.

82. La Cour relève que le décret nécessaire à la détermination de la participation étatique n'avait pas encore été pris lorsque le Conseil d'Etat a rendu son arrêt le 15 mai 1992 et a fixé, par défaut, le taux de remboursement à 1,5 %. Ainsi, le 15 mai 1992, la part contributive de l'Etat était indéterminée et il revenait au Conseil d'Etat de liquider la créance du demandeur, dans le cas d'espèce. Dès lors, cet arrêt ne peut être considéré comme une décision judiciaire ayant force de chose jugée, constatant et liquidant la créance de tous les OGEC de France.

La question se pose alors de savoir si les requérants pouvaient avoir une « espérance légitime » de voir les juridictions administratives constater et liquider leurs propres créances au taux de 1,5 % également.

83. La Cour insiste sur le fait que le Conseil d'Etat n'a confirmé la créance au taux de 1,5 % que dans la mesure où il y avait une carence dans la législation. Ainsi, le droit de créance invoqué par les requérants au taux de 1,5 % ne l'était que « par défaut ». Dès lors, la Cour estime que l'espérance d'obtenir le remboursement des cotisations était « légitime » uniquement dans sa proportion nécessaire à l'égalisation des situations en vertu de l'article 15 de la loi Debré modifiée.

84. Or, il n'appartient pas à la Cour de déterminer si ce taux devait être évalué à 1,5 % ou si un taux inférieur devait être retenu. Il lui appartient uniquement de contrôler si cette ingérence a ménagé un juste équilibre entre les exigences de l'intérêt général de la communauté et les impératifs de la protection des droits fondamentaux de l'individu. Le souci de réaliser cet équilibre se reflète dans la structure de l'article 1 tout entier, y compris dans son second alinéa ; dès lors, il doit y avoir un rapport raisonnable de proportionnalité entre les moyens employés et le but poursuivi. Par ailleurs pour rechercher si cette exigence se trouve remplie, il est reconnu qu'un Etat contractant jouit d'une large marge d'appréciation, et la Cour respecte l'appréciation portée par le législateur en pareilles matières, sauf si elle est dépourvue de base raisonnable (*Building Societies c. Royaume-Uni*, précité, § 80).

85. Cela étant, la Cour note qu'en adoptant l'article 107 de la loi du 30 décembre 1995 avec effet rétroactif, le législateur avait le souci de rétablir et de réaffirmer son intention initiale, à laquelle avait fait obstacle la carence du pouvoir réglementaire, mise en évidence par l'arrêt du 15 mai 1992 du Conseil d'Etat. De fait, un intérêt général évident et impérieux commande de veiller à ce que des

organismes privés ne bénéficient pas d'avantages exorbitants en cas de changement de régime en matière de cotisations sociales et ne fassent pas, pour une carence du pouvoir réglementaire à l'origine d'un vide juridique, peser sur l'Etat des obligations indues.

86. Certes, l'intervention législative rétroactive a contrecarré l'espoir des requérants de voir l'Etat persévérer dans son inactivité et, par conséquent, les juridictions administratives leur appliquer le taux de 1,5 % déterminé par défaut. Mais la décision de faire disparaître rétroactivement le vide juridique n'a pas eu pour effet d'éteindre les créances des requérants. Elle eut simplement pour effet de fixer à un taux inférieur à 1,5 % la part dont l'Etat avait la charge pour assurer cette égalisation. Ainsi, le droit à remboursement des requérants n'a pas été atteint dans son principe, seul le montant de la créance ayant été fixé en deçà de leurs espoirs.

87. L'intérêt général qu'il y avait à dissiper toute incertitude quant à la proportion de remboursement des cotisations nécessaire à l'égalisation des situations doit être tenu pour impérieux et comme primant les intérêts que les requérants défendaient en sollicitant le remboursement intégral des cotisations versées, cherchant à profiter de la carence du pouvoir réglementaire.

88. La Cour estime donc que les mesures prises par l'Etat défendeur n'ont pas porté atteinte à l'équilibre qui doit être ménagé entre la protection du droit des requérants au remboursement des cotisations versées et l'intérêt général commandant d'assurer l'égalisation des situations de tous les enseignants.

Partant, il n'y a pas eu violation de l'article 1 du Protocole no 1.

III. SUR LA VIOLATION ALLÉGUÉE DES ARTICLES 6 § 1 DE LA CONVENTION ET 1 DU PROTOCOLE No 1 COMBINES A L'ARTICLE 14 DE LA CONVENTION

89. Les requérants (requête no 54563/00) estiment que les dispositions de l'article 107 ont introduit une inégalité de traitement entre les organismes de gestion en fonction de la date de saisine de la juridiction administrative. Ils invoquent les articles 6 § 1 de la Convention et 1er du Protocole no 1 combinés à l'article 14 de la Convention, qui se lit comme suit :

« La jouissance des droits et libertés reconnus dans la (...) Convention doit être assurée, sans distinction aucune, fondée notamment sur le sexe, la race, la couleur, la langue, la religion, les opinions politiques ou toutes autres opinions, l'origine nationale ou sociale, l'appartenance à une minorité nationale, la fortune, la naissance ou toute autre situation. »

90. La Cour a examiné ces griefs tel qu'ils ont été présentés par les requérants. Compte tenu de l'ensemble des éléments en sa possession, elle considère que ces griefs font partie intégrante des griefs tirés des articles 6 § 1 de la Convention et 1 du Protocole no 1.

91. Elle estime en conséquence qu'il ne s'impose pas de statuer séparément sur les griefs en question.

PAR CES MOTIFS, LA COUR, À l'UNANIMITÉ,

1. *Dit* qu'il n'y a pas eu violation de l'article 6 § 1 de la Convention ;

2. *Dit* qu'il n'y a pas eu violation de l'article 1 du Protocole no 1 ;

3. *Dit* qu'il n'y a pas lieu d'examiner séparément les autres griefs tirés des articles 6 de la Convention et 1 du Protocole no 1 combinés avec l'article 14 de la Convention ;

Fait en français, puis communiqué par écrit le 27 mai 2004 en application de l'article 77 §§ 2 et 3 du règlement.
Søren Nielsen
Christos Rozakis
Greffier Président__

Estratto (par. 18-48) della sentenza del 18 gennaio 2007, sez. III, causa BULGAKOVA c. Russia

In the case of Bulgakova v. Russia,
The European Court of Human Rights (Third Section), sitting as a Chamber composed of:
Mr B.M. ZUPANČIČ, President, Mr C. BÎRSAN, Mr A. KOVLER, Mr V. ZAGREBELSKY, Mrs A. GYULUMYAN, Mr E. MYJER, Mr DAVID THÓR BJÖRGVINSSON, judges, and Mr V. BERGER, Section Registrar,
Having deliberated in private on 12 December 2006,
Delivers the following judgment, which was adopted on that date:

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 AND ARTICE 1 OF PROTOCOL NO. 1

18. The applicant complained that the State had reconsidered a final judgment favourable to her. This complaint falls to be examined under Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 (see in this respect Pravednaya v. Russia (dec.), no. 69529/01, 25 September 2003).

Article 6 § 1 of the Convention, as far as relevant, reads as follows:

"In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal...."

Article 1 of Protocol No. 1 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."

A. The parties' submissions

1. The Government

19. The Government submitted that the re-opening of the case did not constitute a violation of Article 6 § 1 or Article 1 of Protocol No. 1.

a) Applicability of Article 6 § 1

20. First, the Government stressed that the judgment of 21 October 1999 did not determine any definite amount, but rather established how the pension should be calculated. In their words, "the subject-matter of the dispute was not the applicant's claim to award her monetary sums, but the matter of lawfulness and reasonability of application of the Instruction". In this respect they recalled the Court's findings in Kiryanov v. Russia (dec., no. 42212/02, 9 December 2004), where the Court held that the judgment at issue "required the competent authority to take a measure of general application," without establishing "how and to what extent such a measure would have affected the applicant's potential individual entitlement". In Kiryanov the Court held that the proceedings did not relate to the "civil rights and obligations" of the applicant.

21. Further, the Government maintained that the dispute at issue concerned the pension law, which was outside the area of "civil rights and obligation". In support of this assertion the Government referred to Schouten and Meldrum v. the Netherlands, judgment of 9 December 1994, Series A no. 304). In that case the Court held that there may be disputes of pecuniary nature which, nevertheless,

"belong exclusively to the realm of public law and are accordingly not covered by the notion of civil rights and obligations" (§ 50). Thus, in Finkelberg v. Latvia (dec., no. 55091/00, 18 October 2001) the Court held that a taxation dispute did not fall under Article 6 of the Convention. In Pančenko v. Latvia, (dec., no. 40772/98, 28 October 1999) the Court recalled that the Convention does not guarantee, as such, socio-economic rights. Referring to this case-law the Government claimed that "the determination of the order of calculation of pensions belong to the realm of public law".

b) Applicability of Article 1 of Protocol No. 1

22. The Government contested that the pension awarded to the applicant by virtue of the judgment of 21 October 1999 was her "possession" within the meaning of Article 1 of Protocol No. 1. They noted that in the case Pravednaya v. Russia (no. 69529/01, 18 November 2004) the Court regarded a judicial award of that type as the applicant's "possessions". In that case the Court ordered restoring the initial judgment in the applicant's favour and paying pension in the amount defined by that judgment. However, in the Government's view, such approach creates confusion. If the sum awarded by the court is the "possession" of the pensioner, it should not be affected by future raises of the pension rates. Therefore, in Pravednaya the applicant has to return the money she has already received from the Pension Fund by virtue of the recent changes in the legislation on the State pensions. They conclude that in order to avoid such situations the Court should not regard the amounts of pension awarded by the domestic courts as

the claimants' "possessions" within the meaning of Article 1 of Protocol No. 1. Consequently, this provision is not applicable in the present case.

c) As to the merits of the complaint

23. The Government also claimed that the District Court reopened the case not capriciously, but because of the Instruction and the ensuing decision of the Supreme Court which confirmed its lawfulness, which were both an important clarification of the law on pensions. Enforcement of the erroneous decision in the applicant's favour would be unfair towards other people receiving their pensions from the Pension Fund. In their request for re-opening the Agency referred to the decision of the Supreme Court of 24 April 2000, which meant that the request was lodged within the three-month time-limit, established by law. This was the major difference with the Pravednaya case where the request for the re-opening was made without reference to that decision of the Supreme Court.

24. Second, the Instruction was issued after the initial judgment became final, so the court had good reason to reopen the case. The Constitutional Court held that nullification of a law because of its incompatibility with the Constitution could be considered as a newly discovered circumstance warranting the re-opening of the case. This was another difference with the Pravednaya case, where the Instruction was adopted while the proceedings were still pending.

25. The Government invited the Court to conclude that the complaint was incompatible with the Convention *ratione materiae*, or, alternatively, that there was no breach of Article 6 § 1 or Article 1 of Protocol No. 1 on account of the re-opening of the case concerning the applicant's pension.

2. The applicant

26. The applicant insisted on her complaint. First, the Instruction should not have been considered a newly discovered circumstance because it arose after the litigation, not before or during it. Second, the agency missed the time-limit for the reopening: it applied to the court eight months after it had learned about the instruction, instead of three months as the civil procedure required. Third, the Constitutional Court's opinion was irrelevant, because it concerned only the changes caused by a law's unconstitutionality; the pensions law was constitutional.

B. The Court's assessment

1. As to the Government's objection on applicability

27. The Court will first address the Government's contention that Article 6 § 1 under its "civil" limb is not applicable to the present case.

28. First, the Government claimed that the dispute at issue was not "civil" because the court did not award the applicant any money but just indicated how the law should have been applied. The Court agrees that not every dispute which is "civil" in domestic terms necessarily determines "civil rights and obligation" within the meaning of Article 6 of the Convention. Thus, in Kiryanov v. Russia, referred to by the Government (see the Government's submissions above), the applicant obtained an injunction ordering the Government to issue a general directive on low-interest loans for the veterans. However, the court was not supposed to establish particular conditions of the low-interest loans' system – it was the Government's prerogative. Thus, there was no evidence that the applicant would be eligible for such a loan or, even more, that he would be interested in getting it under conditions established by the Government. In other words, in that case there was only a very tenuous connection between the applicant's civil rights and the subject-matter of the litigation.

29. The present case, however, should be distinguished from the Kiryanov v. Russia case. What the applicant sought before the domestic courts was the raising of her pension. The courts' decisions did not specify a precise amount to be paid. However, the courts ordered the application of a certain multiplier to her existing pension; therefore, the amount due to her could easily have been calculated and the Pension Fund had no discretion in this respect, unlike the Government in the Kiryanov case (see also Mihailov v. Bulgaria, no. 52367/99, § 34, 21 July 2005). The enforcement proceedings were initiated, and as follows from the writ of execution of 14 December 1999 the bailiffs invited the Pension Fund to pay money to the applicant. Therefore, even if the indication of the precise amount was missing from the judgment, the proceedings at issue established a particular pecuniary obligation of the State vis-à-vis the applicant.

30. Secondly, the Government indicated that the dispute was about a State pension, and, therefore, was not a "civil" one within the meaning of Article 6 of the Convention. The Court is aware that various socio-economic rights, such as the right to a State pension, have their origin in the public law and as such are not protected by the Convention. However, the fact that a substantive right is not protected by the Convention does not exclude a dispute over such a right from the scope of Article 6. It is beyond doubt that the pension and the related benefits, which are purely economic in nature, are "civil" rights within the meaning of Article 6 § 1 (see Francesco Lombardo, cited above, pp. 26-27, § 17, Schuler-Zgraggen v. Switzerland, judgment of 24 June 1993, Series A no. 263, p. 17, § 46, and Massa v. Italy, judgment of 24 August 1993, Series A no. 265-B, p. 20, § 26; applicability of Article 6 to the pensions disputes was assumed in many Russian cases – see, for example, Androsov v. Russia, no. 63973/00, § 48 et seq., 6 October 2005). It follows that Article 6 § 1 is applicable.

31. The Government also contests the applicability of Article 1 of Protocol No. 1. The Court underlines in this respect that Article 1 of Protocol No. 1 does not include a right to acquire property, in particular, to receive a social security benefit or pension. It places no restriction on the Contracting State's freedom to decide whether or not to have in place any form of social security scheme, or to choose the type or amount of benefits to provide under any such scheme (see Stec and Others v. the United Kingdom [GC], no. 65731/01, § 53, 12 April 2006). However, it was a long and well-established practice of this Court to regard court awards of pecuniary nature against the State, whatever their origin may be, as "possessions" within the meaning of Article 1 of Protocol no. 1 (see, among many other authorities, Brumărescu v. Romania, judgment of 28 October 1999, Reports of Judgments and Decisions 1999-VII; see also Ryabykh v. Russia, no. 52854/99, § 52, ECHR 2003–X; see also Androsov mentioned above, § 55). Whereas a mere expectation to receive a pension is not protected by the Convention, a "legitimate" one does attract protection of Article 1 of Protocol no. 1. An expectation may become "legitimate", for example, by virtue of a final court judgment, as in the present case. The Court reiterates in this respect that the judgment was sufficiently clear and specific to be enforceable (see paragraphs 28 and 29 above). Therefore, its annulment constituted an interference with the applicant's "possessions" within the meaning of Article 1 of Protocol no. 1.

32. The Court concludes that the reversal of a final decision in the applicant's favour constituted an interference with her rights under both Article 6 and Article 1 of Protocol no. 1 to the Convention. It remains to be established whether this interference was justified.

2. Alleged violation of Article 6 § 1

(a) General principles

33. The right to a fair hearing before a tribunal as guaranteed by Article 6 § 1 of the Convention must be interpreted in the light of the Preamble to the Convention, which declares, in its relevant part, the rule of law to be part of the common heritage of the Contracting States. One of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, among other things, that where the courts have finally determined an issue, their ruling should not be called into question (see Brumărescu, cited above, § 61). This principle insists that no party is entitled to seek a review of a final and binding judgment merely for the purpose of a rehearing and a fresh decision of the case.

34. Indeed, the Convention in principle tolerates the reopening of final judgments if new circumstances are discovered. For example, Article 4 of Protocol no. 7 expressly permits the State to correct miscarriages of criminal justice. A verdict ignoring key evidence may well be such a miscarriage.

However, the power of review should be exercised for correction of gross judicial mistakes and miscarriages of justice, and not just as an "appeal in disguise" (see Ryabykh, cited above, § 52).

35. The Court should be especially mindful of the dangers inherent in the use of retrospective legislation which has the effect of influencing the judicial determination of a dispute to which the State is a party. Respect for the rule of law and the notion of a fair trial require that any reasons adduced to justify such measures be treated with the greatest possible degree of circumspection (see The National & Provincial Building Society, the Leeds Permanent Building Society and the Yorkshire Building Society v. the United Kingdom, judgment of 23 October 1997, Reports 1997-VII, § 112; Zielinski and Pradal & Gonzalez and Others v. France [GC], nos. 24846/94 and 34165/96 to 34173/96, § 57, ECHR 1999-VII). Thus, in Smokovitis and Others v. Greece (no. 46356/99, § 23, 11 April 2002) the Court held as follows:

"The Court reaffirms that while in principle the legislature is not precluded in civil matters from adopting new retrospective provisions to regulate rights arising under existing laws, the principle of the rule of law and the notion of fair trial enshrined in Article 6 preclude any interference by the legislature – other than on compelling grounds of the general interest – with the administration of justice designed to influence the judicial determination of a dispute to which the State was a party."

36. In another Greek case (Stran Greek Refineries and Stratis Andreadis v. Greece, judgment of 9 December 1994, Series A no. 301-B, § 47) the State, by adopting new legislation, determined the outcome of a pending dispute to which it was a party. The Government argued that the new law had been democratically passed and that it was aimed at the eradication of negative consequences of a unfair business arrangement made under the military regime. However, in the Court's view, even such important considerations could not outweigh the rule of law. Having analysed the "timing and manner" of the adoption of the law at issue, the Court concluded that the legislative interference upset the fairness of the proceedings.

37. The Court finally recalls its findings in the Pravednaya case, cited above, where it held (§ 28 et seq.) as follows:

"The procedure for quashing of a final judgment presupposes that there is evidence not previously available through the exercise of due diligence that would lead to a different outcome of the proceedings. The person applying for rescission should show that there was no opportunity to present the item of evidence at the final hearing and that the evidence is decisive. Such a procedure is defined in Article 333 of the CCivP and is common to the legal systems of many member States."

However, this procedure can be misused, as it happened in the Pravednaya case. In that case the State Pension Agency, referring to the same Instruction as in the present case, obtained the re-opening of the case and quashing of the initial judgment with a retroactive effect. The Court

concluded that it constituted a breach of Article 6 § 1 and Article 1 of Protocol No. 1.

(b) Application to the present case

38. The Court notes that from 1998 the applicant's pension was to be calculated under the new law on pensions. The law contained an equivocal term, and each opposing party – pensioners and pension agencies – read it in their own favour. Negotiations exhausted, the applicant brought a civil action against the agency. The court read the law in the applicant's favour and granted her claims. The judgment was upheld on appeal and became final in December 1999. Two weeks later, the Ministry of Labour issued a detailed instruction on how to apply the law. The instruction supported the agency's reading of the law, and in August 2000 the agency asked the court to reconsider the case because the instruction was a "newly discovered circumstance". The court agreed, reconsidered the case, and held against the applicant. In the applicant's view, that re-opening was arbitrary.

39. The first question to answer is whether instruments issued after litigation may count as a "newly discovered circumstance", as it was qualified by the domestic court. In this respect it is important to tell "newly discovered circumstances" from "new". Circumstances which concern the case, exist during the trial, remain hidden from the judge, and become known only after the trial, are "newly discovered". Circumstances which concern the case but arise only after the trial are "new". It appears that in the present case the domestic court has confused the two.

40. The Government may be understood as claiming that even if the Instruction was a "new" and not "newly discovered" circumstance, it was nevertheless possible to reopen the case. The ruling of the Constitutional Court interpreting somewhat similar provisions of the Code of Criminal Procedure (see paragraph 17 above) speaks in favour of this position, although indirectly. Therefore, the second question to answer is whether the adoption of a new instrument might have justified the annulment of the initial decision.

41. It is conceivable that a judgment looses its legal force when the legislative framework changes. For instance, the decriminalisation of certain acts by the legislator may lead to the discontinuation of the enforcement of a penal sentence, without, however, annulling the initial conviction. As regards statutory pensions regulations, they are "liable to change and a judicial decision cannot be relied on as a guarantee against such changes in the future" (see Sukhobokov v. Russia, no. 75470/01, § 26, 13 April 2006), even if such changes are to the disadvantage of certain welfare recipients. Therefore, the Government is wrong when they assume that, once established by a court judgment, the amount of the pension may not be increased by virtue of the new legislation (see the Government's argument in paragraph 22 above).

42. However, the State cannot interfere with the process of adjudication in an arbitrary manner. Thus, when the authorities loose the case in a court but then obtain the reopening of the case by introducing new legislation with retroactive effect, an issue under Article 6 § 1 may arise. That problem – the retroactive application of the new legislation - was at the heart of several cases, such as Pravednaya v. Russia, cited above, and Vasilyev v. Russia (no. 66543/01, § 41, 13 October 2005).

43. Turning to the present case the Court notes that that the annulment of the judgment of 21 October 2000, as upheld on 14 December 1999, could not be explained by the "newly discovered" circumstances. The only reason for the revision of the settled dispute was the adoption of the Instruction, which gave new interpretation of the law underlying the judgment in the applicant's favour. The Court further notes that the interpretation was given by the same State authority which was a party to the proceedings. Finally, what is decisive in this case is that the application of those new rules led to a retrospective recalculation of the amounts due to the applicant by virtue of the judgment of 21 October 2000. Therefore, not only had the agency established a new rule applicable for future cases, it also nullified the final judgment, replacing a "wrong" judicial interpretation of the law with a "correct" one, favourable for that agency.

44. Such situation, in the opinion of the Court, is incompatible with the principles of legal certainty and equality of arms, enshrined in Article 6 § 1 of the Convention. Accordingly, there has been a violation of this provision.

3. Alleged violation of Article 1 of Protocol No. 1

45. The Court reiterates that the judicial award of a pecuniary nature against the State was the applicant's "possession" within the meaning of Article 1 of Protocol No. 1 (see paragraphs 31 and 32 above). Annulment of such an award clearly constituted an interference with the applicant's rights guaranteed by this provision.

46. To justify that interference the Government claimed that it had been lawful and pursued a legitimate aim: to correct a judicial error. The Court accepts that this measure pursued the public interest; however, its compliance with the "lawfulness" requirement of Article 1 of Protocol No. 1 is questionable. Thus, the case was re-opened because the domestic court viewed the Instruction as a "newly discovered circumstance". However, this reading of Article 333 of CCivP is more than liberal (see paragraph 39 above). Even assuming that the court's reading of the domestic law was not absolutely arbitrary (see in this respect paragraph 17 above), it still remains to be established whether the interference was proportionate to the legitimate aim pursued.

47. In this respect the Court recalls that it has already examined a similar argument in the Pravednaya case, where it held that "the State's possible interest in ensuring a uniform application of the Pensions Law should not

have brought about the retrospective recalculation of the judicial award already made" (§ 41). The recalculation of a pension and its subsequent reduction does not, as such, violate Article 1 of Protocol No. 1 (Skorkiewicz v Poland (dec.), no. 39860/98, 1 June 1998). However, backdating the recalculation with the effect that the sums due were reduced involved an individual and excessive burden for the applicant and was incompatible with Article 1 of the Protocol no 1.

48. The Court does not see any reason to depart from this position in the circumstances of the present case. It concludes that the quashing of the judgment of 21 October 1998 constituted a violation of Article 1 of Protocol No. 1.

Vincent BERGER Boštjan	M. ZUPANČIČ
Registrar	President

Estratto (par. 25-52) della sentenza del 7 giugno 2007, sez. I, causa KUZNETSOVA c. Russia

In the case of Kuznetsova v. Russia,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Mr C.L. ROZAKIS, President, Mr A. KOVLER, Mrs E. STEINER, Mr K. HAJIYEV, Mr D. SPIELMANN, Mr S.E. JEBENS, Mr G.MALINVERNI, judges, and Mr S. NIELSEN, Section Registrar,

Having deliberated in private on 15 May 2007,

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

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION AND ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

25. The applicant complained that the final judgment in her favour had been quashed on account of newly discovered circumstances, which had resulted in a decrease in her pension. The Court will examine this complaint under Article 6 of the Convention and Article 1 of Protocol No. 1 to the Convention. These provisions read as follows:

Article 6 § 1

"In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

Article 1 of Protocol No. 1

"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."

A. Submissions by the parties

1. The applicant

26. The applicant contended that the decision of the Supreme Court of 24 April 2000 was a new – as opposed to a newly discovered – circumstance, since it was adopted between the first-instance and appellate decisions in the applicant's case. The defendant Agency should therefore have been aware of that decision before the appeal proceedings. Moreover the decision of 24 April 2000 had been issued in the context of another court dispute, and therefore, in the applicant's view, should not have been used as a ground for re-opening her case. The applicant next noted that the decision of the Constitutional Court dated 14 January 1999 referred to by the Government was irrelevant to her case, as it only concerned changes caused by a law's unconstitutionality, whereas the constitutionality of the legislation and regulations applied in her case had never been disputed. Finally, the applicant alleged that the judgment of 13 April 2000 in her favour had become final and legally binding once it had been upheld on appeal, and therefore constituted a "possession", within the meaning of Article 1 of Protocol No. 1, until it was quashed on 13 August 2000.

2. The Government

27. The Government argued that the application was incompatible ratione materiae with the provisions of the Convention. As regards the applicability of Article 6 of the Convention, they referred to the cases of Schouten and Meldrum v. the Netherlands (dec. nos. 19005/91 and 19006/91, 9 December 1994); Pančenko v. Latvia, (dec. no. 40772/98, 28 October 1999) and Kiryanov v. Russia (dec. no. 42212/02, 9 December 2004) and argued that the applicant's pension dispute involved the interpretation of pension legislation rather than the determination of her right to pension benefits and that the method of the calculation of an old-age pension belonged to the public-law domain.

28. The Government further contested that the pension awarded to the applicant by the judgment of 13 April 2000 was a "possession" within the meaning of Article 1 of Protocol No. 1. They pointed out that in the case of Pravednaya v. Russia (no. 69529/01, 18 November 2004) the Court had regarded a judicial award of that type as being the applicant's "possession" and made an order for the initial judgment in the applicant's favour to be restored and the pension paid to the applicant in the amount originally determined. However, in the Government's view, such an approach created confusion. If the sum awarded by the court was a "possession" of the pensioner, it should not be affected by future rises in the pension rates. Therefore, in the Pravednaya case the applicant would have to return the money she had already received from the Pension Fund by virtue of the recent changes in the legislation on State pensions. They concluded that in order to avoid such a situation the Court should not regard the amounts of pension awarded by the domestic courts as the claimants' "possession" within the meaning of Article 1 of Protocol No. 1, and that therefore this provision was inapplicable in the present case.

29. As regards the merits of the application, the Government alleged that the decision to re-open the applicant's civil case had not been arbitrary, since it had been based on the Supreme Court's decision of 24 April 2000 confirming the lawfulness of the Directive of 29 December 1999 clarifying how the Pensions Law should be interpreted and applied. In the Government's view, it had been necessary to re-open the case in order to correct a judicial error in the application of the substantive law.

30. They stressed that since the defendant Agency had learnt about this new circumstance, which was of crucial relevance to the applicant's case, only after the judgment of 13 April 2000 became final, it had been entitled to request the re-opening of the applicant's case and the domestic court had had good grounds for granting its request. In this respect the Government also stressed that the Agency had lodged the application for a review of the judgment of 13 April 2000 within the statutory time-limit of three months after the delivery of the decision of the Supreme Court of 24 April 2000 which constituted the newly discovered circumstance in the applicant's case. The Government also pointed out that the Constitutional Court of Russia had recognised in a decision of 14 January 1999 that changes in the law could constitute newly discovered circumstances and had gone on to confirm in decisions of 2 February 1996 and 3 February 1998 that the Supreme Court's rulings could be regarded as newly discovered circumstances. They argued that the decision to re-open the case fully complied with the Code of Civil Procedure, so that there had been no violation of the applicant's right to a fair trial.

31. As to whether the applicant's property right had been violated, the Government contended that the applicant had not acquired property since the judgment which had conferred a right on her had been annulled owing to the discovery of new circumstances and the applicant's claims for a higher pension had ultimately been dismissed.

32. The Government concluded that neither Article 6 § 1 of the Convention nor Article 1 of Protocol No. 1 to the Convention had been violated as a result of the annulment of the judgment in the applicant's favour.

B. The Court's assessment

1. The Government's objection on applicability

33. The Court notes at the outset that the Government's objection concerning the applicability of Article 6 § 1 of the Convention was adequately dealt with in the decision on the admissibility of the present application. It does not consider it necessary to re-examine the matter and therefore rejects the Government's objection in this respect.

34. In so far as the Government disputed the applicability of Article 1 of Protocol no. 1, the Court reiterates that the Convention does not guarantee, as such, the right to an old-age pension or any social benefit in a particular amount (see, for example, Aunola v. Finland (dec.), no. 30517/96, 15 March 2001). However a "claim" – even concerning a pension – can constitute a "possession" within the meaning of Article 1 of Protocol No. 1 where it has a sufficient basis in national law, for example where it is confirmed by a final court judgment (see Pravednaya, cited above, § 38; and Kopecký v. Slovakia judgment, [GC], no. 44912/98, § 35, ECHR 2004-IX).

35. The judgment of the Serpukhov Town Court of 13 April 2000 as upheld by the Moscow Regional Court on 22 May 2000 provided the applicant with an enforceable claim to receive an increased pension with an IPC of 0.7 together with arrears of RUR 4,593.89. It became final and binding after being upheld on appeal and enforcement proceedings were instituted. In the Court's view, the applicant therefore had a "possession" for the purposes of Article 1 of Protocol No. 1. The Court also finds that the quashing on 16 August 2000 of that final and binding judgment deprived the applicant of her entitlement to the increased pension, and therefore constituted interference with her right to the peaceful enjoyment of her possessions guaranteed by Article 1 of Protocol No. 1 (see Brumărescu v. Romania [GC], no. 28342/95, § 74, ECHR 1999-VII; and Pravednaya, cited above, § 39).

36. The Court concludes that the reversal of the final and binding decision in the applicant's favour constituted interference with her rights under both Article 6 and Article 1 of Protocol No. 1 to the Convention. It remains to be established whether this interference was justified.

2. Alleged violation of Article 6 § 1 of the Convention

37. The Court reiterates that the right to a fair hearing before a tribunal as guaranteed by Article 6 § 1 of the Convention must be interpreted in the light of the Preamble to the Convention, which declares, in its relevant part, the rule of law to be part of the common heritage of the Contracting States. One of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, among other things, that where the courts have finally determined an issue, their ruling should not be called into question (see Brumărescu, cited above, § 61).

38. This principle insists that no party is entitled to seek a review of a final and binding judgment merely for the purpose of a rehearing and a fresh decision of the case. The power of review should be exercised for correction of gross judicial mistakes and miscarriages of justice, and not to substitute a review. The review cannot be treated as "an appeal in disguise", and the mere possibility of two views on the subject is not a ground for re-examination. Departures from that principle are justified only when made necessary by circumstances of a substantial and compelling character (see Ryabykh v. Russia, no. 52854/99, § 52, ECHR 2003–X).

39. The Court should be especially mindful of the dangers inherent in the use of retrospective legislation which has the effect of influencing the judicial determination of a dispute to which the State is a party. Respect for the rule of law and the notion of a fair trial require that any reasons adduced to justify such measures be treated with the greatest possible degree of circumspection (see The National & Provincial Building Society, the Leeds Permanent Building Society and the Yorkshire Building Society v. the United Kingdom, judgment of 23 October 1997, Reports 1997-

VII, § 112; and Zielinski and Pradal & Gonzalez and Others v. France [GC], nos. 24846/94 and 34165/96 to 34173/96, § 57, ECHR 1999-VII).

40. The Court also notes, more specifically, that the procedure of re-opening a civil case on account of newly discovered circumstances does not by itself contradict the principle of legal certainty in so far as it is used to correct miscarriages of justice. The Court's task is to determine whether this procedure was applied in a manner which is compatible with Article 6 § 1 (see Pravednaya, cited above, § 28).

41. Turning to the present case, the Court observes that on 13 April 2000 the Serpukhov Town Court delivered a judgment that was favourable to the applicant. The domestic court construed the applicable law in the applicant's favour and rejected the defendant Agency's reference to the Directive supporting the Agency's interpretation of that law. However, several months after the judgment of 13 April 2000 had become final, it was set aside on the ground that it had not taken into account the decision of the Supreme Court dated 24 April 2000 confirming the lawfulness of the Directive.

42. The Court does not consider it necessary to decide whether the decision of the Supreme Court delivered on 24 April 2000, that is to say. after the judgment of the Serpukhov Town Court, could be regarded as "newly discovered evidence", as stated by the Government, or "new evidence", as alleged by the applicant, as these terms pertain to the domain of the domestic law. The Court reiterates in this respect that it is not called upon to decide issues of interpretation of domestic law but rather has to verify whether on the facts of the case the authorities complied with the requirements of Article 6 of the Convention. Having examined the parties' observations and the materials in its possession, the Court is not satisfied that the aforementioned requirements of Article 6 § 1 were complied with.

43. It finds it difficult to accept the Government's argument that the applicant's case was re-opened with a view to correcting a judicial error in the application of the substantive law. It notes in this respect that the only reason for the review of the settled dispute was the adoption, in an unrelated set of proceedings, of the decision of the Supreme Court, which confirmed the defendant Agency's interpretation of the law applied in the applicant's case. In the Court's view, being dissatisfied with the outcome of the civil dispute with the applicant, the Agency attempted in essence to re-argue the case with the result that the "wrong" judicial interpretation of the law applied in the applicant's case was replaced with the "correct" interpretation, favourable to the Agency. Moreover, the application of the Agency's interpretation of the law, as supported by the decision of the Supreme Court, led to a retrospective recalculation of the amounts due to the applicant under the judgment of 13 April 2000.

44. Against this background, the Court considers that the decision to re-open the applicant's case was not aimed at correcting a judicial error or a miscarriage of justice but rather was an abuse of procedure used merely for the purpose of obtaining a rehearing and fresh determination of the case. This, in the Court's view, infringed the principle of legal certainty and the applicant's "right to a court".

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

3. Alleged violation of Article 1 of Protocol No. 1

46. The Court reiterates that the existence of a debt confirmed by a binding and enforceable judgment furnishes the judgment creditor with a "legitimate expectation" that the debt will be paid and constitutes the judgment creditor's "possessions" within the meaning of Article 1 of Protocol No. 1. The quashing of such a judgment amounts to an interference with his or her right to the peaceful enjoyment of possessions (see, among other authorities, Brumărescu, cited above, § 74).

47. The Court observes that in the instant case the applicant failed to pursue the proceedings once the judgment in her favour had been quashed. In particular, she did not properly appeal against the new judgment which rejected her claims for a higher pension. It reiterates in this respect that the quashing of a final and binding judgment is an instantaneous act (see Sitokhova v. Russia (dec.), no. 55609/00, 2 September 2004). Thus, the eventual outcome of the subsequent proceedings is not directly relevant to the Court's analysis of the complaint about the annulment of the judgment in the applicant's favour (see Ivanova v. Ukraine, no. 74104/01, §§ 35-38, 13 September 2005), save in cases where the subsequent proceedings result in an increased award for the applicant.

48. The Court further observes that the judgment of the Serpukhov Town Court of 13 April 2000, as upheld by the Moscow Regional Court on 22 May 2000, provided the applicant with an enforceable claim to an increased pension with an IPC of 0.7 plus arrears of RUR 4,593.89. It became final and binding after it had been upheld on appeal, and enforcement proceedings were instituted. In the Court's view, the applicant therefore had a “possession” for the purposes of Article 1 of Protocol No. 1.

49. The Court finds that the decision of 16 August 2000 to quash the judgment of 13 April 2000 deprived the applicant of her entitlement to an increased pension, and therefore constituted an interference with her right to the peaceful enjoyment of possessions guaranteed by Article 1 of Protocol No. 1 (see Brumărescu, cited above, § 74; and Pravednaya, cited above, § 39).

50. While the Court accepts that this measure was lawful and pursued the public interest (such as, for example, providing an efficient and harmonised State pension scheme), its compliance with the requirement of proportionality is open to question.

51. It is true that the recalculation of a pension and its subsequent reduction does not, as such, violate Article 1 of Protocol No. 1 (Skorkiewicz v. Poland (dec.), no. 39860/98, 1 June 1998). However, backdating the recalculation with the effect that the sums due were reduced involved an individual and excessive burden for the applicant and was incompatible with Article 1 of the Protocol. In this respect, the Court refers to the aforementioned Pravednaya judgment, in which it noted:

“40. ... The 'public interest' may admittedly include an efficient and harmonised State pension scheme, for the sake of which the State may adjust its legislation.

41. However, the State's possible interest in ensuring a uniform application of the Pensions Law should not have brought about the retrospective recalculation of the judicial award already made. The Court considers that by depriving the applicant of the right to benefit from the pension in the amount secured in a final judgment, the State upset a fair balance between the interests at stake (see, mutatis mutandis, Pressos Compania Naviera S.A. and Others v. Belgium, judgment of 20 November 1995, Series A no. 332, § 43).”

52. The Court does not find it necessary to depart from its conclusions in that judgment and considers that there has been a violation of Article 1 of Protocol No. 1 in the present case.

Done in English, and notified in writing on 7 June 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN

Christos ROZAKIS Registrar President

Estratto (par. 56-82) della sentenza del 19 giugno 2012, sez. III, causa KHONIAKINA c. Georgia

In the case of Khoniakina v. Georgia,
The European Court of Human Rights (Third Section), sitting as a Chamber composed of:
Josep Casadevall, President, Corneliu Bîrsan, Alvina Gyulumyan, Ineta Ziemele, Luis López Guerra, Nona Tsotsoria, Kristina Pardalos, judges, and Santiago Quesada, Section Registrar,
Having deliberated in private on 22 May 2012,
Delivers the following judgment, which was adopted on that date:

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

56. The applicant complained that the ex post facto amendment of 23 December 2005 had deprived her of the right to receive a pension under the adjustment clause of the original version of section 36 of the Supreme Court Act, in breach of Article 1 of Protocol No. 1. This provision reads, in its relevant part, 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 ..."

A. Admissibility

57. The Government submitted that the applicant had not exhausted domestic remedies as required by Article 35 § 1 of the Convention. They stated that the applicant should have applied to the Constitutional Court of Georgia and requested that the impugned amendment of 23 December 2005 be repealed as being unconstitutional.

58. The applicant disagreed.

59. The Court reiterates that it has already found the lodging of an individual constitutional complaint in Georgia to be an ineffective remedy for the purposes of Article 35 of the Convention, mainly on account of the Constitutional Court's inability to set aside individual decisions by the public authorities or courts which directly affect the complainant's rights (see Apostol v. Georgia, no. 40765/02, §§ 41-47, ECHR 2006-XIV).

60. Consequently, the Court, dismissing the Government's objection of non-exhaustion, notes that the complaint under Article 1 of Protocol No. 1 is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. The Court further notes that the complaint is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The Government

61. At the outset, the Government described the general context of the Georgian social security system. The system, as a vestige of the Soviet era, was based on the principle of solidarity rather than the contributory principle, as a result of which, they argued, the margin of appreciation of the respondent State in regulating and fixing the specific amounts of pensions was particularly wide. The Government further submitted that a major reform of the social security system had been initiated in Georgia in the last few years. That process required complex planning of financial policy, consideration of the potential of the public budget and a careful review of a large number of other factors, including the need to avoid the imposition of an additional heavy burden on taxpayers.

62. The Government explained that the adjustment clause, as initially contemplated by the respondent State, had been aimed at providing a special standard of welfare for persons of special merit because of their services to the country, such as former members of the Supreme Court of Georgia. They emphasised that at the time of the introduction of that clause salaries in the public sector, in line with which the life-time pension was intended to be adjustable, had been very low. Thus, relying on the official statistical data, the Government stated that the average monthly salary in the public sector at that time had been roughly equal to GEL 85 (EUR 39). However, over a period of several years thereafter, salaries had increased significantly. By 2004 the average salary in the public sector had risen to GEL 192 (EUR 88), while in 2008 it was GEL 870 (EUR 399).

63. The State, facing a budget deficit due to the rise in public salaries, had either to maintain the resulting increase in pensions for the special category of persons while on the other hand leaving the most vulnerable category with miserable pensions, or to set a decent and fair pension for the special category while starting a gradual but steady and rapid increase in the pensions of ordinary senior citizens. The second option had been chosen.

The Government added that, in addition to reducing the life-time and adjustable pension of retired Supreme Court judges to GEL 1,200 (EUR 551), a move which concerned 21 individuals overall, the respondent State had also concurrently adopted, on 27 December 2005, a new Act on State Compensation (see paragraphs 39 and 40 above), which similarly discontinued the application of the same adjustment principle to the pensions of 850 retired civil servants (former officials of the Defence, Interior and Security Ministries (191 individuals), former public prosecutors (98 individuals) and former members of Parliament (561 individuals)).

64. However, despite repealing the adjustment clause, the State had maintained the general idea of a special life-time pension for meritorious individuals, by fixing the maximum amount at a fair level which had been and continued to be well beyond the amount of the average regular pension. In particular, the applicant's current allowance of GEL 1,200 (EUR 551) was almost twelve times the amount of the average pension, which currently amounted to approximately GEL 100 (EUR 46). This meant that the applicant, a former Supreme Court judge, was provided with a level of financial support reflecting her merit, and enjoyed a far better standard of living than the average senior citizen in Georgia. In other words, the State, whilst exercising its sovereign power to reform its social and economic policy, had implemented legislative amendments that were reasonably proportionate to the interest pursued.

65. The Government further submitted that when the amendment of 23 December 2005 had repealed the adjustment clause and granted retired Supreme Court judges a pension of GEL 1,200 (EUR 551), it had not deprived the judges of their right to receive a pension as such, but rather had regulated the question anew by changing the amount. They reiterated that the determination of social policy fell, according to the relevant case-law of the Court, within the wide margin of appreciation of the national authorities, and that Article 1 of Protocol No. 1 should in no way be interpreted as entitling a person to receive a pension of a particular amount.

(b) The applicant

66. The applicant replied that in so far as the adjustment clause had first been repealed as far back as 16 March 2001, that is, several years before the salaries in the public sector had started to rise in 2004-2005, it was scarcely possible to establish any causal link between the two events. Consequently, the Government's argument that the removal of the clause had been a necessary austerity measure, aimed at avoiding an added burden for taxpayers when State expenditure increased owing to the payment of higher public salaries, was illogical. The applicant also maintained that the argument about the State budget deficit could not be a genuine reason for the removal of the adjustment clause, as it had been voiced by the State for the first time in the proceedings before the Court. No such reason had ever been cited, even in approximate terms, whether in the official explanatory memorandum to the amendment of 23 December 2005, by the

legislature during the examination of that amendment in Parliament or in the respondent authority's submissions during the relevant judicial proceedings at domestic level.

67. Furthermore, pointing out that only 21 retired Supreme Court judges, including herself, were concerned by the removal of the adjustment clause, the applicant stated that it was incongruous to claim that the funds saved by reducing the pension of such a small number of persons could make any meaningful contribution to the financing of pensions for ordinary senior citizens. The supposed causal link between the two events was further undermined by the fact that, while the removal of the clause had occurred in December 2005, the pension of ordinary senior citizens had started to rise only several years later, in 2008. If the State budget deficit was the real reason for the annulment of the life-long and adjustable pension of the twenty-one retired senior Supreme Court judges, the applicant wondered how it had become possible to increase significantly in a rather short period of time the salary of acting judges of the Supreme Court, which was currently fixed at GEL 4,400 (EUR 2,020). As further proof of the manifestly unfair distribution of public funds between acting senior public servants and retired judges' pensions, the applicant also commented on the fact that Ministers' salaries had recently reached approximately GEL 5,000 (EUR 2,305); the salary of the Chief Public Prosecutor had risen to GEL 4,000 (EUR 1,844) and that of the regional public prosecutors was set at GEL 2,580 (EUR 1,190). Thus, the applicant complained that she and her fellow retired judges of the Supreme Court were being required to bear an excessive burden, incompatible with the proportionality test under Article 1 of Protocol No. 1.

68. The applicant also complained that, by adopting the amendment of 23 December 2005 which discontinued the application of the adjustment clause to her situation, the legislative authority had interfered, with retrospective effect, in her pending judicial dispute with the Fund, in breach of the principle of legal certainty and other principles of the rule of law enshrined in the Convention (she referred to Zielinski and Pradal and Gonzalez and Others, cited above, § 53, and Smokovitis and Others v. Greece, no. 46356/99, § 34, 11 April 2002). The applicant then pointed to the provision of the European Charter on the Statute for Judges according to which the level of social protection for judges could not be downgraded once it had been established (see paragraph 47 above). She emphasised in that respect that not only the social well-being of individual judges was at stake but also the protection of the judicial system in the form of the guarantees for its independence from outside pressure. The applicant also submitted opinions issued by the Constitutional Court of Georgia and various State and independent legal experts, all of which warned the Georgian Parliament that the removal of the adjustment clause in relation to the pensions rights of retired judges would be incompatible with the relevant international standards on the protection of judges and might undermine the guarantees of stability, irremovability and independence of the judiciary.

2. The Court's assessment

(a) General principles

69. The Court reiterates that Article 1 of Protocol No. 1 does not guarantee, as such, any right to a pension of a particular amount (see, amongst other authorities, Kjartan Ásmundsson, cited above, § 39). However, where a Contracting State has in force legislation providing for the payment as of right of a pension – whether or not conditional on the prior payment of contributions – that legislation has to be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 for persons satisfying its requirements (see Carson and Others v. the United Kingdom [GC], no. 42184/05, § 64, ECHR 2010). The reduction or the discontinuance of a pension may therefore constitute interference with possessions that needs to be justified (see, for instance, Rasmussen v. Poland, no. 38886/05, § 71, 28 April 2009).

70. Indeed, the principles which apply generally in cases under Article 1 of Protocol No. 1 are equally relevant when it comes to pensions (see, as a recent authority, Stummer v. Austria [GC], no. 37452/02, § 82, 7 July 2011). Thus, the first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of

possessions should be lawful and that it should pursue a legitimate aim "in the public interest". Any interference must also be reasonably proportionate to the aim sought to be realised. In other words, a "fair balance" must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The requisite balance will not be found if the person or persons concerned have had to bear an individual and excessive burden (see, amongst many other authorities, The Former King of Greece and Others v. Greece [GC], no. 25701/94, §§ 79 and 82, ECHR 2000-XII).

71. Whilst Article 1 of Protocol No. 1 cannot restrict a State's freedom to choose the type or amount of benefits that it provides under a social security scheme (see Stec and Others v. the United Kingdom [GC], no. 65731/01, § 53, ECHR 2006-VI), it is also important to verify whether an applicant's right to derive benefits from the social security scheme in question has been infringed in a manner resulting in the impairment of the essence of his or her pension rights (see Wieczorek v. Poland, no. 18176/05, § 57, 8 December 2009). In addition, any measure reducing the amount of pensions normally payable to the qualifying population must be implemented in a non-discriminatory manner (see Lakićević and Others v. Montenegro and Serbia, nos. 27458/06, 37205/06, 37207/06 and 33604/07, § 59, 13 December 2011).

(b) Application of the above principles to the present case

(i) Whether there was interference with the applicant's possessions

72. Turning to the present case, the Court considers that the applicant's right to receive a life-long retirement pension in an amount equal to her final salary and adjustable in accordance with changes in the salary of serving Supreme Court judges under the original version of section 36 of the Supreme Court Act, as that provision stood at the time of her retirement on 4 May 2000, created a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 (see, for instance, Stec and Others v. the United Kingdom (dec.), no. 65731/01 and 65900/01, § 39 ECHR 2005-X). Furthermore, the subsequent discontinuation of the adjustment requirement since 1 January 2006, as a result of which the applicant became unable to claim a higher pension despite the significant rise in the salary of acting Supreme Court judges, a statutory change which clearly reduced the initial scope of the applicant's pension entitlement, must be regarded as interference with her right to the peaceful enjoyment of her possessions. This interference thus requires to be justified under the relevant "lawfulness", "public interest" and "proportionality" principles contained in Article 1 of Protocol No. 1 (see, for instance, Lakićević and Others, cited above, § 59).

(ii) Lawfulness of the interference

73. The Court first notes that the applicant's complaint about the legislative interference with the pending judicial proceedings concerning her pension rights (see paragraph 68 above) is misconceived. At the time of the adoption of the amendment of 23 December 2005 only the applicant's first pension dispute, calling into question the lawfulness of the separate amendment of 16 May 2001, was pending (compare Torri and Others v. Italy (dec.), nos. 11838/07 and 12302/07, 24 January 2012). That first dispute, it must be noted, was then finally determined in the applicant's favour by the Supreme Court's final decision of 21 February 2006. It was only after the relevant State agency had started implementing the new pension scheme under the impugned amendment of 23 December 2005 that she brought, on 31 May 2006, a second action against the State, unrelated to the previous set of pension proceedings (see paragraphs 11 and 26-29 above).

74. In so far as the above-mentioned complaint by the applicant can also be understood as challenging the amendment of 23 December 2005 as an attempt to thwart the general interpretation adopted by the domestic courts in the course of her first pension dispute regarding comparable statutory regulations with retrospective effect, the Court has already ruled on previous occasions that statutory pension regulations are liable to change, that the legislature cannot be prevented from regulating, via new retrospective provisions, pension rights derived from the laws in force and that a final judicial decision on a comparable matter cannot be validly used as a shield against such

changes in the future (see, mutatis mutandis, Arras and Others v. Italy, no. 17972/07, § 42, 14 February 2012; see also Sukhobokov v. Russia, no. 75470/01, § 26, 13 April 2006).

75. The Court thus concludes that the interference with the applicant's pension rights, which was effected on the basis of the clearly and precisely formulated legislative amendment of 23 December 2005 and was not tainted by any manifest arbitrariness in the course of the application of that amendment by the relevant domestic authorities (see Torri and Others, cited above, § 42, and Moskal v. Poland, no. 10373/05, § 56, 15 September 2009), satisfied the lawfulness requirement under Article 1 of Protocol No. 1.

(iii) Legitimate aim and proportionality of the interference

76. Reiterating that, because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to decide what is "in the public interest", and that that notion is particularly extensive when the implementation of social and economic policies is at stake, the Court accepts the Government's argument that the amendment of 23 December 2005, which removed the adjustment clause from section 36 of the Supreme Court Act, pursued the legitimate aim of maintaining the sustainability of the public budget, thereby rationalising public expenditure (see, mutatis mutandis, Panfile v. Romania (dec.), no. 13902/11, 20 February 2012; Šulcs v. Latvia (dec.), no. 42923/10, §§ 25 and 29, 6 December 2011; Leinonen v. Finland (dec.), no. 33898/96, 7 June 2001; Moskal, cited above, § 61; and Arras and Others, cited above, § 81).

77. As to whether the interference in the instant case was proportionate to the legitimate aim pursued, the Court notes that the State's rationale for granting the applicant entitlement to a life-long pension equivalent, as a minimum, to her final salary and also adjusted in accordance with the salary rises of acting judges, was the public recognition of her merit on account of her services to the State as a Supreme Court judge. It further notes that, whilst discontinuing the adjustment requirement, the amendment of 23 December 2005 entitled the applicant instead to a sum of GEL 1,200 (EUR 551). It is significant that the new amount of the applicant's retirement benefit slightly exceeded the amount of her final salary before retirement (see paragraph 7 above). It therefore preserved, in substance, the initial equivalence requirement of her special pension entitlement and, as the Government demonstrated, was still much higher than the average retirement pension in Georgia, thus maintaining the idea of a special, more generous welfare scheme for retired Supreme Court judges. That being so, the Court finds that the amendment of 23 December 2005 cannot be said to have impaired the very essence of the applicant's special retirement benefit as it was initially contemplated by the respondent State (contrast, for instance, Lakićević and Others, cited above, § 72, and Kjartan Ásmundsson, cited above, § 45).

78. The Court further observes that the amendment of 23 December 2005 to the Supreme Court Act was not a single isolated statutory change but formed part of a much wider legislative reform of the pension system for retired civil servants. In particular, the concurrently enacted Act on State Compensation similarly discontinued the application of the same adjustment to the pensions of 850 retired civil servants (see paragraphs 39, 40 and 62 above). Consequently, it cannot be said, contrary to the applicant's assertion, that the general reform of retired civil servants' pension entitlements made the applicant bear an individual and excessive burden as one of the small number of retired judges of the Supreme Court.

79. All in all, the Court, having regard to the respondent State's wide margin of appreciation in balancing the rights at stake in relation to economic policies in situation of complex transitional processes and observing the overall public interests (see, for instance, Frimu and Others v. Romania (dec.), nos. 45312/11, 45581/11, 45583/11, 45587/1 and 45588/11 7 February 2011; Maggio and Others v. Italy, nos. 46286/09, 52851/08, 53727/08, 54486/08 and 56001/08, § 63, 31 May 2011; Lenz v. Germany (dec.), no. 40862/98, ECHR 2001-X; and also Šulcs, cited above, § 26), concludes that the discontinuation of the adjustment requirement in relation to the applicant's special retirement benefit was not disproportionate to the legitimate aim pursued.

80. It follows that there has been no violation of Article 1 of Protocol No. 1.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

81. Lastly, the applicant complained that the incorrect reading and application of the relevant domestic law to her situation by the courts in the course of her second pension dispute amounted to a violation of her rights under Articles 6 § 1 and 14 of the Convention.

82. However, in the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

B. PRONUNCE RESE NEI CONFRONTI DI ALTRI PAESI

Retroattività della legge “civile”

Artt. 6 § 1 della Convenzione (equo processo)
e 1 del Protocollo n. 1 (diritto al rispetto dei beni)

In materia di proprietà

Sentenza del 20 febbraio 2003, sez. II, causa FORRER-NIEDENTHAL c. Germania (in particolare, par. 28-69)

En l'affaire Forrer-Niedenthal c. Allemagne,

La Cour européenne des Droits de l'Homme (troisième section), siégeant en une

chambre composée de :
M. I. Cabral Barreto, *président*,
M. G. Ress,
M. L. Caflisch,
M. P. Kūris,
M. J. Hedigan,
Mme M. Tsatsa-Nikolovska,
M. K. Traja, *juges*,
et de M. V. Berger, *greffier de section*,

Après en avoir délibéré en chambre du conseil les 25 avril 2002 et 30 janvier 2003,

Rend l'arrêt que voici, adopté à cette dernière date :

PROCÉDURE

1. A l'origine de l'affaire se trouve une requête (no 47316/99) dirigée contre la République fédérale d'Allemagne et dont une ressortissante suisse, Mme Evamarie Forrer-Niedenthal (« la requérante »), avait saisi la Cour européenne des Droits de l'Homme (« la Cour ») le 15 décembre 1998 en vertu de l'article 34 de la Convention de sauvegarde des Droits de l'Homme et des Libertés fondamentales (« la Convention »).

2. La requérante est représentée devant la Cour par Me Udo Heidrich, avocat à Zurich. Le gouvernement allemand (« le Gouvernement ») est représenté par son agent, M. K. Stoltenberg, *Ministerialdirigent*, du ministère fédéral de la justice.

3. La requérante alléguait une atteinte à son droit au respect de ses biens garanti à l'article 1 du Protocole no 1. Elle se plaignait également de ne pas avoir bénéficié d'un procès équitable au sens de l'article 6 § 1 de la Convention.

4. La requête a été attribuée à la troisième section de la Cour (article 52 § 1 du règlement). Au sein de celle-ci, la chambre chargée d'examiner l'affaire (article 27 § 1 de la Convention) a été constituée conformément à l'article 26 § 1 du règlement.

5. Le 1er novembre 2001, la Cour a modifié la composition de ses sections (article 25 § 1 du règlement). La présente requête a été attribuée à la troisième section ainsi remaniée (article 52 § 1).

6. Par une décision du 25 avril 2002, la chambre a déclaré la requête recevable.

7. Tant la requérante que le Gouvernement ont déposé des observations écrites sur le fond de l'affaire (article 59 § 1 du règlement). La chambre ayant decide après consultation des parties qu'il n'y avait pas lieu de tenir une audience consacrée au fond de l'affaire (article 59 § 3 *in fine* du règlement), les parties ont chacune soumis des commentaires écrits sur les observations de l'autre. Quant au gouvernement suisse, avisé par le greffier de la possibilité d'intervenir dans la procédure (articles 36 § 1 de la Convention et 61 du règlement), il n'a pas manifesté l'intention de s'en prévaloir.

EN FAIT

I. LES CIRCONSTANCES DE L'ESPÈCE

A. La genèse de l'affaire

8. La requérante est le successeur légal (*Rechtsnachfolgerin*) de sa grand-mère, elle-même héritière d'une indivision successorale (*Erbengemeinschaft*) propriétaire d'un terrain situé à Halle, ville de la République démocratique allemande (RDA), et sur lequel se trouvaient les locaux d'une société pharmaceutique. La grand-mère de la requérante avait quitté la RDA en 1946 et s'était installée en Bavière.

9. Par un contrat notarié du 13 novembre 1959, la société en liquidation fut vendue pour 180 650 marks de la RDA à l'Institut pour l'industrie du sucre et de l'amidon (*Institut für Zucker-und Stärkeindustrie*) Halle-Trotha, propriété de la RDA, et son terrain fut inscrit le 25 mai 1960 comme « propriété du peuple » (*Volkseigentum*) dans le livre foncier (*Grundbuch*), alors que deux

membres de l'indivision successorale, dont la grand-mère de la requérante, n'avaient pas été dûment représentés lors de la vente.

10. Après la réunification allemande le 3 octobre 1990, la propriété passa à l'Institut pour l'industrie du sucre et de l'amidon, dont la République fédérale d'Allemagne (RFA) était devenue entre-temps propriétaire.

B. Les procédures devant les juridictions de la RFA

1. La procédure en référé devant les juridictions civiles

11. En juin 1993, la requérante, considérant que la vente était nulle, fit opposition devant le tribunal d'instance (*Amtsgericht*) de Halle en raison de l'inscription incorrecte dans le livre foncier.

12. Par un jugement du 22 octobre 1993, le tribunal d'instance fit droit à son opposition.

13. Par un jugement du 22 avril 1994, le tribunal régional (*Landgericht*) de Halle rejeta l'opposition en appel, au motif que la propriété avait été transférée par usucapion (*Ersitzung*) à la RDA, puis à la RFA après la réunification.

2. La procédure devant le tribunal administratif de Berlin

14. Le 23 octobre 1995, le tribunal administratif (*Verwaltungsgericht*) de Berlin rejeta l'opposition de la requérante contre une décision de l'administration compétente d'attribuer le bien en question en priorité à des personnes qui s'engageaient à y effectuer certains investissements (*Investitionsvorrangsbescheid*). Le tribunal considéra également que la requérante avait perdu la propriété de son bien par usucapion.

3. La procédure au fond devant les juridictions civiles

a. Le jugement du tribunal régional de Halle du 29 juin 1995

15. Par un jugement du 29 juin 1995, le tribunal régional (*Landgericht*) de Halle rejeta le recours de la requérante visant à obtenir le montant des bénéfices tires de son entreprise depuis le 3 octobre 1990 pour les mêmes motifs que dans son jugement du 22 avril 1994.

b. L'arrêt de la cour d'appel de Naumburg du 30 janvier 1996

16. Par un arrêt du 30 janvier 1996, la cour d'appel (*Oberlandesgericht*) de Naumburg rejeta également le recours de la requérante en se basant sur ces mêmes motifs.

c. L'arrêt de la Cour fédérale de justice du 10 octobre 1997

17. Par un arrêt du 10 octobre 1997, la Cour fédérale de justice

(*Bundesgerichtshof*), après avoir tenu une audience, déclara en revanche que la requérante n'avait pas perdu son titre de propriété par usucapion, contrairement à ce qu'avaient dit les juridictions ordinaires, en se référant à son arrêt de principe du 29 mars 1996 en la matière. En effet, en vertu du code civil de la RDA, l'acqui ition d'une « propriété du peuple » ne pouvait se faire par usucapion.

Cependant, d'après la Cour fédérale, d'éventuels vices de la vente avaient été purgés en l'espèce par l'article 237 § 1 de la loi introductive au code civil (*Einführungsgesetz zum Bürgerlichen Gesetzbuche* - EGBGB), dans la version de la loi du 17 juillet 1997 sur la préservation de la modernisation de l'espace habitable (*Wohnraummodernisierungssicherungsgesetz* – voir Droit et pratique internes pertinents ci-dessous). En effet, ce qui était déterminant n'était pas la question de savoir si la vente s'était déroulée correctement d'un point de vue formel, mais si elle avait été possible d'après le droit de la RDA. Cette disposition s'appliquait donc également lorsque la vente était entachée d'un vice de défaut de représentation.

La Cour fédérale estima qu'en l'espèce les vices dont faisait état la requérante auraient pu être évités, qu'ils étaient minimes (*unbeachtlich*) et ne nécessitaient plus d'éclaircissements (*Aufklärung*).

De plus, le droit de propriété (*Eigentumsposition*) des vendeurs du terrain en question, qui était devenu « propriété du peuple » à l'époque, était tellement réduit (*geschmälert*) que sa réalisation (*Realisierung*) avant la réunification était exclue et que même après la réunification, elle était loin d'être certaine.

La Cour fédérale ajouta que l'article 237 § 1 de la loi introductive au code civil n'était pas contraire à la Constitution et que si le législateur avait considéré, dans ce contexte particulier lié à la réunification et caractérisé par une incertitude juridique générale, que la protection de la situation existant de fait (*der tatsächliche Bestand*) devait prévaloir sur celle du droit de propriété, alors la privation de propriété sans indemnisation était exceptionnellement justifiée, pour cause d'utilité publique, en tenant compte du principe de proportionnalité (*unter Berücksichtigung des Grundsatzes der Verhältnismässigkeit*).

La Cour fédérale conclut également qu'il n'y avait pas atteinte au principe d'égalité, car le domaine d'application de cette disposition n'était pas comparable à la situation juridique de l'ancien territoire de la RFA.

d. La décision de la Cour constitutionnelle fédérale du 3 juillet 1998

18. Le 3 juillet 1998, la Cour constitutionnelle fédérale

(*Bundesverfassungsgericht*), siégeant en comité de trois membres, décida de ne pas retenir le recours de la requérante, au motif qu'il ne soulevait pas de question fondamentale de droit constitutionnel et qu'il ne présentait pas des chances suffisantes de succès.

La Cour constitutionnelle estima qu'il ne s'agissait pas en l'espèce d'une expropriation légale (*Legalenteignung*) au sens de l'article 14 § 3 de la Loi fondamentale (*Grundgesetz*), qui serait anticonstitutionnelle faute d'indemnisation.

D'après la Cour constitutionnelle, cette disposition ne s'appliquait pas si le législateur, dans le cadre de la mise en place d'un nouveau système juridique, déclarait caducs certains droits qui n'avaient pas d'équivalent dans le nouveau système. Cela était également valable pour des dispositions qui purgeaient rétroactivement des vices formels entachant le transfert de propriété et annulaient de ce fait des droits de propriété existants.

La Cour constitutionnelle ajouta qu'en l'espèce l'article 237 § 1 de la loi introductive au code civil ne présentait pas le caractère d'une expropriation, mais constituait une norme visant à retirer aux vices ayant existé lors du transfert de propriété leur base (*Grundlage*) pour l'avenir. Après l'adhésion de la RDA à la RFA, le législateur avait été confronté au fait que le respect des règles de procédure lors de l'acquisition d'une « propriété du peuple » dans la RDA n'avait pas la même portée que lors de transferts de propriété en RFA. Cela avait à l'époque abouti dans de nombreux cas à la création de « propriétés du peuple »

de fait, dont l'existence (*Bestand*) pouvait paraître douteuse d'un point de vue formel d'après le droit de la RDA, mais qui n'avaient jamais été contestées dans leur existence juridique (*Rechtswirklichkeit*). La contestation ultérieure de ces transferts de propriété avait conduit à de nombreux litiges à l'issue incertaine sur l'ancien territoire de la RDA et à un sentiment d'insécurité dans la population.

Or, d'après la Cour constitutionnelle, l'objectif de l'article 237 § 1 de la loi introductive au code civil était de rétablir la sécurité juridique en protégeant les droits acquis (*Bestandsschutz*) et la paix juridique dans ce domaine. Afin de parvenir à atteindre ces objectifs, cette disposition était appropriée et même nécessaire dans l'intérêt public. La perte du droit formel de propriété (*Entzug einer formalen Eigentumsposition*) qui en découlait demeurait acceptable (*zumutbar*), car les anciens propriétaires ne disposaient pas de droits dont la protection était plus importante que la réalisation des objectifs visés par la disposition en question. A l'époque de la RDA, ils devaient partir du principe que la transformation en « propriété du peuple » était définitive et même après la réunification, ils ne disposaient pas d'un droit certain (*keine gesicherte Rechtsposition*) et ne pouvaient compter sur le fait de retrouver leur titre de propriété.

II. LE DROIT ET LA PRATIQUE INTERNES PERTINENTS

A. Le Traité d'Etat entre la RFA et la RDA sur la création d'une union monétaire, économique et sociale

19. Le Traité d'Etat entre la RFA et la RDA sur la création d'une union monétaire, économique et sociale (*Staatsvertrag über die Schaffung einer Währungs-, Wirtschafts- und Sozialunion zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik*) du 18 mai 1990 se réfère en son article premier à l'économie sociale de marché (*soziale Marktwirtschaft*) ainsi qu'à la protection du droit de propriété.

B. La déclaration commune de la RFA et de la RDA sur la réglementation des questions patrimoniales non résolues

20. Au cours des négociations portant sur la réunification allemande entre les gouvernements de la RFA et de la RDA et les quatre anciennes puissances d'occupation (la France, le Royaume-Uni, les Etats-Unis et l'Union soviétique), les deux gouvernements allemands formulèrent le 15 juin 1990 une déclaration commune sur la réglementation des questions patrimoniales non résolues (*Gemeinsame Erklärung der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik zur Regelung offener Vermögensfragen*), qui devint partie intégrante du Traité sur l'unification (*Einigungsvertrag*) allemande du 31 août 1990.

21. Dans cette déclaration, les deux gouvernements allemands ont indiqué que, dans la recherche de solutions aux questions patrimoniales litigieuses, il leur fallait établir un équilibre socialement acceptable (*sozial verträglicher Ausgleich*) entre des intérêts divergents, en tenant compte des principes de sécurité et de clarté juridiques ainsi que de la protection du droit de propriété.

22. Cette déclaration prévoit, au point 3, que les biens expropriés à l'époque de la RDA devaient en principe être restitués. Si une restitution s'avérait impossible en pratique ou si des tiers avait acquis ces biens de bonne foi, les anciens propriétaires devaient être indemnisés. On ne pouvait en revanche revenir sur les expropriations qui s'étaient déroulées dans l'ancienne zone d'occupation soviétique entre 1945 et 1949.

C. La loi sur la réglementation des questions patrimoniales non résolues

23. Le 29 septembre 1990 entra en vigueur la loi du 23 septembre 1990 sur les questions patrimoniales non résolues / loi sur le patrimoine (*Gesetz über die Regelung offener Vermögensfragen / Vermögensgesetz*), qui devait faire également partie du Traité sur l'unification allemande. D'après ce dernier, la loi sur le patrimoine continuerait d'exister dans l'Allemagne réunifiée après la réunification des deux Etats allemands le 3 octobre 1990. Le but de cette loi était

de régler les conflits relatifs à des biens situés sur le territoire de la RDA d'une manière acceptable sur le plan social, afin d'assurer de manière durable la paix juridique en Allemagne.

24. La loi sur le patrimoine prévoit en principe un droit à restitution pour les personnes ayant été victimes d'expropriations illégales (*rechtsstaatswidrige Enteignungen*) à l'époque de la RDA, à moins que la restitution ne s'avère impossible en pratique ou que les acquéreurs n'aient été de bonne foi (*redlicher Erwerb* – article 4 § 2 de la loi). Dans ce dernier cas, les anciens propriétaires ont droit à une indemnisation d'après la loi du 27 septembre 1994 sur l'indemnisation d'après la loi sur le patrimoine (*Gesetz über die Entschädigung nach dem Gesetz zur Regelung offener Vermögensfragen*).

D. La loi sur la préservation de la modernisation de l'espace habitable

25. En 1997, la RFA adopta une nouvelle loi visant à réglementer un autre type de conflit patrimonial apparu après la réunification allemande et relatif aux transfert de propriétés en « propriétés du peuple » à l'époque de la RDA par le biais d'un acte juridique.

26. L'article 237 § 1 de la loi introductive au code civil, dans la version de la loi du 17 juillet 1997 sur la préservation de la modernisation de l'espace habitable (*Wohnraummodernisierungssicherungsgesetz*), est ainsi rédigé : « Des vices lors de l'achat, de l'expropriation ou de tout autre transfert d'un terrain ou d'un immeuble ne doivent être pris en compte que si le terrain ou l'immeuble ne pouvait valablement être transformé en « propriété du peuple » d'après les principes généraux du droit, les règles de procédure et la pratique administrative en vigueur au moment de la transformation en « propriété du peuple », ou si la transformation éventuelle en « propriété du peuple » était clairement incompatible avec les principes de l'Etat de droit. » (*« Fehler bei dem Ankauf, der Enteignung oder der sonstigen Überführung eines Grundstückes oder selbständigen Gebäudeeigentums sind nur zu beachten, wenn das Grundstück oder selbständige Gebäudeeigentum nach den allgemeinen Rechtsvorschriften, Verfahrensgrundsätzen und der ordnungsgemässen Verwaltungspraxis, die im Zeitpunkt der Überführung in Volkseigentum hierfür massgeblich waren, nicht wirksam in Volkseigentum hätte überführt werden können oder wenn die mögliche Überführung in Volkseigentum mit rechtsstaatlichen Grundsätzen schlechthin unvereinbar war. »*)

GRIEFS

27. La requérante soutient qu'elle a été victime d'une expropriation rétroactive et sans indemnisation et qui a porté atteinte à son droit au respect de ses biens garanti à l'article 1 du Protocole no 1. Elle se plaint également de ne pas avoir bénéficié d'un procès équitable au sens de l'article 6 § 1 de la Convention, car la RFA aurait modifié de manière rétroactive et à ses dépens la situation légale existant dans la RDA.

EN DROIT

I. SUR LA VIOLATION ALLÉGUÉE DE L'ARTICLE 1 DU PROTOCOLE No 1

28. La requérante soutient que son expropriation rétroactive et sans

indemnisation a porté atteinte à son droit au respect de ses biens garanti à l'article 1 du Protocole no 1, ainsi rédigé : « Toute personne physique ou morale a droit au respect de ses biens. Nul ne peut être privé de sa propriété que pour cause d'utilité publique et dans les conditions prévues par la loi et les principes généraux du droit international. Les dispositions précédentes ne portent pas atteinte au droit que possèdent les Etats de mettre en vigueur les lois qu'ils jugent nécessaires pour réglementer l'usage des biens conformément à l'intérêt général ou pour assurer le paiement des impôts ou d'autres contributions ou des amendes. »

A. Thèses des parties

1. Le Gouvernement

29. Le Gouvernement soutient à titre principal que la requérante ne disposait ni d'un « bien actuel » ni d'un droit à indemnisation reconnu au moment de l'entrée en vigueur du Traité d'unification, car la communauté des héritiers avait perdu le bien en question lorsque celui-ci était devenu « propriété du peuple » par le biais de la vente effectuée en 1960. A titre subsidiaire, il considère que même s'il y avait eu ingérence, celle-ci était prévue par l'article 237 § 1 de la loi introductive au code civil, poursuivait un but d'intérêt général et était proportionnée au but légitime poursuivi. En effet, il paraissait légitime de priver la requérante d'un droit qui était purement formel, alors que son bien avait été transformé *de facto* en « propriété du peuple ». Le Gouvernement rappelle que les Etats disposent d'une large marge d'appréciation pour légiférer dans le domaine économique et social, en mettant l'accent sur les particularités de la réunification allemande. Or l'article 237 § 1 de la loi introductive au code civil ne représenterait pas une expropriation, mais une nouvelle réglementation d'un domaine juridique, dans laquelle le législateur avait considéré, pour des raisons de politique économique, que les contrats de vente - pour les biens transformés en « propriétés du peuple » - conclus à l'époque de la RDA demeuraient valables même si toutes les conditions formelles n'avaient pas été respectées à l'époque, à condition que le transfert de propriété fût valable d'après les principes généraux du droit de la RDA. De plus, la communauté des héritiers avait à l'époque perçu un prix qui n'apparaissait pas déraisonnable pour la vente de leur bien. Enfin, la Cour fédérale de justice était tenue d'appliquer cette nouvelle disposition, ce qu'elle a fait d'une manière qu'on ne saurait qualifier d'arbitraire.

2. La requérante

30. La requérante considère que dès les premières élections démocratiques en RDA le 18 mars 1990, elle disposait d'un droit à restitution de son bien en vertu de l'article 356 du code civil de la RDA. Cela résulterait également des dispositions du Traité d'Etat entre la RFA et la RDA sur la création d'une union monétaire, économique et sociale et de la déclaration commune de la RFA et de la RDA sur la réglementation des questions patrimoniales non résolues. Il n'y aurait eu aucun doute que la protection de la propriété socialiste serait supprimée et la RFA ne pourrait dès lors aujourd'hui, d'un point de vue politique, moral ou de droit public, invoquer une quelconque protection de la « propriété du peuple ». La requérante ajoute que même d'après le droit de la RDA, le transfert de propriété à l'époque aurait été caduc, et le versement d'une somme adéquate n'y changerait rien, car la somme figurait sur un compte de sa grand-mère qui avait été gelé et le bien en question avait été utilisé pendant trente ans en RDA. En effet, les vices dont étaient entachés la vente à l'époque, à savoir l'absence de représentation adéquate de sa grand-mère et de la soeur de celle-ci, n'étaient pas purement formels, mais représentaient une violation flagrante du droit des contrats, que les juridictions allemandes avaient méconnu au détriment de la requérante. L'article 237 § 1 de la loi introductive au code civil constituerait dès lors une ingérence disproportionnée dans son droit de propriété en protégeant des bénéficiaires qui, à l'époque, avaient acquis le bien litigieux de mauvaise foi, et en ne prévoyant aucune indemnisation pour la requérante.

B. Décision de la Cour

31. La Cour rappelle que l'article 1 du Protocole no 1, qui garantit en substance le droit de propriété, contient trois normes distinctes (*James et autres c. Royaume-Uni*, arrêt du 21 février 1986, série A no 98-B, pp. 29-30, § 37) : la première, qui s'exprime dans la première phrase du premier alinéa et revêt un caractère général, énonce le principe du respect de la propriété ; la deuxième, figurant dans la seconde phrase du même alinéa, vise la privation de propriété et la soumet à certaines conditions ; quant à la troisième, consignée dans le second alinéa, elle reconnaît aux Etats contractants le pouvoir, entre autres, de réglementer l'usage des biens conformément à l'intérêt général. La deuxième et la troisième norme, qui ont trait à des exemples particuliers d'atteintes au droit de propriété, doivent s'interpréter à la lumière du principe consacré par la première (voir notamment *Iatridis c. Grèce* [GC], no 31107/96, § 55, CEDH 1999-II).

1. Sur l'existence d'une ingérence

32. D'après la jurisprudence de la Cour, la notion de « biens » de l'article 1 du Protocole no1 a une portée autonome qui ne se limite pas à la propriété de biens corporels : certains autres droits et intérêts constituant des actifs peuvent aussi passer pour des « droits de propriété » et donc pour des « biens » aux fins de cette disposition (voir notamment *Gasus Dosier- und Fördertechnik GmbH c.*

Pays-Bas, arrêt du 23 février 1995, série A no 306-B, p. 46, § 53, *Iatridis* précité, § 54, et *Wittek c. Allemagne*, no 37290/97, § 42, CEDH 2002).

33. La Cour relève qu'en l'espèce la requérante était le successeur légal d'une indivision successorale, propriétaire d'un terrain situé en RDA et sur lequel se trouvaient les locaux d'une société pharmaceutique.

34. Dès lors, il convient d'examiner le présent litige sous l'angle de la première phrase de l'article 1 du Protocole no 1 (voir, *mutatis mutandis*, *•eskomoravská myslivecká jednota c. République tchèque* (déc.), no33091/96, 23.3.1999, *Teuschler c. Allemagne* (déc.), no 47636/99, 22.4.1999, et *Wittek* précité, § 44).

35. La Cour constate qu'en l'espèce la Cour fédérale de justice a déclaré que la requérante n'avait pas perdu son titre de propriété par usucapion. Cependant, cette dernière n'a par la suite pu faire valoir ni un droit à restitution ni un droit à indemnisation devant les juridictions civiles, au motif qu'en vertu de l'article 237 § 1 de la loi introductive au code civil, la vente était purgée des vices dont celleci avait été entachée à l'époque de la RDA.

36. Il y a donc eu ingérence dans le droit de la requérante au respect de son bien.

2. Sur la justification de l'ingérence

37. En ce qui concerne la légalité de l'ingérence, la Cour relève que la mesure litigieuse était fondée sur l'article 237 § 1 de la loi introductive au code civil, dans la version de la loi du 17 juillet 1997 sur la préservation de la modernisation de l'espace habitable, qui est précis et accessible à tous.

38. En l'espèce, la Cour fédérale de justice, dans son arrêt du 10 octobre 1997, a écarté toute demande en restitution ou indemnisation de la part de la requérante, au motif que les vices - purement formels et d'importance mineure - dont la vente avait été entachée à l'époque des faits avaient été en l'espèce purgés par l'article 237 § 1 de la loi introductive au code civil, eu égard au fait que par ailleurs la vente avait respecté les principes généraux du droit de la RDA.

39. La Cour estime que cette interprétation n'était pas arbitraire, et elle rappelle à cet égard qu'il appartient au premier chef aux autorités nationales, et singulièrement aux cours et tribunaux, d'interpréter et appliquer le droit interne (voir *Brualla Gómez de la Torre c. Espagne*, arrêt du 19 décembre 1997, *Recueil* 1997-VIII, p. 2955, § 31, et *Glässner c. Allemagne* (déc.), no 46362/99, CEDH 2001-VII, et Wittek précité, § 49).

40. Quant à la finalité de l'ingérence, la Cour constate que l'article 237 § 1 de la loi introductive au code civil visait à rétablir la sécurité et la paix juridiques en Allemagne en préservant les droits acquis dans les cas où les transferts de propriété en « propriétés du peuple » effectués à l'époque de la RDA n'étaient entachés que de vices formels ou d'importance mineure. Il poursuivait donc sans conteste un but d'intérêt général (voir la décision *Teuschler* précitée).

41. Enfin, la Cour doit se pencher sur la proportionnalité de l'ingérence.

42. D'après sa jurisprudence, une mesure d'ingérence dans le droit au respect des biens doit ménager un juste équilibre entre les exigences de l'intérêt général et les impératifs de la sauvegarde des droits fondamentaux de l'individu (voir, parmi d'autres, *Sporrong et Lönnroth c. Suède*, arrêt du 23 septembre 1982, série A no 52, p. 26, § 69). Le souci d'assurer un tel équilibre se reflète dans la structure de l'article 1 tout entier. En particulier, il doit exister un rapport raisonnable de proportionnalité entre les moyens employés et le but visé par toute mesure privant une personne de

sa propriété (*Pressos Compania Naviera S.A. et autres c. Belgique*, arrêt du 20 novembre 1995, série A no 332, p. 23, § 38, et *Yagzilar et autres c. Grèce*, no 41727/98, § 40, CEDH 2001-XII).

43. Afin de déterminer si la mesure litigieuse respecte le juste équilibre voulu, la Cour doit notamment rechercher si elle ne fait pas peser sur la requérante une charge disproportionnée.

44. En l'espèce, la Cour relève que dans son arrêt du 10 octobre 1997, la Cour fédérale de justice a analysé en détail les circonstances de l'espèce et les arguments de la requérante avant de conclure que les vices invoqués n'étaient pas de nature à rendre caduc le contrat de vente conclu à l'époque de la RDA, conformément à l'article 237 § 1 de la loi introductive au code civil, eu égard au fait que par ailleurs la vente avait respecté les principes généraux du droit de la RDA. Dans sa décision du 3 juillet 1998, la Cour constitutionnelle fédérale a considéré que cette disposition était conforme à la Loi fondamentale, compte tenu de l'objectif légitime poursuivi par le législateur après la réunification allemande.

45. D'après la Cour, cette analyse paraît bien fondée. En effet, dans la période d'incertitude juridique liée à la réunification allemande, le législateur a voulu trancher en préservant les droits acquis si les transferts *de facto* de propriétés en « propriétés du peuple » en RDA n'étaient entachés que de vices formels ou d'importance mineure. En revanche, l'article 237 § 1 de la loi introductive au code civil s'assurait que de tels vices étaient pris en compte si le terrain ne pouvait valablement être transformé en « propriété du peuple » « d'après les principes généraux du droit, les règles de procédure et la pratique administrative en vigueur », ou si cette transformation était « clairement incompatible avec les principes de l'Etat de droit ».

46. Par ailleurs, la Cour note que, comme dans l'affaire Wittek précitée, il y eu à l'époque versement à l'indivision successorale d'une somme de 180 650 marks de la RDA, que la requérante elle-même ne considère pas comme déraisonnable.

47. Dès lors, on ne saurait parler de « charge disproportionnée ».

48. Compte tenu de tous ces éléments, et notamment des circonstances exceptionnelles liées à la réunification allemande, la Cour estime que l'Etat défendeur n'a pas excédé sa marge d'appréciation et qu'il n'a pas manqué, eu égard à l'objectif légitime poursuivi, de ménager un « juste équilibre » entre les intérêts de la requérante et l'intérêt général de la société allemande.

49. Il n'y a donc pas eu violation de l'article 1 du Protocole no 1.

II. SUR LA VIOLATION ALLÉGUÉE DE L'ARTICLE 6 § 1 DE LA CONVENTION

50. La requérante se plaint de ne pas avoir bénéficié d'un procès équitable au sens de l'article 6 § 1 de la Convention, qui est ainsi rédigé : « Toute personne a droit à ce que sa cause soit entendue équitablement (...)par un tribunal (...), qui décidera (...) des contestations sur ses droits et obligations de caractère civil (...) »

A. Sur l'exception préliminaire du Gouvernement

51. Le Gouvernement excipe du non-épuisement des voies de recours internes, au motif que la requérante n'a pas soulevé le grief relatif à l'équité de la procédure dans son recours devant la Cour constitutionnelle fédérale.

52. La requérante quant à elle rétorque à titre principal que cette exception a été soulevée tardivement ; à titre subsidiaire, elle allègue que la présentation des faits dans son recours constitutionnel impliquait une application erronée du droit (*unvertretbare Rechtsanwendung*) et une méconnaissance de l'article 3 § 1 de la Loi fondamentale.

53. La Cour rappelle que si la Partie contractante entend soulever une exception d'irrecevabilité, elle doit le faire, pour autant que la nature de l'exception et les circonstances le permettent, dans les observations sur la recevabilité de la requête (article 55 du règlement de la Cour ; voir aussi *Zana c. Turquie*, arrêt du 25

novembre 1997, Recueil 1997-VII, p. 2546, § 44, et *Schweighofer et autres c. Autriche*, (sect. 3), nos 35673/97, 35674/97, 36082/97 et 37579/97, 9.10.2001).

54. En l'espèce, la Cour note que le Gouvernement a soulevé pour la première fois cette exception préliminaire dans ses écritures du 1er juillet 2002, parvenues à la Cour le même jour par télécopie, après la décision de recevabilité rendue par la Cour dans cette affaire le 25 avril 2002.

55. Or en l'occurrence la Cour ne relève aucune circonstance ayant empêché le Gouvernement de soulever cette exception au stade de la recevabilité.

56. Dès lors, il échet de rejeter l'exception préliminaire pour forclusion.

B. Sur le fond

57. Le Gouvernement soutient que dans tous les Etats modernes, un changement de législation en cours de procès entraîne une modification des chances de succès des parties au litige. Cependant, en l'espèce, la requérante n'aurait pas de ce fait été privée d'un droit à un procès équitable au sens de l'article 6 § 1.

58. La requérante considère que la Cour fédérale de justice, en appliquant l'article 237 § 1 de la loi introductive au code civil, a modifié de manière rétroactive et à ses dépens la situation légale existant en RDA. De plus, alors qu'une nouvelle situation juridique était ainsi créée, la requérante ne pouvait contester la décision de la Cour fédérale de justice que devant la Cour constitutionnelle fédérale, qui elle-même ne pouvait pas réexaminer les faits.

59. La Cour rappelle que le droit d'accès aux tribunaux garanti par l'article 6 § 1 n'est pas absolu ; il se prête à des limitations implicitement admises car il appelle de par sa nature même une réglementation par l'Etat, réglementation qui peut varier dans le temps et dans l'espace en fonction des besoins et des ressources de la société et des individus. En élaborant pareille réglementation, les Etats contractants jouissent d'une certaine marge d'appréciation (*Lithgow et autres c. Royaume-Uni*, arrêt du 8 juillet 1986, série A no 102, p. 71, § 194).

60. Cependant le principe de la prééminence du droit et la notion de procès équitable consacrés par l'article 6 s'opposent à toute ingérence du pouvoir législatif dans l'administration de la justice dans le but d'influer sur le dénouement judiciaire du litige (voir *Raffineries grecques Stran et Stratis Andreadis c. Grèce*, arrêt du 9 décembre 1994 , série A no 301-B, p. 82, § 49, et *National & Provincial Building Society, Leeds Permanent Building Society et Yorkshire Building Society c. Royaume-Uni*, arrêt du 23 octobre 1997, *Recueil des arrêts et décisions* 1997-VII, p. 2363, § 112, et *Zielinski et Pradal et Gonzalez et autres c. France* [GC], nos 24846/94 et 34165/96 à 34173/96, CEDH 1999-VII, § 57).

61. L'article 6 § 1 ne saurait toutefois s'interpréter comme empêchant toute ingérence des pouvoirs publics dans une procédure judiciaire pendante à laquelle ils sont parties (arrêt *Building societies* précité, *ibidem*).

62. En l'espèce, la Cour fédérale de justice, dans son arrêt du 10 octobre 1997, a déclaré que la requérante n'avait pas perdu son titre de propriété par usucapion. Elle a néanmoins écarté toute demande en restitution ou d'indemnisation de sa part, car d'éventuels vices de la vente avaient été purgés en l'espèce par l'article 237 § 1 de la loi introductive au code civil, dans la version de la loi du 17 juillet 1997 sur la préservation de la modernisation de l'espace habitable (paragraphe 17 ci-dessus).

63. Or la Cour considère qu'il convient de distinguer très nettement la présente espèce des affaires Raffineries grecques Stran et Stratis Andreadis et Zielinski et Pradal et Gonzalez et autres ci-dessus mentionnées, où le législateur est intervenu de manière rétroactive en faveur de l'Etat dans des litiges auquel ce dernier était partie. Dans l'affaire Raffineris grecques, les requérants disposaient même d'un jugement définitif contre l'Etat.

64. Même si en l'espèce il y a eu intervention du législateur pendant la durée du litige, la loi du 17 juillet 1997 sur la préservation de la modernisation de l'espace visait notamment à réglementer d'une manière générale les conflits patrimoniaux apparus après la réunification allemande et relatifs aux transferts de propriétés en « propriétés du peuple » à l'époque de la RDA par le biais d'un acte juridique (en l'occurrence un acte de vente). Il est vrai qu'à cette fin, les pouvoirs publics avaient conféré à ladite loi un effet rétroactif pour toutes ces situations de transfert de propriété, de même que pour les procédures judiciaires pendantes. Cependant, il est également vrai que ladite loi ne visait pas spécialement le présent litige, mais poursuivait un but d'intérêt général, qui était de régler ces conflits consécutifs à la réunification allemande afin d'assurer de manière durable la paix et la sécurité juridiques en Allemagne (voir, *mutatis mutandis*, l'arrêt *Building societies* précité, § 110).

65. La Cour rappelle par ailleurs que dans des litiges opposant des intérêts de caractère privé, l'exigence de l'égalité des armes implique l'obligation d'offrir à chaque partie une possibilité raisonnable de présenter sa cause dans des conditions qui ne la placent pas dans une situation de net désavantage par rapport à son adversaire (voir notamment les arrêts *Dombo Beheer B.V. c. Pays-Bas* du 27 octobre 1993, série A no 274, p. 19, § 33, et *Raffineries grecques Stran et Stratis Andreadis* précité, p. 81, § 46).

66. Or en l'espèce, la requérante a pu contester le refus des autorités de lui restituer son bien ou de lui accorder une indemnisation devant les juridictions civiles et présenter, aux différents stades de la procédure, les arguments qu'elle jugeait pertinents pour la défense de sa cause. Il est vrai que compte tenu du changement de législation intervenu, la Cour fédérale de justice était tenue d'appliquer la nouvelle loi. Cependant, elle a alors examiné de manière approfondie les circonstances de l'affaire ainsi que les arguments avancés par la requérante, après avoir tenu une audience. De même, à la suite de son recours constitutionnel, la Cour constitutionnelle fédérale a statué sur la conformité de la disposition légale litigieuse avec la Loi fondamentale, qui était un point essentiel du litige en question.

67. La requérante a donc eu accès à des juridictions indépendantes qui ont statue dans son affaire.

68. De plus, la Cour estime que, considérée dans son ensemble, la procedure litigieuse a revêtu un caractère équitable, au sens de l'article 6 § 1 de la Convention.

69. Il s'ensuit qu'il n'y a pas eu violation de l'article 6 § 1 de la Convention.

PAR CES MOTIFS, LA COUR, À l'UNANIMITÉ,

1. *Dit* qu'il n'y a pas eu violation de l'article 1 du Protocole no 1 ;

2. *Dit* qu'il n'y a pas eu violation de l'article 6 § 1 de la Convention.

Fait en français, puis communiqué par écrit le 20 février 2003 en application de l'article 77 §§ 2 et 3 du règlement.

Vincent Berger Ireneu Cabral Barreto

Greffier Président

B. PRONUNCE RESE NEI CONFRONTI DI ALTRI PAESI

Retroattività della legge "civile"

Artt. 6 § 1 della Convenzione (equo processo)
e 1 del Protocollo n. 1 (diritto al rispetto dei beni)

In materia di responsabilità civile dello Stato

Sentenza del 9 dicembre 1994, Camera, causa STRAN GREEK REFINERIES e STRATIS ANDREADIS c. Grecia (in particolare, par. 37-50)

Nella causa Stran Greek Refineries e Stratis Andreadis c. Greece*,

La Corte europea dei diritti dell'uomo, riunita, in conformità all'articolo 43 (art. 43) della Convenzione per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali ("la Convenzione") nonché alle pertinenti disposizioni delle Regole della Corte A**, in una camera composta dai seguenti giudici:

R. Ryssdal, Presidente,
B. Walsh,
R. Macdonald,
C. Russo,
N. Valticos,
S.K. Martens,
R. Pekkanen,
F. Bigi,
L. Wildhaber,
e da H. Petzold, cancelliere,

Dopo aver deliberato in camera di consiglio il 22 aprile e il 21 novembre 1994,

Pronuncia la seguente sentenza, emessa in quest'ultima data:

PROCEDURA

1. La causa veniva deferita alla Corte dalla Commissione europea dei diritti dell'uomo ("la Commissione") il 12 luglio 1993, nel rispetto del termine di tre mesi stabilito dagli articoli 32 paragrafo 1 e 47 (artt. 32-1 e 47) della Convenzione. All'origine vi è un ricorso (n° 13427/87), presentato contro la Repubblica ellenica, con cui una società a responsabilità limitata sita in tale Stato, la Stran Greek Refineries, ed il suo unico socio azionista, il sig. Stratis Andreadis, il 20 novembre 1987 adivano la Commissione in applicazione dell'art. 25 della Convenzione. Morto il secondo ricorrente nel 1989, suo figlio ed erede, il sig. Petros Andreadis, manifestava il proprio interesse alla prosecuzione dell'azione.

La richiesta della Commissione si fondava sugli articoli 44 e 48 (artt. 44 e 48) e sulla dichiarazione con cui la Grecia aveva riconosciuto la giurisdizione obbligatoria della Corte (articolo 46) (art. 46). Essa mirava ad ottenere una decisione la quale accertasse se dai fatti di causa risultasse che lo Stato convenuto era venuto meno ai suoi obblighi di cui all'articolo 6 (art. 6) della Convenzione e all'articolo 1 del Protocollo n° 1 (P1-1).

2. In risposta all'indagine espletata conformemente alla regola 33 paragrafo 3, lettera d, delle Regole della Corte A, i ricorrenti manifestavano l'intenzione di prendere parte alla procedura e designavano l'avvocato che li avrebbe rappresentati in giudizio (regola 30).

3. La costituenda Camera si componeva del sig. N. Valticos, nominato ex officio, il giudice eletto di nazionalità greca (articolo 43 della Convenzione) (art. 43), ed il sig. R. Ryssdal, presidente della Corte (regola 21 paragrafo 3, lettera b). Il 25 agosto 1993, alla presenza del cancelliere, il presidente estraeva a sorte i nomi degli altri sette membri, e cioè il sig. B. Walsh, il sig. R. Macdonald, il sig. C. Russo, il sig. S.K. Martens, il sig. R. Pekkanen, il sig. F. Bigi e il sig. L. Wildhaber (articolo 43 in fine della Convenzione e regola 21 paragrafo 4) (art. 43).

4. In veste di presidente della Camera (regola 21, paragrafo 5), il sig. Ryssdal, si confrontava, per mezzo della persona del cancelliere, con l'agente del governo greco ("il Governo"), gli avvocati

dei ricorrenti ed il delegato della Commissione al fine di organizzare la procedura (regole 37 paragrafo 11 e 38). Conformemente a quanto così predisposto, il cancelliere riceveva, il 13 gennaio 1994, la memoria del Governo ed, il 19 gennaio, quella dei ricorrenti. Il 21 febbraio 1994 il segretario della Commissione informava il cancelliere del fatto che il delegato avrebbe presentato le sue osservazioni in udienza.

5. Conformemente alla decisione del Presidente, un'udienza a porte aperte si svolgeva il 19 aprile 1994 nell'edificio cd. "*Human Rights*" di Strasburgo. La Corte, in precedenza, aveva tenuto una riunione preparatoria.

Apparivano davanti alla Corte:

- per il Governo

il sig. P. Georgakopoulos, difensore principale,

Consiglio di Stato, delegato dell'agente,

la sig.ra K. Grigoriou, assistente legale,

Consiglio di Stato, avvocato;

- per la Commissione

il sig. C.L. Rozakis, Delegato;

- per il ricorrente

il sig. M. Beloff, avvocato (*QC*),

il sig. P. Martyr, avvocato (*solicitor*),

la sig.ra T. Foster, avvocato (*solicitor*),

il sig. K.D. Kerameus, docente di diritto

presso l'Università di Atene, consulenti legali.

La Corte prendeva atto delle osservazioni orali presentate dal sig. Georgakopoulos, dal sig. Rozakis e dal sig. Beloff, nonché delle risposte date alle domande loro poste.

IN FATTO

I. LE CIRCOSTANZE DELLA CAUSA

6. La Stran Greek Refineries ("Stran") è una società attualmente in liquidazione. La sua sede sociale è sita in Atene ed il sig. Stratis Andreadis era il suo unico azionista.

A. Antefatti della causa

7. Ai termini del contratto, stipulato il 22 luglio 1972 con lo Stato greco, il quale, a quel tempo, era governato da una giunta militare, il sig. Andreadis si impegnava a costruire una raffineria di petrolio greggio nella regione di Megara, vicino ad Atene. La raffineria doveva essere costruita, ad un costo stimato di 76.000.000 dollari USA, ad opera di una società ancora da costituire, la raffineria greca Stran, della quale il secondo ricorrente doveva essere l'unico proprietario. Una volta espletata la procedura di incorporazione, tutti i diritti e gli obblighi di quest'ultimo dovevano essere automaticamente trasferiti alla Stran.

Il governo ratificava il contratto con decreto legislativo n° 1211/1972, pubblicato nella gazzetta ufficiale del 26 luglio 1972. Conformemente all'articolo 21 del contratto, lo Stato si impegnava ad acquistare, entro il 31 dicembre 1972, un appezzamento di terreno in Megara, adatto per la costruzione della raffineria. Il 27 luglio 1972, lo Stato, con regio decreto (n° 450), adottato in applicazione del decreto legislativo n° 2687/1953 concernente "l'investimento e la protezione dei capitali provenienti dall'estero", autorizzava il sig. Andreadis ad importare 58 milioni di dollari USA per finanziare il progetto.

8. Tuttavia, il progetto si bloccava perché lo Stato non teneva fede agli impegni presi. Il 28 novembre 1973, nel corso di una conferenza stampa svoltasi a Megara, i Ministri dell'industria e dell'agricoltura, annunciavano la decisione del Governo di restituire ai proprietari il terreno già espropriato in ossequio all'articolo 21 del contratto. Il giorno successivo la polizia di Megara ordinava la cessazione dei lavori.

Nel dicembre 1973, la Stran protestava con le autorità competenti e presentava richiesta di autorizzazione per la prosecuzione dei lavori. Inoltre, il 27 febbraio 1974, con atto di convocazione stragiudiziale, invitava lo Stato a ratificare l'acquisto del terreno in questione. Da parte sua, lo Stato rifiutava di revocare l'ordine con il quale la polizia aveva proibito la continuazione dei lavori.

9. Ristabilito il regime democratico, il Governo riteneva che il contratto ed il decreto n° 450 arrecassero un pregiudizio all'economia nazionale; questa conclusione trovava il proprio fondamento giuridico nell'articolo 2 paragrafo 5 della legge n° 141/1975 sulla risoluzione dei contratti preferenziali (kharistikes symvasseis) stipulati nell'ambito del regime militare (1967-74). Detta legge, adottata in forza di autorizzazione speciale di cui alla costituzione del 1975 (articolo 107 - *infra* paragrafo 24), godeva di forza sovraordinata.

I ricorrenti non rispondevano ad una proposta inviata loro il 19 novembre 1975 dal Ministro per il coordinamento che li invitava a negoziare la revisione o la risoluzione del contratto. Conseguentemente, il 14 ottobre 1977, il comitato ministeriale per l'economia risolveva il contratto. Questa decisione non veniva impugnata dai ricorrenti.

B. Il procedimento davanti al Tribunale di primo grado di Atene

10. Prima della risoluzione del contratto, la Stran aveva sostenuto alcune spese legate al progetto. In particolare, aveva stipulato dei contratti per la fornitura di beni e di servizi con imprese straniere e greche ed aveva contratto dei prestiti.

Insorgeva così una controversia tra la Stran e lo Stato. Il 10 novembre 1978 la Stran intentava un'azione civile (agogi di anagnoristiki) davanti al Tribunale di primo grado di Atene al fine di far dichiarare che lo Stato doveva risarcirla di una somma pari a 251.113.978 dracme, 22.799.782 dollari USA e 877.466 franchi francesi. A giustificazione della sua pretesa, osservava che lo Stato, in vigenza del contratto, non aveva adempiuto ai suoi obblighi, in particolare in quanto a partire dal 27 novembre 1973 aveva proibito la continuazione dei lavori di costruzione della raffineria a Megara e, fino al 9 febbraio 1974, non aveva preso alcuna misura atta a espropriare il terreno individuato per la costruzione. Domandava, inoltre, la restituzione di un assegno del valore di 240 milioni di dracme che aveva depositato presso il Ministero dell'economia nazionale a garanzia della corretta esecuzione del contratto; infine, reclamava il rimborso della commissione e della tassa di bollo pagati alla Banca commerciale della Grecia.

Lo Stato eccepiva l'assenza di giurisdizione del Tribunale. Riteneva che la controversia dovesse essere riferita ad arbitri in ossequio all'articolo 27 del contratto, i paragrafi rilevanti del quale erano formulati come segue:

> "1. Qualsiasi divergenza, discussione o disaccordo che dovesse insorgere tra lo Stato ed il concessionario in merito all'applicazione del presente accordo e relativi all'interpretazione di termini e condizioni nonché alla portata di diritti e obblighi saranno rimessi esclusivamente alla competenza di un collegio arbitrale composto da tre arbitri secondo la seguente procedura, non essendo richiesto nessun altro accordo arbitrale.
>
> ...
>
> 9. Il lodo arbitrale sarà definitivo, conclusivo ed irrevocabile, e costituirà titolo esecutivo, non esigendo a tal fine alcuna ulteriore azione ovvero altra formalità. Non sarà sottoposto ad alcun ricorso giudiziario ordinario o straordinario, né sarà passibile di annullamento o sospensione davanti agli ordinari organi giudiziari. La parte che non sarà in grado di ottemperare alle disposizioni del lodo arbitrale dovrà risarcire qualunque nonché tutto il danno (damnum emergens o lucrum cessans) causato all'altra parte."

11. Con decisione preliminare (n. 13910/1979) del 29 settembre 1979, il Tribunale di primo grado di Atene rigettava l'argomento principale dello Stato. Riteneva che la clausola compromissoria riguardasse esclusivamente la composizione di controversie nascenti in sede di esecuzione del contratto e non di mancato adempimento di una delle parti. Considerava inoltre che, posto che il comitato ministeriale per l'economia aveva risolto il contratto in questione nella sua

interezza (vedi, *supra*, paragrafo 9), la clausola compromissoria, in quanto disposizione non autonoma, era da considerarsi senza effetto. Inoltre, il Tribunale rigettava l'argomento dello Stato in forza del quale due delle condizioni previste nel contratto, cioè il deposito di un assegno in garanzia ed il pagamento della seconda parte del capitale sociale minimo, non erano state soddisfatte. Infine, il Tribunale ordinava misure istruttorie supplementari, compresa un'udienza di escussione di cinque testimoni, al fine di accertare sussistenza ed entità del danno addotto da Stran.

C. Il procedimento arbitrale

12. Il 12 giugno 1980 lo Stato predisponeva una petizione arbitrale e nominava un arbitro. In detta sede, domandava al Tribunale arbitrale di dichiarare prive di fondamento tutte le pretese risarcitorie avanzate da Stran contro lo Stato greco davanti al Tribunale di primo grado di Atene (vedi, *supra*, paragrafo 10).

Nella sua memoria del 28 giugno 1980 la Stran – la quale aveva nominato come arbitro un docente di diritto presso l'università di Atene – sosteneva, in via principale, che il Tribunale arbitrale non aveva giurisdizione e chiedeva che la procedura arbitrale venisse sospesa in attesa che l'azione intentata il 10 novembre 1978 arrivasse a giudizio; in via subordinata, e al solo fine di confutare gli argomenti addotti dallo Stato in punto di merito, rinviava alle argomentazioni sviluppate davanti al Tribunale di primo grado di Atene.

13. Il Tribunale arbitrale veniva istituito il 3 luglio 1980; il suo presidente veniva scelto di comune accordo dagli altri due arbitri (articolo 27 paragrafo 3 del contratto). Il lodo veniva pronunciato il 27 febbraio 1984.

Il Tribunale arbitrale riteneva di essere dotato di giurisdizione in quanto, secondo il suo parere, anche le controversie ingenerate dalla totale mancata esecuzione del contratto erano soggette a procedura arbitrale, la quale, come addotto dallo Stato, non poteva dirsi limitata a quelle derivanti dall'inadempimento di singole clausole. La formulazione della clausola compromissoria di cui all'articolo 27 (vedi, *supra*, paragrafo 10) era sufficientemente generale e chiara per escludere una tale distinzione.

Quanto al merito della causa, il Tribunale arbitrale fondava le proprie conclusioni sulle argomentazioni addotte dalle parti, il 10 novembre 1978, davanti al Tribunale di primo grado di Atene (vedi, *supra*, paragrafo 10). Riteneva che la responsabilità per le perdite subite dalla Stran dovesse essere attribuita ad entrambe – per il 70% allo Stato e per il 30% alla società. Quest'ultima aveva iniziato i lavori su un terreno oggetto di un contestato ordine di espropriazione e senza prima ottenere le necessarie autorizzazioni. Concludeva, dunque, che le richieste di Stran erano fondate in una misura non eccedente 116.273.442 dracme, 16.054.165 dollari USA e 614.627 franchi francesi, più gli interessi pari al 6% dal 10 novembre 1978; tuttavia, questo riferimento all'interesse non trovava spazio nel dispositivo della decisione. Infine, il Tribunale dichiarava che lo Stato stava trattenendo illegalmente l'assegno depositato in garanzia (vedi, *supra*, paragrafo 10).

14. Il 24 luglio 1984 la società ricorrente si rivolgeva al Tribunale di primo grado di Atene al fine di ottenere, a carico dello Stato, un ordine di restituzione della garanzia, ma il Tribunale sospendeva la procedura in attesa che si concludesse quella introdotta il 10 novembre 1978 (vedi, *supra*, paragrafo 10).

D. I procedimenti di appello contro il giudizio arbitrale del 27 febbraio 1984

1. Il procedimento davanti al Tribunale di primo grado di Atene

15. Il 2 maggio 1984 lo Stato domandava al Tribunale di primo grado di Atene di annullare il lodo arbitrale del 27 febbraio 1984.

Affermava che il Tribunale arbitrale non aveva giurisdizione, in quanto non poteva decidere delle controversie generate dal contratto in questione e delle pretese economiche avanzate da Stran contro lo Stato. In subordine, asseriva che le parti contraenti avevano inteso limitare la giurisdizione del Tribunale arbitrale alle sole controversie riguardanti l'adempimento e l'interpretazione delle clausole del contratto nonché il campo d'applicazione di diritti e obblighi da esso derivanti; la sua giurisdizione non potrebbe, dunque, estendersi a controversie generate dall'omissione totale di

eseguire il contratto. Ne risultava che la controversia in questione spettava alla competenza dei tribunali civili ordinari, come il Tribunale di primo grado di Atene aveva concluso nella sua decisione n. 13910/1979. In via di ulteriore subordine, lo Stato osservava che l'insussistenza della giurisdizione del Tribunale arbitrale trovava la propria conferma nel fatto che le richieste avanzate dalla Stran contro di esso erano, in seguito alla risoluzione dello contratto, diventate prive di ogni fondamento giuridico. Infine, sottolineava la natura dichiarativa dell'azione intentata da Stran il 10 novembre 1978 (vedi, *supra*, paragrafo 10).

16. Con decisione (n. 5526/1985) del 21 aprile 1985 il Tribunale di primo grado di Atene respingeva la pretesa dello Stato, in quanto riteneva che dalla decisione di risolvere il contratto non derivava l'inefficacia della clausola compromissoria. Detta clausola continuava a produrre i suoi effetti relativamente alle controversie che fossero insorte in vigenza del contratto.

17. Il 19 dicembre 1986 la società ricorrente rinunciava alla prima azione intentata innanzi al Tribunale di primo grado di Atene (vedi, *supra*, paragrafo 9), ma si prodigava per proseguire quella volta alla restituzione dell'assegno depositato in garanzia (vedi, *supra*, paragrafo 14).

Il 6 febbraio 1987, quando quest'azione arrivava davanti al Tribunale di primo grado di Atene, lo Stato, facendo leva sull'articolo 294 del Codice di procedura civile, si opponeva alla rinuncia della prima azione. Riteneva, infatti, che detta azione si sarebbe conclusa con una sentenza sfavorevole a Stran e che lo Stato avesse, dunque, un interesse legittimo ad ottenere una decisione definitiva.

Tuttavia, il Tribunale decideva nuovamente di sospendere la procedura (decisione n. 2877/1987) in considerazione del fatto che un giudizio di appello su punti di diritto era ancora pendente (vedi, *infra*, paragrafo 19).

2. Il procedimento davanti alla Corte d'appello di Atene

18. Con decisione (n. 9336/1986) del 4 novembre 1986, la Corte d'appello di Atene, fondando la propria decisione sugli stessi motivi, confermava il giudizio del 21 aprile 1985.

Questa statuiva, *inter alia*:

> "Nel diritto Greco moderno prevale il principio di autonomia di una clausola compromissoria rispetto al contratto. La risoluzione del contratto, per qualsiasi ragione, non comporta il venir meno del potere degli arbitri designati a conoscere delle controversie insorte durante il periodo di vigenza del contratto ... La decisione del comitato ministeriale dell'economia non ha annullato la clausola compromissoria contenuta nell'articolo 27 del contratto e, conseguentemente, questa non preclude agli arbitri l'esame del merito della controversia."

3. Il procedimento davanti alla Corte di Cassazione

19. Il 15 dicembre 1986 lo Stato proponeva appello davanti alla Corte di Cassazione.

L'udienza veniva inizialmente fissata al 4 maggio 1987, ma in quella data, su richiesta dello Stato, veniva rinviata al 1° giugno 1987, in quanto un progetto di legge rilevante per la soluzione della causa in questione era all'esame del Parlamento.

In risposta ad una domanda posta dalla Corte europea all'udienza del 19 aprile 1994, l'avvocato dei ricorrenti rilevava che il giudice relatore della Corte di Cassazione aveva comunicato alle parti, prima del 4 maggio, il suo parere, favorevole alla posizione dei ricorrenti, e quest'affermazione non faceva oggetto di contestazione da parte del Governo.

20. Il 22 maggio 1987 il Parlamento approvava la legge n. 1701/1987 sulla "partecipazione obbligatoria dello Stato in imprese private ... e sul riscatto delle azioni", la quale entrava in vigore il 25 maggio 1987 con la sua pubblicazione sulla gazzetta ufficiale. Questa legge si occupava principalmente della rinegoziazione di una concessione per la prospezione e l'estrazione di petrolio e di gas naturale in un settore del mare della Tracia. Tuttavia, l'articolo 12 della legge era formulato come segue:

> "1. Il vero e legittimo significato di quanto previsto all'articolo 2 paragrafo 1 della legge n. 141/1975, riguardante la risoluzione dei contratti conclusi tra il 21 aprile 1967 ed il 24 luglio 1974, è che, con la risoluzione di questi contratti, tutti i loro termini, condizioni e clausole, compresa la clausola compromissoria, sono ipso iure abrogati e il Tribunale arbitrale non ha più giurisdizione.
>
> 2. I lodi coperti dal paragrafo 1 non sono più validi o applicabili.

3. Qualsiasi pretesa principale ovvero accessoria nei confronti dello Stato greco, espressa sia in valuta straniera che locale, e che trovi il proprio fondamento in contratti conclusi tra il 21 aprile 1967 ed il 24 luglio 1974, ratificati con legge e risolti in virtù della legge n. 141/1975, va ora considerata prescritta.

4. Qualsiasi procedimento giudiziario, a qualsiasi livello, che sia pendente al tempo della promulgazione di questa legge e che abbia ad oggetto le pretese di cui al precedente paragrafo, va dichiarato estinto."

21. Il 10 luglio 1987, dopo avere ascoltato il parere del giudice relatore il quale proponeva di rigettare il ricorso, la prima sezione della Corte di Cassazione rendeva la propria decisione (n. 1387/1987). Questa concludeva che l'articolo 12 era incostituzionale per i seguenti motivi:

"...

Non solo [l'articolo 107] della Costituzione attribuisce forza sovraordinata alla legge n. 141/1975, ma in aggiunta proibisce emendamenti o aggiunte successive, o perfino la sua interpretazione data nella forma di legge ordinaria. Lo scopo di questa forza nonché di quella disposizione della Costituzione che richiede che una data legge sia adottata in via definitiva entro tre mesi dall'entrata in vigore della Costituzione era quello di assicurare la stabilità dell'ordine legale e la fiducia internazionale per gli investimenti in Grecia. Questo parere si fonda sull'unico significato che si possa attribuire all'espressione "una legge da adottare in via definitiva" e sulla facilità con la quale detta disposizione verrebbe dileggiata se emendamenti, aggiunte ovvero un'interpretazione autorevole fossero permessi...

Ne consegue che ... quanto previsto all'articolo 12 della legge n. 1701/1987 che pretende di fornire un'interpretazione autorevole e di modificare e completare l'articolo 2 paragrafo 1 della legge n. 141/1975 e che è stato adottato dopo la scadenza del termine previsto dall'articolo 107 paragrafo 2 della Costituzione è contrario a quello strumento. Conformemente all'articolo 93 paragrafo 4 della Costituzione la Corte, dunque, non deve applicarlo. La sezione si rifiuta di applicare disposizioni incostituzionali e, in ossequio all'articolo 563 paragrafo 2 del Codice di procedura civile, ritiene di essere obbligata a rinviare la causa alla seduta plenaria della Corte di Cassazione..."

22. L'udienza davanti alla Corte di Cassazione riunita in seduta plenaria veniva aperta il 19 novembre 1987, ma, a seguito della morte di uno dei suoi membri, la Stran faceva richiesta di nuova udienza, la quale si teneva il 25 febbraio 1988.

La Corte di Cassazione rendeva la sua decisione (n. 4/1989) il 16 marzo 1989. Questa statuiva, *inter alia*:

"... [La Costituzione] prevede la promulgazione di "una legge da adottare in via definitiva" la quale, per definizione, possiede forza superiore, in quanto questa non può essere né completata né modificata con legge ordinaria ... Tuttavia, il fatto di proibire il completamento ovvero la modifica del contenuto di [dette] leggi non significa che queste non possano mai essere interpretate. Il fatto che siano da ritenersi *sui generis*, carattere che attribuisce loro la supremazia rispetto alla legge ordinaria ... non esclude la loro interpretazione laddove le circostanze lo richiedano. Lo scopo di una tale interpretazione non è quello di modificare la sostanza della legge interpretata, ma di chiarirne il significato originale e di risolvere le controversie che siano insorte in relazione alla sua applicazione o che possano sorgere in futuro. [La necessità di una tale interpretazione] sarà infine vagliata dalla Corte la quale dovrà stabilire se il significato della legge interpretata abbia effettivamente dato luogo a dei dubbi che giustifichino l'intervento del legislatore ... In conseguenza, l'interpretazione della legge n. 141/1975 non è contraria alla Costituzione solo perché questa è una legge sovraordinata. Nondimeno, occorre determinare, da un lato, se l'interpretazione era nella specie necessaria e, dall'altro, se le disposizioni non interpretative di questa legge, che rilevano per la soluzione del caso in questione, siano contrarie alla Costituzione ... La lettera [dell'articolo 2 paragrafo 5 della legge n. 141/1975] non è chiara e fa sorgere dei dubbi circa la sopravvivenza della clausola compromissoria alla risoluzione del contratto ... e riguardo alla giurisdizione del Tribunale arbitrale. Nel caso di specie, il dubbio si è dapprima manifestato nel corso dell'azione intentata dai ricorrenti davanti al Tribunale civile ordinario e nuovamente - in seguito alla decisione preliminare del Tribunale di primo grado di Atene - quando questa azione è stata ritirata e si è fatto ricorso allo strumento dell'arbitrato, sede in cui sono stati presentati argomenti diametralmente contrari ... Indipendentemente da questi dubbi, la questione principale va ricondotta alla accettazione ovvero al rifiuto del principio del carattere autonomo della clausola compromissoria e della sua portata. Per molto tempo questa materia è stata oggetto di significative divergenze d'opinione nella giurisprudenza internazionale e in dottrina. In alcuni paesi prevale il principio della sopravvivenza della clausola rispetto alla composizione delle controversie che siano insorte prima della risoluzione dei contratti ... In altri paesi è opinione prevalente che la risoluzione del contratto comporti l'annullamento della clausola e, per l'effetto, il rinvio di tutte le controversie ai tribunali ordinari. In altri paesi ancora, la posizione accolta è quella che il carattere autonomo della clausola compromissoria si manifesti soltanto rispetto a certi tipi di controversie. Fornire una interpretazione della legge n. 141/1975 era dunque necessario e questa interpretazione ha risolto il problema nell'ambito del sistema giuridico greco, optando per l'annullamento delle clausole compromissorie ... nonché per la revoca della giurisdizione al Tribunale arbitrale. Il fatto che il legislatore sia intervenuto ... cinque giorni prima dell'udienza davanti alla prima sezione di questa Corte ed in seguito ad un precedente rinvio non significa che questo intervento non era necessario e non è tale da renderlo contrario all'articolo 26 paragrafi 1 e 3 e agli articoli

77 e 87 della Costituzione. La controversia in questione ha fornito l'occasione per risolvere un problema che era già sorto. Conseguentemente, non si può concludere che, nel dare una tale interpretazione nel caso in esame, il legislatore abbia interferito con la giurisdizione dei tribunali ordinari e abbia usurpato questa giurisdizione. Ne consegue che, contrariamente a quanto statuito dalla prima sezione, l'articolo 12 paragrafo 1 della legge n. 1701/1987 non viola la Costituzione ..."

La Corte di Cassazione riteneva che il paragrafo 2 dell'articolo 12 non fosse incostituzionale in quanto, in sostanza, completava il paragrafo 1 e rendeva privo di effetto qualsiasi lodo che fosse stato proclamato dopo la risoluzione dei contratti e che non sarebbe stato proclamato se il significato della legge n. 141/1975 fosse stato chiarito per tempo. Inoltre, la Corte rifiutava di esaminare la costituzionalità del paragrafo 3, in quanto riteneva che fosse irrilevante per la soluzione della causa davanti ad lei pendente. Infine, sosteneva che l'adozione del paragrafo 4 poco prima dell'udienza mirava a privare i tribunali della possibilità di decidere della validità del contestato lodo. Quella norma, dunque, costituiva una violazione del principio della separazione dei poteri.

23. La Corte di Cassazione rimetteva la causa alla prima sezione, la quale l'11 aprile 1990 cassava la decisione della Corte di Appello del 4 novembre 1986 (vedi, *supra*, paragrafo 18) e dichiarava nullo il lodo del 27 febbraio 1984 (vedi, *supra*, paragrafo 13).

II. LA NORMATIVA NAZIONALE RILEVANTE

A. La Costituzione

24. Nel caso di specie assumono rilievo le seguenti disposizioni della Costituzione del 1975:

Articolo 77

"1. L'interpretazione autentica delle leggi spetta al potere legislativo.

2. Una legge, salvo quella avente carattere esclusivamente interpretativo, entra in vigore solo a partire dalla sua pubblicazione."

Articolo 93 paragrafo 4

" I tribunali sono tenuti a non applicare le leggi con contenuto contrario alla Costituzione."

Articolo 107

"1. Le leggi e gli atti aventi forza di legge, adottati prima del 21 aprile 1967 e miranti alla protezione del capitale straniero, conservano il loro valore e, d'ora in poi, si applicano al capitale importato.

2. Una legge, la quale debba essere adottata, in via definitiva, entro tre mesi dalla data di entrata in vigore di questa Costituzione, precisa i termini e la procedura per la risoluzione ovvero la modifica degli accordi o provvedimenti amministrativi preferenziali, conclusi o adottati tra il 21 aprile 1967 ed il 23 luglio 1974 in conformità al decreto legislativo n. 2687/1953, se ed in quanto detti accordi o provvedimenti riguardino l'investimento di capitale straniero ..."

Secondo la dottrina specialistica, il rinvio effettuato dall'107 della Costituzione al decreto n. 2687/1953 – il quale stabilisce, *inter alia*, che l'arbitrato costituisce il solo mezzo di risoluzione delle controversie insorte in relazione agli investimenti esteri – permette di attribuire valore costituzionale a questa forma di arbitrato (*Introduction to Greek Law*, edita da K.D. Kerameus e P.J. Kozyris, Deventer/Athens, Kluwer/Sakkoulas, 1988, p. 263).

B. Il codice di procedura civile

25. Il Codice di procedura civile statuisce, *inter alia*, come segue:

Articolo 294

"L'attore può rinunciare all'azione senza il consenso del convenuto prima che quest'ultimo abbia preso posizione sul merito della causa in sede di memoria di costituzione e risposta. Non può, allo stesso modo, farlo in seguito, se il convenuto si oppone, dimostrando di avere un legittimo interesse a che l'azione si concluda con sentenza definitiva."

Articolo 295 paragrafo 1

"A seguito di rinuncia, l'azione deve considerarsi come mai introdotta ..."

La sezione XII del Codice di procedura civile (Articoli 867-903) è dedicata all'arbitrato. Le norme rilevanti dispongono come segue:

Articolo 893 paragrafo 2

"L'arbitro …, salvo che la clausola compromissoria disponga diversamente, deposita l'originale del lodo alla cancelleria del Tribunale di primo grado nella cui giurisdizione la decisione è stata resa …"

Articolo 895

"1. Gli ordinari mezzi di impugnazione non possono essere impiegati contro i lodi arbitrali.

2. La convenzione d'arbitrato può indicare quale mezzo di impugnazione del lodo l'appello davanti ad arbitri diversi …, ma, allo stesso tempo, deve definire le condizioni, il termine e la procedura da seguire per l'esercizio di un tale rimedio e per la decisione"

Articolo 896

" Se la convenzione d'arbitrato non predispone la disciplina dell'appello di cui all'articolo 895, paragrafo 2, ovvero se il termine per presentare detto appello è scaduto, il lodo diventa definitivo ..."

Articolo 897

"Il lodo può essere annullato, in tutto o in parte, solo con decisione giudiziaria e per le seguenti ragioni:

(1) se la convenzione d'arbitrato è invalida;

(2) se è stato pronunciato dopo che la convenzione d'arbitrato abbia cessato i propri effetti;

(3) se gli arbitri sono stati nominati in violazione dei termini della convenzione arbitrale ovvero di norme di legge ...;

(4) se gli arbitri sono andati al di là dei poteri ad essi conferiti dalla convenzione arbitrale ovvero dalla legge;

(5) se le disposizioni degli articoli 886 paragrafo 2, 891 e 892 sono state violate;

(6) se è contrario all'ordine pubblico e alla morale;

(7) se è non è chiaro o se contiene disposizioni contraddittorie;

..."

Articolo 904

"1. L'esecuzione forzata può avere luogo esclusivamente in virtù di una decisione esecutiva.

2. Le decisioni che seguono sono esecutive:

...

(b) i lodi arbitrali;

..."

Articolo 918

"1. L'esecuzione forzata può avere luogo esclusivamente sulla base della copia della decisione esecutiva munita del timbro che le conferisce forma esecutiva ...

2. L'apposizione del timbro che conferisce alla decisione forma esecutiva spetta:

...

(d) per quanto riguarda i lodi arbitrali, al Tribunale di primo grado ...;

..."

C. La legge n. 141/1975 "sulla … modifica o risoluzione degli accordi … stipulati nel periodo della dittatura"

26. La legge n. 141/1975, adottata in forza dell'art. 107 paragrafo 2 della Costituzione, ha reso possibile la modifica o la risoluzione di tutti i provvedimenti amministrativi di ratifica adottati tra il 21 aprile 1967 e il 23 luglio 1974 e di tutti i contratti conclusi dallo Stato durante detto periodo con una persona fisica o giuridica ed aventi ad oggetto gli investimenti disciplinati con decreto legislativo n. 2687/1953. Detti provvedimenti o contratti dovevano essere modificati ovvero risolti ogni qual volta questi fossero risultati incompatibili con la Costituzione o altre leggi ovvero contrari alla morale, e pregiudizievoli per gli interessi dello Stato, dei consumatori e dell'economia nazionale.

I contratti dovevano essere risolti ogni qual volta una loro modifica totale fosse risultata impossibile. La risoluzione poteva essere disposta su istanza scritta della parte interessata ovvero unilateralmente dal comitato ministeriale per l'economia.

L'articolo 2 paragrafo 5 della legge descriveva gli effetti della risoluzione nei termini seguenti:

"A seguito della risoluzione di un contratto ... privilegi e accordi speciali smettono di produrre effetti e l'obbligo o investimento è soggetto alle leggi ordinarie che governano le obbligazioni e gli investimenti ordinari ..."

IL PROCEDIMENTO DAVANTI ALLA COMMISSIONE

27. La Stran Greek Refineries e il sig. Stratis Andreadis inoltravano il ricorso alla Commissione il 20 novembre 1987. Questi ritenevano che si fosse verificata una violazione dell'articolo 6 paragrafo 1 (art. 6-1) della Costituzione dal momento che non avevano avuto un equo processo in un termine ragionevole. Essi affermavano, inoltre, che in ragione della durata e della natura dilatoria della procedura nonché delle disposizioni dell'articolo 12 della legge n. 1701/1987 il loro diritto di proprietà tutelato in forza dell'articolo 1 del Protocollo n. 1 (P1-1) era stato violato.

28. Il 4 luglio 1991, la Commissione dichiarava il ricorso (n. 13427/87) ricevibile. Nel suo rapporto del 12 maggio 1993 (Articolo 31) (art. 31) esprimeva il seguente parere:

(a) c'era stata una violazione dell'articolo 6 paragrafo 1 (art. 6-1) della Convenzione con riferimento al diritto ad un processo equo (all'unanimità), ma non per quanto riguarda la durata della procedura (dodici voti a due);

(b) c'era stata una violazione dell'articolo 1 del Protocollo n. 1 (P1-1) (all'unanimità).

Il testo integrale del parere della Commissione e delle due opinioni distinte contenute nella relazione è riprodotto in allegato alla presente decisione *.

LE RICHIESTE FINALI PRESENTATE ALLA CORTE

29. Nella sua memoria il Governo chiedeva alla Corte:

"[di dichiarare] irricevibile la domanda proposta dalla Stran Greek Refineries ..., da un lato, e [inoltre che non c'era stata] alcuna violazione dei diritti dei ricorrenti quali tutelati dall'articolo 6 paragrafo 1 (art. 6-1) della Convenzione ... e dall'articolo 1 del primo Protocollo (P1-1)".

30. I ricorrenti chiedevano alla Corte di dichiarare:

"(1) che c'era stata una violazione dell'articolo 6 paragrafo 1 (art. 6-1) con riferimento al diritto dei ricorrenti ad un processo equo davanti ad un tribunale;

(2) che c'era stata una violazione dell'articolo 6 paragrafo 1 (art. 6-1) con riferimento al rispetto della condizione del termine ragionevole;

(3) che c'era stata e continuava a esserci la violazione dell'articolo 1 del Protocollo n. 1 (P1-1);

(4) che lo Stato convenuto deve pagare ai ricorrenti ... la somma richiesta a titolo di equa soddisfazione ".

DIRITTO

I. LE ECCEZIONI PRELIMINARI DEL GOVERNO

31. Il Governo ha affermato che i ricorrenti non hanno esaurito i rimedi interni. Se il Tribunale di primo grado di Atene non accogliesse la domanda di rinuncia presentata dai ricorrenti il 19 dicembre 1986 (vedi, *supra*, paragrafo 17), l'esame della causa che questi avevano introdotto il 10 novembre 1978 proseguirebbe e loro sarebbero nella posizione di poter sollevare la questione della incompatibilità con la Costituzione e con la Convenzione dell'articolo 12 paragrafo 3 della legge n. 1701/1987, la cui costituzionalità non è stata sottoposta al vaglio dalla seduta plenaria della Corte di Cassazione (vedi, *supra*, paragrafo 22).

Se, d'altra parte, il Tribunale di primo grado accogliesse la rinuncia, nulla impedirebbe ai ricorrenti di intentare una nuova azione per far valere le stesse pretese; il diritto nazionale, nello specifico gli articoli 4, 5, 20 paragrafo 2, 28 e 93 paragrafo 4 della Costituzione, garantirebbe loro una sufficiente tutela giurisdizionale.

32. La Corte ricorda che procede all'esame delle eccezioni preliminari solo se ed in quanto lo Stato interessato le abbia già sollevate, almeno nell'essenziale e in modo sufficientemente chiaro, di fronte alla Commissione, in linea di massima nella fase dell'esame preliminare sulla ricevibilità.

33. Davanti alla Commissione, il Governo ha affermato essenzialmente che i ricorrenti avrebbero dovuto introdurre un'azione amministrativa nel 1977 contro la decisione di risolvere il contratto adottata il 14 ottobre 1977 dal comitato ministeriale per l'economia.

La Commissione non ha accolto questa eccezione in quanto il Governo non aveva dimostrato che questo procedimento avrebbe garantito in qualsiasi caso una compensazione per l'entrata in vigore della legge n. 1701/1987, la sua applicazione ai ricorrenti o per la durata della procedura davanti ai tribunali nazionali.

34. Nella memoria presentata alla Corte il Governo ha fatto rinvio al seguente estratto delle osservazioni addizionali datate 6 maggio 1991 relative alla ricevibilità della domanda: i ricorrenti "scelgono di perseguire i loro interessi per mezzo di una procedura ... che non è disciplinata dal sistema giuridico greco – l'arbitrato – e, conseguentemente, la domanda è irricevibile in quanto questi non hanno esaurito i rimedi messi per legge a loro disposizione in situazioni analoghe".

35. Dal punto di vista della Corte, una tale considerazione non può bastare per fondare l'eccezione sollevata dal Governo in questa fase della procedura. Quando uno Stato fa riferimento alla regola dell'esaurimento deve indicare con sufficiente chiarezza i rimedi effettivi ai quali i ricorrenti non hanno fatto ricorso; in questo campo non spetta agli organi della Convenzione rimediare di propria iniziativa a qualsiasi lacuna ovvero mancanza di precisione degli argomenti addotti dallo Stato convenuto (vedi, tra molte altre, *Barberà, Messegué e Jabardo c. Spagna*, sentenza del 6 dicembre 1988, serie A n. 146, p. 27, paragrafo 56).

Inoltre, la Corte osserva che era il Governo che inizialmente aveva contestato la giurisdizione dei Tribunali ordinari e aveva suggerito l'arbitrato quale mezzo di risoluzione della controversia (vedi, *supra*, paragrafi 10 e 12).

36. Sussiste, dunque, un motivo di inammissibilità per quanto riguarda l'eccezione preliminare.

II. LE PRESUNTE VIOLAZIONI DELL'ARTICOLO 6 PARAGRAFO 1 (art. 6-1) DELLA CONVENZIONE

37. I ricorrenti hanno addotto due violazioni dell'articolo 6 paragrafo 1 (art. 6-1) della Convenzione, il quale dispone come segue:

> "Al fine della determinazione dei suoi diritti e dei suoi doveri di carattere civile ..., ogni persona ha diritto ad un'equa ... udienza entro un termine ragionevole, davanti a un tribunale ..."

In primo luogo, hanno sostenuto, l'adozione dell'articolo 12 della legge n. 1701/1987 e la sua applicazione ad opera della Corte di Cassazione nel loro caso li aveva privati di un processo equo. In secondo luogo, la durata del procedimento volto a statuire circa la validità del lodo del 27 febbraio 1984 aveva superato il "termine ragionevole".

A. Sull'applicabilità dell'articolo 6 paragrafo 1 (art. 6-1)

38. All'udienza il Governo ha negato che l'articolo 6 (art. 6) fosse applicabile nel caso di specie. A suo avviso, l'oggetto della "contestazione" (controversia) sollevato davanti ai giudici nazionali era stato la validità della clausola compromissoria e, conseguentemente, quella dello stesso lodo. Non aveva dunque riguardato "un diritto civile" ai sensi dell'articolo 6 (art. 6). La clausola in questione era stata accordata come privilegio in un contesto normativo molto particolare e si era occupata esclusivamente dei rapporti contrattuali intercorrenti tra il regime militare ed i ricorrenti.

Perché questi rapporti potessero produrre effetto dovevano essere ratificati con una legge *ad hoc*, nella specie il decreto legislativo n. 1211/1972 (vedi, *supra*, paragrafo 7). Inoltre, tutta la normativa sugli investimenti esteri in Grecia (vedi, *supra*, paragrafo 7) perseguiva uno scopo di pubblico interesse, cioè lo sviluppo economico del paese.

39. Secondo la giurisprudenza della Corte, il concetto di "diritti civili e di obblighi" non deve essere interpretato soltanto alla luce del diritto interno dello Stato convenuto. L'articolo 6 paragrafo 1 (art. 6-1) si applica indipendentemente dallo status delle parti, dalla natura della normativa che disciplina il modo di risoluzione della controversia e dal tipo di autorità giudiziaria competente nella materia; è sufficiente che la decisione che conclude l'azione possa risultare decisiva per i diritti e gli obblighi privati (vedi, fra molte altre, *Allan Jacobsson c. Svezia*, sentenza del 25 ottobre 1989, serie A n. 163, p. 20, paragrafo 72).

40. La Corte osserva che, in seguito alla risoluzione del contratto stipulato tra loro e lo Stato greco, i ricorrenti hanno intentato un'azione davanti al Tribunale di primo grado di Atene per far dichiarare che lo Stato doveva risarcirli delle spese fino a quel momento sostenute ai fini dell'adempimento del contratto (vedi, *supra*, paragrafo 10). La loro richiesta, che era essenzialmente una richiesta di danni, si basava soprattutto sulla considerazione che lo Stato aveva già violato i suoi obblighi derivanti dal contratto prima della sua risoluzione. Nella procedura arbitrale la loro richiesta si fondava su un argomento analogo. Il Tribunale arbitrale accoglieva in parte le richieste dei ricorrenti (vedi, *supra*, paragrafo 13) con una decisione che era definitiva, irrevocabile ed immediatamente applicabile sia in forza del contratto stesso (l'articolo 27 paragrafo 9 del contratto - vedi, *supra*, paragrafo 10) che in virtù della normativa greca (articolo 904 del codice di procedura civile - vedi, *supra*, paragrafo 25).

La Corte nota che il diritto dei ricorrenti accertato con lodo arbitrale aveva natura "pecuniaria", come lo era stata la loro richiesta di risarcimento danni accolta dal Tribunale arbitrale. Il loro diritto di ottenere le somme riconosciute loro dal Tribunale arbitrale era dunque un "diritto civile" ai sensi dell'articolo 6 (art. 6), qualunque fosse, secondo la legge greca, la natura del contratto concluso tra i ricorrenti e lo Stato greco (vedi, *mutatis mutandis*, *Editions Périscope c. Francia*, sentenza del 26 marzo 1992, serie A n. 234-B, p. 66, paragrafo 40). Ne consegue che il risultato dell'azione intentata dallo Stato innanzi ai tribunali ordinari al fine di ottenere l'annullamento del lodo era decisivo per un "diritto civile".

41. Conseguentemente, l'articolo 6 paragrafo 1 (art. 6-1) è applicabile.

B. Sull'osservanza dell'articolo 6 paragrafo 1 (art. 6-1)

1. Sull'equo processo

42. I ricorrenti hanno sostenuto di essere stati privati di un processo equo e perfino del loro diritto di accesso alla giustizia. A tal fine, hanno fatto riferimento, in particolare, a *Golder c. Regno Unito*, sentenza del 21 febbraio 1975 (serie A n. 18).

Adottando ed applicando nei confronti dei ricorrenti l'articolo 12 della legge n. 1701/1987, lo Stato aveva in effetti privato della giurisdizione i tribunali chiamati a decidere della validità del lodo arbitrale nonché impedito l'espletamento di un'adeguata indagine giudiziaria rispetto all'oggetto della controversia. Una tale interferenza era, nelle parole della sentenza *Golder*, "indissociabile dal pericolo di esercizio arbitrario del potere" nonché incompatibile con i principi generali del diritto internazionale e la nozione di Stato di diritto inerente alla Convenzione. Lo Stato aveva deciso delle sorti del caso di cui era parte mediante l'azione legislativa. "Raggiri legislativi" avevano provocato, nell'azione in questione, una disparità delle armi su vasta scala.

43. Il Governo ha contestato queste argomentazioni. Il Parlamento, fonte di ogni potere, è stato ampiamente giustificato ad interpretare autorevolmente le leggi che adottava, ove queste risultassero ambigue. Inoltre, il potere di fare ciò gli è stato espressamente attribuito dall'articolo 77 della Costituzione. Chiaramente una tale interpretazione doveva applicarsi a tutti i casi esistenti, a prescindere dalla circostanza che fossero pendenti davanti ai tribunali, in quanto non introduceva regole nuove e non modificava la disposizione in questione, ma semplicemente chiariva il suo reale significato.

Tale intervento da parte del legislatore non potrebbe dirsi una illegittima interferenza con il potere giudiziario, specialmente se quest'ultimo aveva a propria disposizione i mezzi necessari per garantire che non si verificasse alcuna arbitrarietà. Questo era il caso dell'ordinamento giuridico

greco. L'articolo 93 della Costituzione proibiva ai Tribunali di applicare le leggi il cui contenuto fosse contrario a detto strumento. Nel caso di specie, quando l'articolo 12 della legge n. 1701/1987 è entrato in vigore, la controversia circa la validità del lodo era ancora pendente davanti alla Corte di Cassazione. Quella Corte poteva dunque accertare se le condizioni che giustificano l'interpretazione autorevole da parte del legislatore della legge n. 141/1975 sussistessero e se una tale interpretazione violasse il principio della separazione dei poteri.

44. La Corte ritiene che le azioni introdotte successivamente all'entrata in vigore della legge n. 1701/1987, quando il caso era pendente davanti alla Corte di Cassazione, siano di importanza decisiva ai fini delle sue indagini. Tuttavia, per valutare se i ricorrenti abbiano avuto un processo equo innanzi a quella Corte, è necessario tener conto delle precedenti azioni, ciò che mettevano in gioco e l'atteggiamento delle parti.

La controversia, che è stata portata il 10 novembre 1978 davanti al Tribunale di primo grado di Atene dai ricorrenti (vedi, *supra*, paragrafo 10), aveva ad oggetto la loro pretesa ad essere riconosciuti titolari di un diritto al risarcimento dei danni, dal momento che lo Stato aveva violato i suoi obblighi derivanti dal contratto già prima della sua risoluzione. Questa è stata deferita al Tribunale arbitrale su iniziativa dello Stato, il quale aveva ritenuto che la clausola compromissoria fosse ancora valida ed aveva così eccepito l'assenza di giurisdizione dei tribunali ordinari (vedi, *supra*, paragrafo 10).

I ricorrenti, anche se in subordine, hanno accettato la giurisdizione del Tribunale arbitrale e, quando quest'ultimo aveva parzialmente accolto le loro richieste, hanno manifestato chiaramente che intendevano attenersi alla sua decisione (vedi, *supra*, paragrafo 17). Lo Stato, tuttavia, ha poi cambiato la sua posizione, e ha portato la controversia innanzi agli ordinari tribunali civili, davanti ai quali, in quest'occasione, ha contestato la validità della clausola compromissoria e, per l'effetto, quella del lodo (vedi, *supra*, paragrafi 15 e 18).

La promulgazione da parte del Parlamento della legge n. 1701/1987 ha, incontestabilmente, rappresentato una svolta importante per il corso dell'azione, che fino a quel momento era stato sfavorevole allo Stato.

45. Il Governo ha affermato che adottare la legge in questione era stato necessario a causa delle contrapposte posizioni assunte da eminenti professori di diritto, delle decisioni giudiziarie contraddittorie, della formulazione di opinioni dissenzienti da parte dei giudici nonché degli atteggiamento delle parti, le quali avevano cambiato alternativamente le loro posizioni rispetto alla questione della validità della clausola compromissoria. Il crescente dibattito e ragioni di ordine pubblico avevano dunque reso necessario un chiarimento del legislatore, attraverso lo strumento dell'interpretazione autorevole - anche dopo dodici anni - della legge n. 141/1975. La legislatura democratica aveva il dovere di sradicare, a partire dalla vita pubblica, ogni residua taccia delle misure adottate dal regime militare. Il sig. Andreadis era stato un gigante dell'economia e, a quel tempo, aveva ideato uno schema in una scala molto larga per un paese delle dimensioni della Grecia. Inoltre, la comunicazione dello schema aveva condotto, prima della caduta del regime militare, ad una delle più vaste manifestazioni contro la dittatura.

46. La Corte non discute dell'intenzione del Governo di dimostrarsi reattivo rispetto all'ansia del popolo greco di ristabilire la legalità democratica.

Tuttavia, ricongiungendosi al Consiglio d'Europa il 28 novembre 1974 e ratificando la Convenzione, la Grecia si è impegnata a rispettare il principio dello stato di diritto. Questo principio, che è custodito nell'articolo 3 dello statuto del Consiglio d'Europa, trova una sua manifestazione, tra gli altri, nell'articolo 6 (art. 6) della Convenzione. Quella disposizione assicura, in particolare, il diritto ad un processo equo e illustra, in modo dettagliato, le principali garanzie inerenti a questa nozione che trovano applicazione nell'azione penale. Per quanto riguarda le controversie riguardanti i diritti civili e gli obblighi, la giurisprudenza della Corte ha enucleato il principio della parità delle armi, da intendersi nel senso di un giusto equilibrio tra le parti. Nei contenziosi che coinvolgono interessi privati opposti, detta parità comporta che ad ogni parte debba essere garantita una possibilità ragionevole di presentare il proprio caso - a condizioni che non la

pongano in una posizione di svantaggio sostanziale rispetto al suo oppositore (vedi *Dombo Beheer B.V. c. Regno dei Paesi Bassi*, sentenza del 27 ottobre 1993, serie A n. 274, p. 19, paragrafo 33).

47. A questo proposito, la Corte ha avuto un occhio di riguardo tanto per le tempistiche che per le modalità di adozione dell'articolo 12 della legge n. 1701/1987. Poco tempo prima dell'udienza davanti alla Corte di Cassazione, inizialmente fissata per il 4 maggio 1987, e dopo che le parti avevano ricevuto il parere del giudice relatore che raccomandava il rigetto del ricorso presentato dallo Stato, quest'ultimo otteneva il rinvio dell'udienza per la ragione che un progetto di legge rilevante per il caso in questione era all'esame del Parlamento (vedi, *supra*, paragrafo 19).

Questo progetto di legge è stato approvato il 22 maggio 1987 ed è entrato in vigore il 25 maggio dopo la sua pubblicazione sulla gazzetta ufficiale (vedi, *supra*, paragrafo 20). L'udienza si è tenuta il 1° giugno (vedi, *supra*, paragrafo 19). Inoltre, se la legge n. 1701/1987 riguardava principalmente la rinegoziazione dei termini di un contratto avente ad oggetto la prospezione e l'estrazione di petrolio e di gas - parimenti concluso durante la dittatura tra lo Stato e società diverse da Stran -, l'articolo 12 era una disposizione complementare rispetto a quella legge ed era in realtà pensata per la società ricorrente - sebbene quest'ultima non fosse citata per nome (vedi, *supra*, paragrafo 20).

La Corte è ben consapevole che per rispondere alle pressanti richieste di urgenti interventi legislativi e per evitare ritardi della macchina legislativa, al giorno d'oggi il legislatore si occupa sovente di materie simili nella stessa legge.

È nondimeno un fatto inevitabile che l'intervento del legislatore nel caso di specie abbia avuto luogo in un momento in cui l'azione giudiziaria nella quale lo Stato era parte in causa era pendente.

48. Il Governo ha cercato di minimizzare l'effetto di quest'intervento. In primo luogo i ricorrenti avrebbero potuto richiedere un ulteriore rinvio dell'udienza al fine di poter disporre di più tempo per preparare le loro difese. In secondo luogo, il paragrafo 2 dell'articolo 12 non era una disposizione autonoma e, di per sé, non poteva rendere nullo il lodo arbitrale, in quanto presupponeva il vaglio giudiziario della nullità contemplato al paragrafo 1. Infine, i ricorrenti avevano avuto l'opportunità di presentare i loro argomenti davanti alla prima sezione della Corte di Cassazione, la quale aveva esaminato il merito della causa alla luce della decisione della Corte plenaria.

49. La Corte non è persuasa da questo ragionamento. Il principio dell'equità si applica ai procedimenti nel loro complesso; non è confinata alle udienze *inter partes*. Non sussiste alcun dubbio che nel caso di specie le apparenze di giustizia siano state preservate, ed, effettivamente, i ricorrenti non hanno contestato di essere stati privati delle facilitazioni necessarie per la preparazione delle loro difese.

Il principio dello Stato di diritto e la nozione di processo equo custodita nell'articolo 6 (l'art. 6) precludono qualsiasi interferenza del legislatore nell'amministrazione della giustizia che sia atta a influenzare la soluzione giudiziaria di una controversia. La formulazione dei paragrafi 1 e 2 dell'articolo 12, considerata nell'insieme, ha in realtà escluso qualsiasi esame significativo del caso di specie da parte della prima sezione della Corte di Cassazione. Una volta che la costituzionalità di quei paragrafi era stata confermata dalla Corte di Cassazione nella seduta plenaria, la decisione della prima sezione della Corte diventava inevitabile.

50. In conclusione, lo Stato, intervenendo in modo decisivo al fine di assicurare che l'esito - imminente - della procedura nella quale era parte fosse a lui favorevole, ha violato i diritti dei ricorrenti ai sensi dell'articolo 6 paragrafo 1 (art. 6-1). C'è stata dunque una violazione di quell'articolo (art. 6-1).

2. Sulla durata della procedura

51. Resta da stabilire se, come hanno sostenuto i ricorrenti, il "termine ragionevole" sia stato superato.

Il Governo e la Commissione hanno affermato che non è stato superato.

(a) Il periodo di riferimento

52. Il periodo di riferimento è cominciato a decorrere il 20 novembre 1985 quando la dichiarazione con la quale la Grecia ha accettato il diritto di ricorso individuale è entrata in vigore. Al fine di statuire circa la ragionevolezza del periodo di tempo trascorso dopo quella data, occorre comunque avere riguardo allo stato in cui si trovava la procedura a quel tempo (vedi, il più recente, *Billi c. Italia*, sentenza del 26 febbraio 1993, serie A n. 257-G, p. 89, paragrafo 16). Ne consegue che soltanto l'azione avente ad oggetto la validità del lodo arbitrale, che è cominciata il 2 maggio 1985, può essere presa in considerazione.

53. Nella sua memoria, il Governo ha sostenuto che il "termine" di riferimento dovrebbe includere soltanto il totale dei periodi che sono trascorsi tra ogni udienza ed ogni sentenza - approssimativamente due anni e due mesi e mezzo – in quanto, in considerazione della natura delle domande oggetto della controversia, ciascun tribunale, dopo aver reso la sua decisione, non aveva più la competenza per proseguire l'esame del caso. All'udienza il delegato dell'agente ha osservato che il periodo rilevante era terminato il 20 novembre 1987, data in cui i ricorrenti hanno inoltrato il loro ricorso alla Commissione. Parte della procedura innanzi alla Cassazione, ancora in corso, aveva avuto luogo dopo quella data.

54. La Corte condivide il parere della Commissione e dei ricorrenti che il periodo in questione debba essere preso in considerazione nella sua totalità. Ha avuto termine l'11 aprile 1990, quando la sentenza della Corte di Cassazione che dichiara nullo il lodo arbitrale è stata depositata (vedi, *supra*, paragrafo 23). Il periodo rilevante è, dunque, durato quattro anni, quattro mesi e venti giorni.

(b) La ragionevolezza della durata della procedura

55. La ragionevolezza della durata della procedura deve essere vagliata facendo riferimento ai criteri elaborati dalla giurisprudenza della Corte e alla luce delle circostanze del caso concreto, le quali, nella specie, impongono un esame complessivo.

I procedimenti davanti al Tribunale di primo grado di Atene e alla Corte d'appello di Atene sono durati diciotto mesi, circa sei dei quali erano antecedenti alla dichiarazione resa dalla Grecia in conformità all'articolo 25 (art. 25) della Convenzione. Questi procedimenti non sono contestati. Il procedimento davanti alla Corte di Cassazione è durato più di tre anni, un periodo che si giustifica in considerazione della necessità di tenere conto della legge n. 1701/1987, e soprattutto del fatto che l'articolo 563 paragrafo 2 del Codice di procedura civile impone ad una sezione della Corte di Cassazione di rinviare la causa alla corte plenaria ogni qual volta la prima si rifiuti di applicare una legge incostituzionale (vedi, *supra*, paragrafo 21 in fine).

56. Ne consegue che su questo punto non c'è stata alcuna violazione dell'articolo 6 paragrafo 1 (art. 6-1).

III. SULLA PRESUNTA VIOLAZIONE DELL'ARTICOLO 1 DEL PROTOCOLLO N. 1 (P1-1)

57. I ricorrenti hanno affermato inoltre di essere vittime di una violazione dell'articolo 1 del Protocollo n. 1 (P1-1), il quale è formulato come segue:

> "Ogni persona fisica o giuridica ha diritto al rispetto dei suoi beni. Nessuno può essere privato della sua proprietà se non per causa di pubblica utilità e alle condizioni previste dalla legge e dai principi generali del diritto internazionale.
>
> Le disposizioni precedenti non portano pregiudizio al diritto degli Stati di porre in vigore le leggi da essi ritenute necessarie per disciplinare l'uso dei beni in modo conforme all'interesse generale o per assicurare il pagamento delle imposte o di altri contributi o delle ammende."

Nelle loro allegazioni, l'adozione e l'applicazione dell'articolo 12 della legge n. 1701/1987 ha avuto l'effetto di privarli del loro diritto di proprietà, in particolare in relazione al debito accertato in loro favore con sentenza n. 13910/79 del Tribunale di primo grado di Atene e, in particolare, dal lodo del 27 febbraio 1984 (vedi, *supra*, paragrafi 11 e13).

1. Sull'esistenza di un diritto di "proprietà" ai sensi dell'articolo 1 (P1-1)

58. L'obiezione principale del Governo è stata che nessun diritto di proprietà dei ricorrenti, ai termini dell'articolo 1 (P1-1), aveva costituito oggetto di interferenza ad opera della legge n. 1701/1987.

Dal suo punto di vista, né la decisione n. 13910/79 né il lodo potevano dirsi sufficienti per concludere circa la sussistenza di un diritto da far valere contro lo Stato. Una decisione giudiziaria che non era ancora diventata definitiva, o un lodo, non potevano essere messi sullo stesso piano del diritto riconoscibile con detta decisione o lodo.

In particolare, per quanto riguarda il lodo, una procedura invalida non poteva produrre effetti validi. I ricorrenti erano perfettamente a conoscenza del fatto che fino a quando la questione circa la validità del lodo arbitrale non fosse stata irrevocabilmente risolta, questo sarebbe stato una base giuridica precaria per le loro pretese risarcitorie. Le decisioni n. 5526/85 del Tribunale di primo grado di Atene (vedi, *supra*, paragrafo 16) e n. 9336/86 della Corte d'appello di Atene (vedi, *supra*, paragrafo 18), le quali inizialmente avevano concluso in senso favorevole ai ricorrenti, avevano fatto oggetto di ricorso davanti alla Corte di Cassazione e, prima della decisione definitiva di quest'ultima, non potevano costituire la base su cui fondare ragionevoli aspettative circa la sussistenza del diritto di proprietà. Inoltre, i ricorrenti hanno avevano essi stessi scelto di introdurre un'azione dinnanzi agli ordinari tribunali civili e si erano energicamente opposti alla giurisdizione del Tribunale arbitrale.

Infine, il Governo ha affermato che le istituzioni di Strasburgo non dovrebbero esse stesse condurre un'indagine sulle pretese dei ricorrenti senza prendere in considerazione tutti gli argomenti addotti dalle parti nonché il comportamento da loro tenuto davanti al Tribunale arbitrale. Lo Stato non aveva riconosciuto alcun fondamento alla richiesta della Stran, il merito della quale aveva dunque contestato, prima davanti al Tribunale di primo grado di Atene e poi davanti al Tribunale arbitrale. Anche il procedimento intentato per ottenere l'annullamento del lodo aveva necessariamente comportato una contestazione indiretta ma implicita del merito della decisione.

59. Al fine di determinare se i ricorrenti siano titolari di un diritto di "proprietà" ai sensi dell'articolo 1 del Protocollo n. 1 (P1-1), la Corte deve accertare se la decisione n. 13910/79 del Tribunale di primo grado di Atene e il lodo arbitrale abbiano fatto sorgere un debito in loro favore sufficientemente certo per poter dar luogo ad esecuzione.

60. Nella natura delle cose, una decisione preliminare, laddove ordini una misura istruttoria, pregiudica il merito di una controversia. Sebbene il Tribunale di primo grado di Atene sembrasse avere accettato che lo Stato era debitore nei confronti dei ricorrenti - come anche la Commissione ha notato -, tuttavia, prima di decidere dell'esistenza e dell'entità del presunto danno, ha ordinato che fossero sentiti dei testimoni (vedi, *supra*, paragrafo 11). L'effetto di una tale decisione è stato soltanto quello di insinuare nei ricorrenti la speranza di vedere soddisfatta la pretesa avanzata. La questione se il risultante debito sia esecutivo dipende da qualunque riesame condotto dai due organi giudiziari superiori.

61. La situazione è diversa per quanto riguarda il lodo, il quale ha chiaramente riconosciuto la responsabilità dello Stato fino ad un massimo di importi precisati in tre valute differenti (vedi, *supra*, paragrafo 13).

La Corte concorda con il Governo che approvare o disapprovare la sostanza del lodo non è di sua competenza. Essa, tuttavia, ha il dovere di prendere nota della valore giuridico di quella decisione rispetto alle parti.

Conformemente alla sua lettera, il lodo era definitivo e vincolante; non richiedeva alcuna ulteriore misura di esecuzione e nessun appello ordinario o speciale era pendente contro di esso (vedi, *supra*, paragrafo 10). A norma della legislazione greca i lodi arbitrali hanno la forza di decisioni definitive e viene loro riconosciuto valore di titoli esecutivi. I motivi per ricorrere in appello contro di questi sono esaurientemente elencati all'articolo 897 del Codice di procedura civile (vedi, *supra*, paragrafo 25); nessuna disposizione disciplina l'appello del merito.

62. Al tempo in cui la legge n. 1701/1987 veniva approvata il lodo del 27 febbraio 1984, dunque, riconosceva ai ricorrenti un diritto alle somme assegnate. Evidentemente, quel diritto era revocabile, poiché il lodo poteva ancora essere annullato, ma, fino ad allora, gli organi giudiziari ordinari avevano concluso già due volte - in primo grado e in appello - che non sussisteva alcuna ragione per tale annullamento. Conseguentemente, ad avviso della Corte, quel diritto costituiva un diritto di "proprietà" ai sensi dell'articolo 1 del Protocollo n. 1 (P1-1).

2. Sulla sussistenza di un'interferenza

63. Nelle allegazioni dei ricorrenti, sebbene nessuna proprietà fosse trasferita allo Stato, il combinato disposto dei paragrafi 2 e 3 dell'articolo 12 ha comportato una privazione di fatto del loro diritto di proprietà, in quanto il risultato era letteralmente quello di annullare il debito accertato con lodo definitivo e vincolante.

64. La Commissione ha osservato che questa costituiva una violazione del diritto al libero esercizio del diritto di proprietà ai sensi della prima frase del primo paragrafo dell'articolo 1 del Protocollo n. 1 (P1-1).

65. Il Governo non ha accettato nessuna di queste posizioni. Ha affermato che il paragrafo 2 dell'articolo 12 prevedeva semplicemente una conseguenza inevitabile del paragrafo 1 e non aveva alcun autonomo significato. A questo proposito ha citato gli argomenti proposti in relazione all'articolo 6 (art. 6) della Convenzione (vedi, *supra*, paragrafo 48), in forza dei quali, più specificatamente, il paragrafo 2 dell'articolo 12 non era dotato di una esistenza autonoma in quanto presupponeva il controllo giudiziario sulla nullità di cui al paragrafo 1 e precisava solo le chiare conseguenze di tale nullità. Il Governo ha aggiunto che il paragrafo 3 ha introdotto una misura la cui costituzionalità non era stata accertata dai tribunali nazionali innanzi ai quali l'azione proposta dai ricorrenti era ancora pendente, e che una nuova azione era sempre possibile se la rinuncia alla prima da parte dei ricorrenti ha condotto alla sua cessazione (vedi, *supra*, paragrafo 17). Tuttavia, in quest'ultimo caso i ricorrenti si scontrerebbero con il mancato esaurimento dei rimedi interni.

66. La Corte ritiene che si sia verificata una interferenza con il diritto di proprietà dei ricorrenti come garantito dall'articolo 1 del Protocollo n. 1 (P1-1). Il paragrafo 2 dell'articolo 12 della legge n. 1701/1987 dichiarava il lodo nullo ed inapplicabile. Il paragrafo 3 prevedeva che qualsiasi pretesa nei confronti dello Stato risultante da contratti come quelli conclusi dai ricorrenti fosse prescritta. Evidentemente la Corte di Cassazione ha lasciato in sospeso la questione della costituzionalità del paragrafo 3 ed i ricorrenti, teoricamente, hanno la possibilità, come il Governo ha sostenuto, di proseguire l'azione intentata nel 1978 ovvero di proporne una nuova. Tuttavia, le prospettive di successo di un tale passo sembrano minime. In effetti la domanda da porsi è se un Tribunale di primo grado si spingerebbe fino a considerare questo paragrafo incostituzionale sulla base di disposizioni generali ed astratte della Costituzione (vedi, *supra*, paragrafo 31 in fine) e, in particolare, alla luce della decisione presa il 16 marzo 1989 dalla Corte di Cassazione, riunita in seduta plenaria, e riguardante i paragrafi 1 e 2 dell'articolo 12 (vedi, *supra*, paragrafo 22). Entrambe, sia la decisione che la sentenza della Corte di Cassazione dell'11 aprile 1990 (vedi, *supra*, paragrafo 23) hanno prodotto l'effetto di chiudere definitivamente il procedimento in questione, ciò che era che il vero obiettivo perseguito dal legislatore con il varo dell'articolo 12. Questo può essere desunto dalla attuale formulazione del paragrafo 4, il quale era nato per portare ad una conclusione l'unica controversia di questa natura allora pendente davanti ai tribunali, cioè quella tra i ricorrenti e lo Stato, nonché dalla lettera del paragrafo 3, il quale doveva impedire qualsiasi azione futura.

67. Ne consegue l'impossibilità per i ricorrenti di procedere all'esecuzione di un lodo definitivo, in forza del quale lo Stato è stato condannato a pagare loro precise somme relative alle spese che questi avevano sostenuto a fine di ottemperare ai loro obblighi contrattuali ovvero perfino di prendere ulteriori provvedimenti al fine di recuperare le somme in questione per vie giudiziarie.

In conclusione, sussisteva una interferenza con il diritto di proprietà dei ricorrenti.

3. Sulla giustificabilità dell'interferenza

68. L'interferenza in questione non è consistita né in una espropriazione né in una misura atta a controllare l'utilizzo di beni in proprietà; questa ricadeva nell'ambito di applicabilità della prima frase del primo paragrafo dell'articolo 1 (P1-1).

69. La Corte deve dunque valutare se si sia proceduto ad un corretto bilanciamento tra le esigenze dell'interesse generale della comunità e della tutela dei diritti fondamentali dell'individuo (vedi *Sporrong e Lönnroth c. Svezia*, sentenza del 23 settembre 1982, serie A n. 52, p. 26, paragrafo 69).

70. Secondo il Governo, le leggi nn. 141/1975 e 1701/1987 perseguivano un obiettivo d'interesse pubblico il quale, nel contesto specifico, aveva un significato ben più ampio rispetto alla mera eliminazione delle conseguenze economiche della dittatura. Queste leggi facevano parte di un pacchetto di misure volte a ripulire la vita pubblica dal discredito collegato al regime militare e ad esprimere il potere e la volontà del popolo greco di difendere le istituzioni democratiche. Le richieste dei ricorrenti hanno trovato il proprio fondamento in un contratto preferenziale, pregiudizievole all'economia nazionale, il quale aveva permesso di sostenere il regime e di dare l'impressione, tanto a livello nazionale che internazionale, che questo godeva dell'appoggio di esponenti eminenti del mondo degli affari greco. Nel lasso di tempo intercorso tra il ristabilimento della democrazia e la promulgazione della legge n. 1701/1987, la decisione dello Stato di optare per l'arbitrato - passo di natura puramente tecnica - ed il fatto che le richieste di Stran si riferissero esclusivamente al rimborso delle sue spese erano irrilevanti.

71. I ricorrenti non hanno contestato l'affermazione del Governo secondo la quale le brutali pratiche del regime militare avevano nella scala dell'interesse pubblico un peso maggiore rispetto ai diritti derivanti da transazioni concluse con detto regime. Tuttavia, l'interesse pubblico che la Corte era chiamata ad accertare nel caso portato di fronte a lei era diverso. Non sarebbe giusto se ogni rapporto giuridico concluso con un regime dittatoriale dovesse essere considerato invalido al venir meno del regime stesso. Inoltre, il contratto in questione aveva ad oggetto la costruzione di una raffineria di petrolio, la quale ha avuto un effetto positivo per l'infrastruttura economica del paese.

72. La Corte non dubita che per lo Stato democratico greco fosse necessario risolvere un contratto pregiudizievole per i suoi interessi economici. In effetti, secondo la giurisprudenza dei tribunali internazionali e arbitrali, ogni Stato detiene il potere sovrano di modificare o perfino risolvere un contratto stipulato con soggetti privati, a condizione che corrisponda un indennizzo (lodo Shufeldt del 24 luglio 1930, *Reports of International Arbitral Awards*, Società delle Nazioni, vol. II, p. 1095). Questa conclusione, da un lato, riflette il riconoscimento che gli interessi superiori dello Stato hanno la precedenza sugli obblighi contrattuali e, dall'altro, tiene conto della necessità di preservare il giusto equilibrio in un rapporto contrattuale. Tuttavia, la risoluzione unilaterale di un contratto non ha effetto rispetto a certe clausole sue essenziali, come la clausola compromissoria. Alterare il meccanismo eretto, attraverso l'approvazione di un emendamento obbligatorio a detta clausola, consentirebbe ad una delle parti di eludere la giurisdizione in una controversia rispetto alla quale specifiche disposizioni hanno previsto il deferimento ad arbitri (decisione *Losinger* del 11 ottobre 1935, Corte permanente di giustizia internazionale, serie C n. 78, p. 110, e lodo *Lena Goldfields Company Ltd c. Governo sovietico*, in *Annual Digest and Reports of Public International Law Cases*, vol. 5 (1929-1930) (causa n. 258), e *Texaco Overseas Petroleum Company and California Asiatic Oil Company c. Governo della Repubblica araba di Libia*, decisione preliminare del 27 novembre 1975, in *International Law Reports*, vol. 53, 1979, p. 393).

73. A questo proposito, la Corte nota che il sistema giuridico greco riconosce il principio in base al quale le clausole compromissorie hanno valore autonomo (vedi, *supra*, paragrafo 18) e che il Tribunale di primo grado di Atene (vedi, *supra*, paragrafo 16), la Corte d'appello di Atene (vedi, *supra*, paragrafo 18) e, sembrerebbe, il giudice relatore della Corte di Cassazione (vedi, *supra*, paragrafo 19) hanno applicato questo principio nel caso di specie. Inoltre, le due Corti hanno ritenuto che le pretese dei ricorrenti, originate prima della risoluzione del contratto, non fossero pertanto invalidate.

Lo Stato aveva dunque il dovere di pagare ai ricorrenti le somme poste a suo carico al termine della procedura arbitrale, una procedura che lui stesso aveva scelto e la validità della quale era stata accettata fino al giorno dell'udienza davanti alla Corte di Cassazione.

74. Scegliendo di intervenire in pendenza della procedura davanti alla Corte di Cassazione con una legge che disponeva la risoluzione del contratto in questione al fine di dichiarare la nullità della clausola compromissoria ed di annullare il lodo del 27 febbraio 1984, il legislatore ha turbato, a detrimento dei ricorrenti, l'equilibrio che deve essere trovato tra la tutela del diritto di proprietà e le esigenze d'interesse pubblico.

75. Conseguentemente, c'è stata una violazione dell'articolo 1 del Protocollo n. 1 (P1-1).

IV. SULLA APPLICAZIONE DELL'ARTICOLO 50 (art. 50) DELLA CONVENZIONE

76. Ai sensi dell'articolo 50 (art. 50) della Convenzione,

> "Se la Corte dichiara che una decisione o una misura adottata da un'autorità giudiziaria ovvero da qualsiasi altra autorità di un'Alta Parte Contraente si pone completamente o parzialmente in conflitto con gli obblighi risultanti ... dalla Convenzione, e se il diritto interno di detta Parte non permette che una parziale riparazione delle conseguenze derivanti da questa decisione o misura, la decisione della Corte, se necessario, accorda alla parte lesa un'equa soddisfazione."

I ricorrenti hanno chiesto il risarcimento del danno patrimoniale nonché il rimborso di spese e onorari.

A. Danno patrimoniale

77. I ricorrenti hanno affermato che il solo pagamento integrale della soma stabilita in sede di giudizio arbitrale sia tale da garantire la *restitutio in integrum* prevista dall'articolo 50 (art. 50).

Per questo motivo hanno chiesto, a titolo di risarcimento del danno patrimoniale, quella somma ("la somma principale") maggiorata di un tasso di interessi pari al 6% - che ritengono debba ritenersi incluso nella decisione arbitrale – dal 10 novembre 1978 fino alla data della violazione, che ammonta ad un totale di 175,869,155.78 dracme, 24,282,694.28 dollari USA e 929,652.81 franchi francesi. Inoltre, i ricorrenti hanno chiesto gli interessi maturati sulla somma dovuta a titolo di risarcimento del danno patrimoniale dalla data della violazione a quella della sentenza della Corte.

In subordine, i ricorrenti hanno chiesto, a titolo di risarcimento del danno patrimoniale, la somma principale maggiorata di un tasso di interesse pari al 6% dal 10 novembre 1978 alla data della sentenza della Corte. Alla data fissata per l'udienza davanti alla Corte gli interessi maturati sulla somma principale ammontavano approssimativamente a 106.898.000 dracme, 14.790.000 dollari USA e 567.000 franchi francesi.

78. Da parte sua, il Governo ha affermato che i ricorrenti non avevano diritto ad alcun risarcimento ai termini dell'articolo 50 (art. 50) in ragione del fatto che questi potevano ottenere soddisfazione attraverso i rimedi nazionali disponibili. Anche a voler supporre che l'applicazione dell'articolo 12 della legge n. 1701/1987 avesse violato il diritto dei ricorrenti ad un processo equo, questa non ha inciso in alcun modo sulle loro pretese risarcitorie. L'annullamento del lodo non ha impedito loro di proseguire l'azione del 1978 o di intentarne una nuova.

In ogni caso, il lodo non ha fornito una base soddisfacente per valutare il quantum del risarcimento richiesto in quanto si era occupato erroneamente del merito della causa. L'azione per l'annullamento del lodo intentata dallo Stato si è fatta portatrice di una precisa critica alla sua equità.

Se, d'altra parte, la Corte ritenesse che vi è stata una violazione dell'articolo 1 del protocollo n. 1 (P1-1), questa conclusione costituirebbe una sufficiente equa soddisfazione; in nessun caso tale soddisfazione dovrebbe superare un milione di dracme per il danno non patrimoniale.

Infine, il Governo ha contestato la richiesta dei ricorrenti relativamente agli interessi. A questo fine, potendo contare sulla normativa greca e sulla costante giurisprudenza, ha affermato che né la decisione n. 13910/1987 né il lodo potrebbero far scattare il pagamento degli interessi in quanto queste erano per natura dichiarative. Più specificamente, il riferimento all'interesse del 6% è comparso solo nella parte motiva del lodo (vedi, *supra*, paragrafo 13) e si è trattato di un mero *obiter dictum* completamente sbagliato. Il Tribunale arbitrale, per una buona ragione, non lo ha più menzionato nel dispositivo della sua decisione. Una tale pretesa non era stata avanzata innanzi a lui e dal momento che la questione era stata deferita ad arbitrato dallo Stato, gli arbitri non avrebbero potuto ordinare a quest'ultimo di corrispondere gli interessi.

79. Il delegato della Commissione, in primo luogo, ha sottolineato che l'articolo 50 (art. 50) esigeva un'equa soddisfazione e non necessariamente una soddisfazione completa. Inoltre, ha attirato l'attenzione sul fatto che le somme menzionate nel lodo non erano state sottoposte al vaglio

dei tribunali nazionali. Questa ha invitato la Corte a sottoporre le somme richieste ad un accurato esame.

80. La Corte ribadisce che essa concede l'"equa soddisfazione" soltanto "se necessario", senza essere vincolata, a tal riguardo, alle normative nazionali (vedi *Sunday Times c. Regno Unito* (n. 1), sentenza del 6 novembre 1980, serie A n. 38, p. 9, paragrafo 15).

81. Osserva che il dispositivo del lodo ha statuito che le pretese di Stran contro lo Stato non sono fondate per la misura eccedente i 116.273.442 dracme, 16.054.165 dollari USA e 614.627 franchi francesi. Avuto riguardo a quanto constatato al paragrafo 75, la Corte conclude che i ricorrenti hanno diritto al risarcimento di queste somme.

82. Per quanto riguarda gli interessi, la Corte ritiene che il Tribunale arbitrale non li abbia considerati quale elemento necessario per la composizione della controversia (vedi, *supra*, paragrafo 13); perciò non sono stati inclusi nel diritto al risarcimento riconosciuto nel dispositivo.

Tuttavia, l'adeguatezza del risarcimento verrebbe diminuita se dovesse essere corrisposto senza tenere conto delle diverse circostanze che ne possono ridurre il valore, come il fatto che sono passati dieci anni da quando il lodo è stato pronunciato.

83. La richiesta dei ricorrenti deve, dunque, trovare accoglimento parziale e ad essi deve essere corrisposto l'interesse semplice del 6% sulle soprammenzionate somme (vedi, *supra*, paragrafo 81) per il periodo che va dal 27 febbraio 1984 alla data della sentenza.

B. Spese e onorari

84. I ricorrenti non hanno avanzato alcuna pretesa rispetto alle spese sostenute nel procedimento davanti alla Corte di Cassazione dopo l'entrata in vigore della legge n. 1701/1987.

D'altra parte, hanno chiesto il rimborso di spese e onorari sostenuti davanti agli organi della Convenzione nell'ammontare di £171,041 sterline, maggiorato dell'interesse dalla data della sentenza della Corte all'effettivo pagamento.

Una settimana dopo l'udienza del 19 aprile 1994, gli avvocati dei ricorrenti hanno presentato alla Corte una richiesta per un ulteriore somma pari a £34,709.05 sterline a titolo di costi supplementari sostenuti tra la data in cui la loro memoria è stata depositata e quella dell'udienza.

85. Il Governo ha manifestato dubbi circa la necessarietà e la ragionevolezza dei costi sostenuti. Ha affermato che era disposto a pagare 2.800.000 dracme.

86. Il delegato della Commissione non si è espresso su questo punto.

87. La Corte nota che conformemente alla regola 50 delle regole della Corte A le richieste devono essere formulate almeno un mese prima della data fissata per l'udienza. In casi recenti ha fatto un'applicazione rigida di questa regola (vedi *Vendittelli c. Italia*, decisione del 18 luglio 1994, serie A n. 293-A, p. 13, paragrafi 42-43).

Nel caso in esame, la Corte non trova alcuna traccia nella memoria dei ricorrenti o nel verbale d'udienza della richiesta supplementare o perfino dell'intenzione di presentare una tale richiesta dopo l'udienza. Perciò, la rigetta in quanto tardiva.

Facendo una stima in via equitativa e alla luce dei criteri che applica in questo campo, la Corte ritiene opportuno ridurre la somma richiesta inizialmente dai ricorrenti. Assegna loro £125,000 sterline, importo che non va maggiorato degli interessi.

PER QUESTI MOTIVI, LA CORTE, ALL'UNANIMITÀ

1. Respinge le eccezioni preliminari sollevate dal Governo;
2. Dichiara che l'articolo 6, paragrafo 1 (art. 6-1), della Convenzione è applicabile al caso di specie;
3. Dichiara che c'è stata una violazione dell'articolo 6, paragrafo 1 (art. 6-1), della Convenzione con riferimento al diritto ad un processo equo;
4. Dichiara che c'è stata una violazione dell'articolo 6, paragrafo 1 (art. 6-1), della Convenzione con riferimento alla lunghezza della procedura;

5. Dichiara che c'è stata una violazione dell'articolo 1 del Protocollo n. 1 (P1-1);

6. Dichiara che lo Stato convenuto deve versare ai ricorrenti, entro il termine di tre mesi:

   (a) per i danni patrimoniali: 116,273,442 (centosedici milioni duecentosettantatre mila quattrocentoquarantadue) dracme, 16,054,165 (sedici milioni cinquantaquattro mila centosessantacinque) dollari USA e 614,627 (seicentoquattordici mila seicentoventisette) franchi francesi, maggiorati di un tasso semplice di interesse pari a 6% dal 27 febbraio 1984 alla data della sentenza (vedi paragrafo 83 della sentenza);

   (b) per spese e onorari sostenuti a Strasburgo: £125,000 (centoventicinque mila) sterline;

7. Respinge la richiesta di equa soddisfazione per il resto.

Fatto in inglese e in francese, e comunicato in pubblica udienza nell'edificio dei diritti dell'uomo a Strasburgo, il 9 dicembre 1994.

Rolv RYSSDAL
Presidente

Herbert PETZOLD
Cancelliere

B. PRONUNCE RESE NEI CONFRONTI DI ALTRI PAESI

Retroattività della legge "civile"

Artt. 6 § 1 della Convenzione (equo processo)
e 1 del Protocollo n. 1 (diritto al rispetto dei beni)

In materia tributaria

Sentenza del 23 ottobre 1997, Camera, causa NATIONAL & PROVINCIAL BUILDING SOCIETY, THE LEEDS PERMANENT BUILDING SOCIETY AND THE YORKSHIRE BUILDING SOCIETY c. Regno Unito (in particolare, par. 50-83 e 93-113)

In the case of the National & Provincial Building Society, the Leeds Permanent Building Society and the Yorkshire Building Society v. the United Kingdom 1,

The European Court of Human Rights, sitting, in accordance with Article 43 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A2, as a Chamber composed of the following judges:

Mr R. Ryssdal, *President*,
Mr R. Macdonald,
Mr N. Valticos,
Mrs E. Palm,
Mr R. Pekkanen,
Sir John Freeland,
Mr P. Jambrek,
Mr K. Jungwiert,
Mr E. Levits,

and also of Mr H. Petzold, *Registrar*, and Mr P.J. Mahoney, *Deputy Registrar*,

Having deliberated in private on 31 May and 27 September 1997,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") and by the Government of the United Kingdom of Great Britain and Northern Ireland ("the Government") on 16 September 1996 and 25 October 1996 respectively, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in three applications (nos. 21319/93, 21449/93 and 21675/93) against the United Kingdom lodged with the Commission under Article 25 on 15 January 1993, 21 December 1992 and 11 January 1993 respectively by the National & Provincial Building Society (hereafter "the National & Provincial"), the Leeds Permanent Building Society (hereafter "the Leeds") and the Yorkshire Building Society (hereafter "the Yorkshire"). The Commission's request referred to Articles 44 and 48 and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46); the Government's application referred to Article 48. The object of the request and of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 1 of Protocol No. 1 taken alone or in conjunction with Article 14 of the Convention and Article 6 § 1 of the Convention taken alone or in conjunction with Article 14.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of Rules of Court A, the applicants stated that they wished to take part in the proceedings and designated the lawyers who would represent them (Rule 30).

3. The Chamber to be constituted included *ex officio* Sir John Freeland, the elected judge of British nationality (Article 43 of the Convention), and Mr R. Ryssdal, the President of the Court (Rule 21 § 4 (b)). On 17 September 1996, in the presence of the Registrar, the President drew by lot the names

of the other seven members, namely Mr F. G•lc•kl•, Mr R. Macdonald, Mr C. Russo, Mr N. Valticos, Mr R. Pekkanen, Mr P. Jambrek and Mr E. Levits (Article 43 *in fine* of the Convention and Rule 21 § 5). Mr G•lc•kl• and Mr Russo were later prevented from taking part in the consideration of the case and were replaced by Mrs E. Palm and Mr K. Jungwiert respectively.

4. As President of the Chamber (Rule 21 § 6), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Government, the applicants• lawyers and the Delegate of the Commission on the organisation of the proceedings (Rules 37 § 1 and 38). Pursuant to the order made in consequence, the Registrar received the Government's and the applicants' memorials on 31 January 1997.

On 10 March 1997 the Commission produced a number of documents from the file on the proceedings before it, as requested by the Registrar on the President's instructions.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 28 May 1997. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

a. *for the Government*

Mr M.R. Eaton, Deputy Legal Adviser,
Foreign and Commonwealth Office, *Agent*,
Mr S. Richards,
Mr D. Anderson, *Counsel*,
Mr W.J. Durrans, Inland Revenue,
Mr P.H. Linford, Inland Revenue, *Advisers*;
b. *for the Commission*
Mrs J. Liddy, *Delegate*;

c. *for the applicants*
Lord Lester of Herne Hill QC,
Mr J. Gardiner QC,
Mr P. Duffy QC,
Mr J. Peacock,
Ms M. Carss-Frisk, *Counsel*,
Mr H. Ross, Solicitor, Clifford Chance
(for the Leeds),
Mr N. Jordan, Solicitor, Clifford Chance
(for the Leeds),
Ms S. Garrett, Solicitor, Addleshaw Booth & Co
(for the Yorkshire),
Ms F. Ferguson, Solicitor, Slaughter and May
(for the National & Provincial), *Solicitors*.

The Court heard addresses by Mrs Liddy, Mr Gardiner, Lord Lester of Herne Hill and Mr Richards.

AS TO THE FACTS

I. general background

6. The applicants were at all relevant times building societies within the meaning of the Building Societies Act 1986. Building societies operate under the status of •mutual societies• under English law as opposed to the status enjoyed by companies under company law. A building society's members are made up of its investors who deposit savings with it and receive a rate of interest or a

dividend in return, and its borrowers who are charged interest on their loans. By and large, loans are taken out by borrowers to buy private residential property.

A. The income-tax liability of investors

7. Investors with a building society are liable to pay income tax in respect of the interest earned on their deposits. The income tax owed to the Inland Revenue for the purposes of the fiscal year running from 6 April of one year to 5 April of the following year was in practice calculated or measured with reference to a period of equal length preceding the actual fiscal year. The so-called "measurement principle" required that the period measured be always equal in length to the period taxed. The taxpayer was not in fact taxed on the income of the preceding year but assessed to tax on the income received in the current year, the amount of the current year's income being artificially computed by reference to the income of the previous year. Accordingly, in normal circumstances, individual investors with building societies would be obliged to declare in their tax returns for the fiscal year in question the amount of interest or dividends earned on their deposits in a preceding reference period of equal length to the fiscal year, and the Inland Revenue would have to make individual assessments to tax on the strength of the information supplied by the investor.

B. The voluntary arrangements for discharging investors• tax liability

8. However, in view of the very large number of building society investors, many of whom had only modest savings and were thus only liable to small amounts of income tax, or to no tax at all, it had for many years up to and including the fiscal year 1985/86 been the practice for the Inland Revenue to make voluntary arrangements with building societies for the payment by each society of a single annual composite amount. The effect of this payment by a building society was to discharge its investors• liability to income tax at the basic rate on the interest which they earned. These arrangements, which were for very many years operated on a non-statutory basis, were at the relevant time given statutory recognition under section 343 (1) of the Income and Corporation Taxes Act 1970 • "the 1970 Act".

9. The composite-rate payment under the voluntary arrangements was calculated for each fiscal year by reference to the global amount of interest paid by the society to its investors. However, in order to reflect the fact that some of the investors would not have been liable to tax at all given the modest amounts of their savings (see paragraph 8 above) a reduced rate of tax was applied. For this reason the annual
payments made under this scheme were known as "reduced-rate tax" or "composite-rate tax", or "CRT".

10. The amount paid to investors by way of interest on their investments took account of the fact that their liability to income tax was discharged by the building society via the payment of CRT to the Inland Revenue. Investors thus received their interest net of tax.

C. Setting the rate of CRT and the revenue-neutrality principle

11. In accordance with the •revenue-neutrality• principle, set out in section 26 of the Finance Act 1984, the CRT payment reflected only the amount which would have been paid by the investors themselves had they been obliged to declare and pay tax on the interest they earned through their deposits.

12. To achieve this, the Treasury, following negotiations with the Building Societies Associations, set each year, by statutory instrument, the CRT rate. In doing so, it was required to aim at a result whereby the same amount of tax was collected at source from building societies for the fiscal year in question as would have been collected from the individual depositors had they been taxed directly on the interest they received over a preceding reference period (see paragraphs 7 above and 13 below).

D. The prior-period system and the accounting-year period

13. Until 1985/86, a "prior-period" system applied in respect of CRT. The amount of CRT to be paid by each building society for each fiscal year (see paragraph 12 above) was calculated by reference to the interest which it paid to its investors not during the actual year being taxed, but during the society's own twelve months• accounting period ending within that fiscal year. The tax was in every case paid on or around 1 January of the year of assessment. As noted above (see paragraph 8 above), the legal effect of this payment representing income tax was to discharge investors• basic-rate liability on the interest earned in the year being taxed.

14. There was no legal requirement to have a harmonised accounting period. Different time frames were used by different building societies, but in all cases the time frames represented a period equal in length to the fiscal year, having regard to the requirements of the measurement principle (see paragraph 7 above). The following accounting periods were operated by each of the applicant societies:

• the Leeds: 1 October to 30 September;

• the National & Provincial: 1 January to 31 December;

• the Yorkshire: 1 January to 31 December.

Thus, on or around 1 January 1986, the three applicant societies paid to the Inland Revenue, to discharge their investors' liability to income tax at the basic rate for the fiscal year 6 April 1985•5 April 1986, sums measured by reference to the interest paid to their investors in their accounting periods ended 30 September 1985 (the Leeds) and 31 December 1985 (the National & Provincial and the Yorkshire). Under the effect of the voluntary arrangements (see paragraph 8 above), these payments completely discharged the income-tax liability of their investors in respect of the interest paid to them by the respective societies for the fiscal year 6 April 1985•5 April 1986.

On that basis each of the applicant companies paid the following amounts by way of CRT to the Inland Revenue:

• the Leeds: 144,500,000 pounds sterling (GBP), a sum measured by reference to the interest paid to its investors in its accounting period ended 30 September 1985;

the National & Provincial: GBP 125,926,662, a sum measured by reference to the interest paid to its investors in its accounting period ended 31 December 1985;

• the Yorkshire: GBP 34,001,214, a sum measured by reference to the interest paid to its investors in its accounting period ended 31 December 1985.

E. The aim and effect of the new legislation: section 40 of the Finance Act 1985

15. With a view to putting the taxation of the interest paid by building societies to investors on a similar footing to the scheme which had been introduced for banks by the Finance Act 1984, the Government proposed the introduction of a mandatory regime for the collection of tax on investors• interest and the payment of the tax quarterly on the last days of February, May, August and November instead of annually in January. In his budget statement on 19 March 1985 announcing the introduction of the new scheme, the Chancellor of the Exchequer declared that it would not produce any additional revenue. The proposal was adopted by Parliament in the form of section 40 of the Finance Act 1985.

16. Section 40 amended section 343 of the 1970 Act (see paragraph 8 above) by inserting a new sub-section (1A) which had the effect of bringing to an end the long-standing voluntary arrangements as from 6 April 1986. It also empowered the Inland Revenue Commissioners to make regulations introducing a new system of accounting for the fiscal year 1986/87 and for subsequent

years. Under the Income Tax (Building Society) Regulations 1986 ("the 1986 Regulations"), which came into force on 6 April 1986, tax was to be calculated on a quarterly basis on the actual interest paid during the actual year of assessment, as opposed to a prior period.

F. The problem of the •gap period•

17. However the ending of the voluntary arrangements exposed a gap ("the gap period") between the end of the applicant societies' accounting periods in 1985/86 (see paragraph 14 above) and the start of the first quarter under the new regime. In the case of the Leeds the gap period was from 1 October 1985 to 5 April 1986, and in the case of the National & Provincial and the Yorkshire it was from 1 January 1986 to 5 April 1986. In order to ensure that each payment of interest formed the basis of an assessment to tax, transitional regulations were introduced which deemed payments falling into the "gap period" to have been made in a later accounting period, with the result that they formed the basis for an assessment to tax under the new "actual-year" arrangements. In the view of the Government the legislative intention was to ensure that the same amount of tax was collected as would have been collected if the previous arrangements had continued and that the building societies did not receive an undeserved windfall in respect of the gap period.

18. Against this background, Regulation 11 (read in conjunction with Regulation 3) of the 1986 Regulations purported to require building societies to account for tax relating to payments of interest to their investors in their respective gap periods. Regulation 11 (4) provided for tax to be charged on interest paid in the gap period at 1985/86 rates, i.e. 25.25%, the basic rate of income tax being 30% for that year.

II. Particular circumstances of the case

19. Each of the applicant societies took the view that the transitional regulations ran counter to the Government•s declared intention that the new regime introduced by the Finance Act 1985 should not produce any additional revenue (see paragraph 15 above), which view was reaffirmed during the parliamentary debates on section 40 of that Act. They considered that the effect of Regulations 3 and 11 was to impose tax again on interest they had paid in 1985/86, a fiscal year for which liability on their investors' interest had already been discharged (see paragraph 14 above). For the applicants this had the result that, for twenty-four months' interest paid to its investors in the two fiscal years 1986/87 and 1987/88, a society like the Leeds, with a 30 September year-end, was required to pay tax on thirty months' interest. For the National & Provincial and the Yorkshire, each would have to pay tax on twenty-seven months' interest for the twenty-four month period covered by the fiscal years 1986/87 and 1987/88. In the view of the applicant societies these consequences ran counter to the measurement principle according to which the measurement period forming the basis of assessment to tax can never exceed the length of the fiscal year (see paragraph 7 above).

Each of the three applicant societies did in fact pay the tax claimed to be due under the transitional provisions of the Regulations as follows:

- the National & Provincial: GBP 15,873,945;
- the Leeds: GBP 56,973,690;
- the Yorkshire: GBP 8,902,620.

20. The Government point out that the payments were made "without formal protest". However, the applicants assert that they made clear from the outset that they disputed the lawfulness of the tax and that they associated themselves with the proceedings initiated by the Woolwich Equitable Building Society ("the Woolwich") to challenge the lawfulness of the transitional provisions in Regulation 11. For its part the Leeds issued a press release when the Regulations were still at the draft stage, drawing attention to, *inter alia*, their complaint that the Regulations would have the objectionable effect of subjecting building societies to double taxation. The affidavit sworn by the Executive Vice-Chairman of the Woolwich referred to the Leeds' support for its decision to initiate

legal proceedings against the transitional arrangements. Both the National & Provincial and the Yorkshire made requests for the repayment of the amounts they had paid to the Inland Revenue.

A. The Woolwich 1 proceedings for judicial review

21. On 18 June 1986 the Woolwich commenced judicial review proceedings seeking a declaration that Regulation 11 was unlawful as being outside the scope of the enabling legislation. It was further alleged that the transitional arrangements transgressed the fundamental principles of constitutional and taxation law and that the machinery adopted by the 1986 Regulations in order to implement the change in the system resulted in a double charge to tax over the gap period.

B. The legislative response to the launch of the Woolwich 1 proceedings: section 47 of the Finance Act 1986

22. On 4 July 1986 the Government introduced in Parliament a measure intended to validate retrospectively the impugned Regulations and to give effect to what they claimed to be the original intention of Parliament when adopting them (see paragraphs 15 and 17 above). The responsible Government minister informed Parliament that the Regulations did not affect the amount of tax collected, only the timing of payment and reiterated that they would not bring extra tax to the Inland Revenue. On 25 July 1986 the Finance Act 1986 ("the 1986 Act") received the Royal Assent. Section 47 of the Act retrospectively amended section 343 (1A) of the 1970 Act (see paragraph 16 above) with the purpose of authorising the Inland Revenue Commissioners to make regulations requiring the taxation in the year 1986/87 and subsequent years of assessments of sums paid to investors in the gap period and not previously brought into account.

C. The Woolwich 2 proceedings for restitution

23. On 15 July 1987 the Woolwich issued a writ against the Inland Revenue claiming repayment of the sums paid by way of tax under the transitional provisions of the Regulations, as well as interest from the date of payment.

D. The decision of the High Court in the Woolwich 1 proceedings

24. On 31 July 1987 Nolan J granted the application in Woolwich 1 (see paragraph 21 above) and made a declaration that Regulation 11 was void in its entirety and that the remaining Regulations were void in so far as they purported to apply to payments made to investors prior to 6 April 1986.

He held that:

(a) there was nothing in the enabling legislation to indicate that Parliament intended to authorise a departure from the principle that income tax should only be levied on the income of one year;

(b) the power to make regulations conferred by section 343 (1A) was to be exercised solely with respect to 1986/87 and later years and nothing in the section authorised the Revenue to go back on the arrangements with the building societies and impose further tax on interest paid to their members during the gap period;

(c) the fact that Regulation 11 (4) provided for tax to be charged at 1985/86 rates (which were higher than the 1986/87 rates) was itself a clear indication that the Regulations went beyond the powers conferred by section 343 (1A);

(d) the position was not affected by the amendment in section 47 (1) of the 1986 Act which, whatever its intention, still left the power conferred by section 343 (1A) as a power exercisable only with respect to 1986/87 and subsequent years.

25. The Inland Revenue appealed against the decision. They conceded that Regulation 11 (4) was invalid but contended that this partial invalidity did not invalidate the rest of the Regulation.

26. Towards the end of 1987, the Inland Revenue repaid to the Woolwich the sum of GBP 57,000,000 with interest from 31 July 1987 (the date of the order of Nolan J) but refused to pay interest from any earlier date. Thus, the remaining issue in the Woolwich 2 proceedings (see paragraph 23 above) came to be whether or not Woolwich had grounds for claiming interest on the payments made by them up to 31 July 1987.

E. The decision of the High Court in the Woolwich 2 proceedings

27. On 12 July 1988 Nolan J dismissed the Woolwich 2 action, holding that the Woolwich was not entitled to recover the sums in issue under any general principle of restitution or as having been paid under duress. He took the view that the sums had been paid under an implied agreement that they would be repaid if and when the dispute about the validity of the 1986 Regulations was resolved in favour of the Woolwich. Thus, the Woolwich had no cause of action to recover the money until the date of his order of 31 July 1987. The Woolwich appealed against the decision and order.

F. The decision of the Court of Appeal in the Woolwich 1 proceedings

28. On 12 April 1989 the Court of Appeal allowed the appeal of the Inland Revenue in the Woolwich 1 proceedings (see paragraph 25 above). The court held that:

(a) as a matter of ordinary construction, the words of section 47 of the 1986 Act were clear and enabled the Revenue to take account of, and to charge to tax, interest paid by the societies in the gap period; and

(b) subject to the invalidity of Regulation 11 (4), which was conceded by the Revenue, Regulation 11 was valid.

G. The decision of the House of Lords in the Woolwich 1 proceedings

29. On 25 October 1990 the House of Lords allowed the appeal of the Woolwich in the Woolwich 1 proceedings. The House of Lords, Lord Lowry dissenting, declared the transitional provisions in the 1986 Regulations to be *ultra vires* on the grounds that Regulation 11 (4), as the Inland Revenue had previously conceded, and Regulation 3, so far as it related to the period after February and before 6 April 1986, were *ultra vires* the empowering statute. The House of Lords considered that Regulation 11 (4) could not be severed from the rest of Regulation 11 and that the transitional provisions in the 1986 Regulations were therefore void in their entirety.

30. Lord Oliver, delivering the judgment of the majority, concluded:

•... I confess that I find the conclusion irresistible that Parliament intended by these words [section 47 of the 1986 Act] to enable the Revenue to take account of and to charge to tax sums which, rightly or wrongly, it regarded as otherwise representing windfalls in the hands of building societies. One has only to look at the circumstances. The Regulations of 1986 had been made and had been objected to. They were made the subject of a direct challenge in legal proceedings, the evidence in support of which clearly adumbrated the arguments advanced before the judge and the Court of Appeal. The notion that Parliament should go to the trouble of enacting an expressly retrospective amendment in order to provide, unnecessarily, for the use of these sums as a measurement of tax liability • a matter never remotely in issue • is simply fanciful ...

... I am bound to say that I think it unfortunate that the Revenue, through Parliament, should have chosen by secondary rather than primary legislation to take what was, on ordinary principles, the very unusual course of seeking to tax more than one year•s income in a single year of assessment, but section 47 of the Finance Act 1986 is, on any analysis, a very unusual provision and I have, in the end, found myself irresistibly driven to the conclusion that this was what Parliament intended should occur. It may be • I do not know • that the legislature did not appreciate fully that the effect of the arrangements made in 1985 was to discharge all liability for tax on interest paid in the year of assessment 1985/86, including tax on interest paid after the end of a society's accounting year, and that, accordingly, to tax those sums again in a subsequent year was, in a sense, to tax them twice.

But even making that assumption it amounts to no more than saying that the legislature should not have intended to do that which it plainly set out to do. I would, for my part, therefore, reject the Woolwich's principal argument.• This ruling declaring Regulation 11 (4) void on technical grounds meant that no mechanism existed to achieve what the Government claimed to be Parliament's initial intention that interest payments made during the gap period should be assessed for tax. This led the Government to introduce new legislative provisions. A draft press release was circulated as early as 7 March 1991 for the approval of the Chancellor of the Exchequer. The draft indicated that the Chancellor in his budget-day speech on 19 March 1991 would introduce legislation to validate retrospectively the Regulations which had been struck down in the Woolwich 1 case (see paragraph 33 below).

H. The Leeds 1 and National & Provincial 1 proceedings for restitution

31. Following the House of Lords• decision in the Woolwich 1 proceedings, and after having made several requests for repayment, the Leeds commenced proceedings on 15 March 1991 against the Inland Revenue for the restitution of the sum of GBP 56,973,690 paid pursuant to the 1986 Regulations which had been declared void in the Woolwich 1 proceedings.

32. On 17 March 1991 the National & Provincial, which had also sought but was refused repayment, commenced proceedings against the Inland Revenue for the restitution of the sum of GBP 15,873,945 paid pursuant to the void Regulations.

I. The legislative response to the Woolwich 1 decision: the enactment of section 53 of the Finance Act 1991

33. On 19 March 1991, in his budget statement, the Chancellor of the Exchequer announced the introduction of legislation to remedy •the technical defects in the Regulations•. This legislation became section 53 of the Finance Act 1991 (•the 1991 Act•), which entered into force on 25 July 1991. Section 53 provided, *inter alia*:

•Section 343 (1A) of the [1970 Act] ... shall be deemed to have conferred powers to make all the provisions

in fact contained in [the 1986 Regulations].•

34. The provision had retrospective effect, save that by subsection (4) it had no effect •in relation to a building society which commenced proceedings to challenge the validity of the Regulations before 18 July 1986•. The Woolwich was the only building society which satisfied this condition.

35. In a letter dated 21 March 1991 the Director-General of the Building Societies Associations informed the Financial Secretary to the Treasury that the decision of the Government •[did] not come as any great surprise, although it will still be very disappointing to the societies concerned•. In fact, the concrete effect of the measure was to stifle the Leeds 1 and National & Provincial 1 proceedings (see paragraphs 31and 32 above). Although they had shown support for the Woolwich•s judicial proceedings (see paragraph 20 above) neither had formally commenced legal proceedings before 18 July 1986. At the costs hearing the Government conceded that they had no defence to the action brought by the Leeds and the National & Provincial had it not been for section 53 of the 1991 Act. Costs were awarded against the Government.

J. The Woolwich 2 proceedings in the Court of Appeal

36. On 22 May 1991 the Court of Appeal, by a majority, allowed the appeal by the Woolwich in Woolwich 2 and awarded the interest claimed.

37. The majority of the Court of Appeal accepted the Woolwich's primary submission that, where money was paid under an illegal demand for taxation by a government body, the payer had an immediate prima facie right to recover the payment.

K. The Leeds 2, National & Provincial 2 and Yorkshire 1 proceedings to challenge the validity of the Treasury Orders by way of judicial review

38. On 10 July 1991 the Leeds applied for leave to commence judicial review proceedings for a declaration that the Treasury Orders establishing the composite-rate tax for 1986/87 and for the following years were unlawful ("Leeds 2"). The Leeds claimed that:

(a) it was clear that in making the estimates for the years following 1986/87, and setting the rates of composite-rate tax on the basis of it, the Treasury had assumed the correctness of the Government•s position that the Regulations collected no •extra• tax;

(b) this position had been shown by the judgments in Woolwich 1 to be wrong, with the result that the Treasury had underestimated the amount of tax collection under the composite-rate tax system and so set the rate of tax for those years substantially too high;

(c) this was of no significance so long as the Regulations were held to be invalid, because the "extra" tax was in law repayable to the building societies; however, by retrospectively validating them the Government had automatically invalidated the bases of the statutory instruments setting the rates;

(d) this, in principle, meant that all composite-rate tax paid in those years had to be repaid, but in its proceedings the Leeds made a binding commitment not to seek to recover more than the sums initially overpaid, namely GBP 57,000,000.

39. On 6 November 1991 the National & Provincial was granted leave to commence judicial review proceedings similar to those in Leeds 2 for a declaration that the Treasury Orders establishing the composite-rate tax for 1986/87 and subsequent years were unlawful because of the retrospective validation of the Regulations ("National & Provincial 2"). The application was joined with the Leeds 2 proceedings and with a similar application made by the Bradford and Bingley Building Society.

40. On 3 March 1992 the Yorkshire applied for leave to commence similar judicial review proceedings for a declaration that the Treasury Orders establishing the composite-rate tax for 1986/87 and subsequent years were unlawful ("Yorkshire 1").

L. The Leeds 3, National & Provincial 3 and Yorkshire 2 proceedings for restitution

41. Further proceedings were commenced by the Yorkshire on 11 May 1992 ("Yorkshire 2"), by the Leeds on 1 June 1992 ("Leeds 3") and by the National & Provincial on 12 June 1992 ("National & Provincial 3"). In those proceedings the applicant societies claimed restitution of the money due to them if the judicial review proceedings (Leeds 2 and National & Provincial 2, and Yorkshire 1) were successful (see paragraphs 38•40 above).

M. The legislative response to the applicants• proceedings for judicial review and restitution: section 64 of the Finance (No. 2) Act 1992

42. On 16 July 1992 section 64 of the Finance (No. 2) Act 1992 ("the 1992 Act") entered into force. This legislation had been anticipated as from 7 May 1992 when the Financial Secretary in a reply to a parliamentary question noted that his Government intended to introduce legislation to validate retrospectively the impugned Treasury Orders. Section 64 provided, with retrospective effect, that the Treasury Orders •shall be taken to be and always to have been effective•. The Government acknowledged during the parliamentary debates on section 64 that the measure was intended to preempt the legal proceedings launched by the applicants to challenge the validity of the Treasury Orders and that it would result in the Woolwich being treated more favourably. However, they pointed out that the

challenge to the composite rate for CRT in the fiscal years 1986/87 to 1989/90 threw into doubt the lawfulness of the collection of all sums from building societies, banks and other deposit institutions in the periods in question. While there was no doubt as to the lawfulness of the collection in respect of the vast majority of those sums, the effect of impugning the rates set would have been to render the collection of all sums unlawful. The amount at stake was in the region of GBP 15 billion.

43. The effect of section 64 was to extinguish the remaining proceedings lodged by the applicants for judicial review of the validity of the Treasury Orders and for restitution (see paragraphs 39•41 above).

N. The final outcome of the Woolwich 2 proceedings

44. On 20 July 1992 the House of Lords, by a majority, dismissed the Inland Revenue•s appeal in the Woolwich 2 proceedings.

The House of Lords did not accept that, on the facts of the Woolwich case, there was any implied agreement for the repayment of the money paid under the invalid Regulations if and when the dispute was resolved in the taxpayer•s favour. Nevertheless, by a majority, the House of Lords held:

(a) that money paid by a citizen to a public authority in the form of taxes or other levies pursuant to an *ultra vires* demand by the authority is prima facie recoverable by the citizen as of right;

(b) that, accordingly, since the building society•s claims fell outside the statutory framework governing repayment of overpaid tax, it was entitled at common law to repayment of the sums and to interest in respect thereof from the date of payment.

III. relevant domestic law

45. Section 343 (1A) of the 1970 Act (introduced by section 40 of the Finance Act 1985, and as amended by section 47 of the Finance Act 1986) provides as follows:

•The Board may by regulations made by statutory instrument make provision with respect to the year 1986/87 and any subsequent year of assessment requiring building societies, on such sums as may be determined in accordance with the regulations **(including sums paid or credited before the beginning of the year but not previously brought into account under subsection (1) above or this subsection)**, to account for and pay an amount representing income tax ... and any such regulations may contain such incidental and consequential provisions as appear to the Board to be appropriate, including provisions requiring the making of returns.• [The words in bold print were added by the 1986 Act.]

46. Section 53 of the Finance Act 1991 provides, so far as relevant, as follows:

•(1) Section 343 (1A) of the Income and Corporation Taxes Act 1970 ... shall be deemed to have conferred power to make all the provisions in fact contained in the Income Tax (Building Societies) Regulations 1986 ...

(4) In relation to a building society which commenced proceedings to challenge the validity of the Regulations before 18 July 1986, this section shall not have effect to the extent that the Regulations apply (or purport to apply) to payments or credits made before 6 April 1986.•

47. Section 64 of the Finance (No. 2) Act 1992 provides as follows:

•(1) For the purposes of this section each of the following is a relevant order •

(a) the Income Tax (Reduced and Composite Rate) Order 1985 ...

(b) the Income Tax (Reduced and Composite Rate) Order 1986 ...

(c) the Income Tax (Reduced and Composite Rate) Order 1987 ...

(d) the Income Tax (Reduced and Composite Rate) Order 1988 ...

(2) If apart from this section a relevant order would not be so taken, it shall be taken to be and always to have been effective to determine the rate set out in the order as the reduced rate and the composite rate for the year of assessment for which the order was made.•

PROCEEDINGS BEFORE THE COMMISSION

48. In their applications (nos. 21319/93, 21449/93 and 21675/93), lodged with the Commission on 15 January 1993, 21 December 1992 and 11 January 1993, the applicants alleged violations of Article 6 of the Convention and Article 1 of Protocol No. 1, taken alone and in conjunction with Article 14 of the Convention.

On 30 August 1994 the Commission joined the National & Provincial's application and the Yorkshire's application, and on 10 January 1995 joined the Leeds• application with the other two applications. On 13 January 1995 the Commission declared the applications admissible. In its report of 25 June 1996 (Article 31) the Commission expressed the opinion that there had been no violation of Article 1 of Protocol No. 1 (thirteen votes to three); that there had been no violation of Article 1 of Protocol No. 1 taken in conjunction with Article 14 of the Convention (fourteen votes to two); that there had been a violation of Article 6 § 1 of the Convention (nine votes to seven); and that it was not necessary to examine the complaint under Article 6 § 1 of the Convention taken in conjunction with Article 14 of the Convention (fourteen votes to two). The full text of the Commission's opinion and of the four separate opinions contained in the report is reproduced as an annex to this judgment.

FINAL SUBMISSIONS TO THE COURT

49. The applicant societies requested the Court to find that the facts disclosed breaches of Article 1 of Protocol No. 1 and of Article 6 of the Convention, taken alone or in conjunction with Article 14 of the Convention, and to award them just satisfaction. The Government for their part requested the Court to decide and declare that the facts gave rise to no breach of the Convention.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

50. The applicants claimed to be victims of a breach of Article 1 of Protocol No. 1, which provides 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.•

A. As to the alleged expropriation of the applicant societies• assets

51. The applicant societies maintained that it had never been suggested during the passage of section 40 of the Finance Act 1985 (see paragraphs 15 and 16 above) or at the time when the 1986 Regulations had been laid before Parliament (see paragraphs 17 and 18 above) that the gap period would be brought into account on a second occasion for tax purposes. The Government had given repeated assurances, including during the parliamentary discussions on section 47 of the Finance Act 1986, that the new arrangements would not produce any additional revenue (see paragraph 22 above). However, this indeed was the effect of the Regulations since they taxed twice interest which had already been assessed to tax for the fiscal year 6 April 1985 to 5 April 1986. The tax had been

paid on or around 1 January 1986 in order to discharge their investor's liability for that fiscal year (see paragraph 14 above). The House of Lords in the Woolwich 1 litigation had acknowledged when striking down those Regulations that the transitional provisions subjected the interest paid in the gap period to double taxation, and this consideration was a fundamental part of the *ratio decidendi* of their decision (see paragraphs 29 and 30 above).

52. According to the applicant societies, it could only be concluded that the Government had misled Parliament as to the aim of the legislative scheme and had in effect procured the enactment of legislation which had the result of expropriating substantial amounts of money lawfully held in their reserves. They subsequently sought to legalise that expropriation by means of retrospective legislation which deprived the societies of their legal rights to recover those amounts.

53. The Government stressed that the sole intention behind section 40 of the Finance Act 1985 and the adoption of the 1986 Regulations was to ensure that in the transition from the prior to the actual year basis of assessment (see paragraphs 13 and 15 above) the interest paid by building societies to investors would be brought into account for tax purposes. Had the 1986 Regulations, as validated ultimately by section 53 of the 1991 Act (see paragraphs 33 and 34 above), not addressed the tax liability of the interest paid during the gap period in the way they did certain building societies like the applicant societies would have been left with considerable amounts of untaxed interest in their reserves. The interest paid in the gap period was taxed once and once only. The Government minister had correctly informed Parliament that the new arrangements would not produce additional revenue. The untaxed interest in the gap period would have been brought into account had the voluntary arrangements continued in force. The Regulations simply altered the timing of payment of tax on that interest by spreading the liability to pay it over successive fiscal years.

54. In the view of the Government, the applicant societies could not rely on the judgments given in the Woolwich 1 litigation to support their contention that the 1986 Regulations imposed double taxation. The Regulations had been declared void on purely technical grounds. Parliament had never been misled as to the effect which the 1986 Regulations would have on the gap period. Parliament had in fact legislated after extensive debates on the new arrangements in full knowledge of the concerns expressed by building societies at the relevant time about the effect of the Regulations.

55. Before the Court the Delegate of the Commission stated that it had been the clear intention of Parliament in enacting section 40 of the Finance Act 1985 and adopting the 1986 Regulations to ensure that building societies did not benefit from a windfall, but should remain liable to tax on interest paid to their investors in the gap period. Furthermore, there was no support in the House of Lords ruling in the Woolwich 1 litigation for the argument that the applicant societies had been subjected to a double imposition other than in a technical sense.

56. The Court notes that the assertions of the applicant societies in regard to the intention of Parliament in 1985 and 1986 are central to their complaints concerning the retroactive removal of their rights to recover the monies which they paid to the Inland Revenue. It is fundamental to their arguments on those complaints that those monies were in reality unlawfully expropriated from their reserves under the guise of taxation.

57. Without prejudice to its subsequent consideration of the applicant societies• allegations that they had been unlawfully deprived of their legal claims to restitution of their monies in breach of Article 1 of Protocol No. 1, the Court is of the opinion that it should clarify at the outset whether or not the applicant societies are correct in their submissions that the legislative measures taken in 1985 and 1986 subjected the interest which they paid to their investors in the gap period to a double imposition contrary to the intention of Parliament.

58. It is to be noted in this respect that, had the voluntary arrangements (see paragraph 8 above) continued to apply as between the building societies and the Inland Revenue, the interest would inevitably have been brought into account for tax purposes. Accordingly, and by way of example,

the Leeds would have had to pay to the Inland Revenue on or around 1 January 1987 tax on the interest earned by its investors between 1 October 1985 and 30 September 1986 in order to discharge the latter's liability to tax on that interest for the fiscal year 6 April 1986 to 5 April 1987. The interest paid in the gap period in issue would thus have been taxed, and subsequent gap periods would have been brought into account in future fiscal years in accordance with the same logic. The voluntary arrangements made no provision for interest to be omitted for tax-assessment purposes.

59. Since the interest earned by their investors in the gap period had been paid to them net of tax (see paragraph 10 above), the applicant societies had already deducted amounts representing tax on that interest. Those amounts were lodged in their reserves waiting to be brought into account. It is an inescapable conclusion that, had steps not been taken to bring those amounts into account in the move from the prior-period system (see paragraphs 13 and 14 above) to the actual-year system (see paragraphs 15 and 16 above), the applicant societies would have been left with considerable sums of money representing unpaid tax. It cannot be maintained that the effect of the transitional arrangements in the 1986 Regulations was to subject those amounts of money to double taxation other than in a technical sense, since no tax had ever been paid on the interest paid in the gap period before the changeover to the new actual-year scheme of assessment. Admittedly, by deeming the interest to have been paid in a later accounting period (see paragraph 17 above) the effect of the transitional regulations was to accelerate the payment of tax owed to the Inland Revenue in a way which may seem to be at variance with the measurement principle (see paragraph 7 above). However, this cannot serve to refute the conclusions that the volume of payments remained the same as between the old and the new system and that there was no increase in the revenue collected from the applicant societies.

60. Nor is the Court persuaded by the arguments of the applicant societies that the judgment of the House of Lords in the Woolwich 1 case (see paragraphs 29 and 30 above) provides support for their view that the effect of the transitional mechanism in the 1986 Regulations was to subject the interest paid to investors in the gap period to double taxation other than in a theoretical sense, having regard to the way in which the measurement principle was adjusted. As noted above (see paragraph 59), had the measurement principle not been modified the applicant societies would undoubtedly have each received a windfall, substantial in all cases but especially so in the case of the Leeds, which had the longest gap period. Neither is it convinced by their claim that Parliament was misled as to the effect of the transitional arrangements. It would appear that both section 40 of the Finance Act 1985 (see paragraph 15 above) and section 47 of the Finance Act 1986 (see paragraph 22 above) were fully discussed at the various legislative stages against the background of strong lobbying on the part of building societies to have the interest paid to investors in the gap period omitted from assessment. It cannot be said therefore that Parliament did not appreciate the impact of the 1986 Regulations, having regard to the opportunities which the opponents of the proposals had to question Government ministers and to clarify the precise implications of the scheme for building societies.

61. Having regard to the above conclusions, the Court will therefore consider the claims of the applicant societies that they were deprived of their legal rights to restitution of the monies paid to the Inland Revenue under the invalidated Regulations on the clear understanding that those monies were intended by Parliament to be charged to tax, had not been subjected to a double imposition and were not therefore wrongfully expropriated.

B. As to the deprivation of the applicant societies• legal claims

1. Whether there were possessions within the meaning of Article 1

62. The applicant societies contended that their legal claims to restitution of the assets which had been •unlawfully expropriated• by virtue of the 1986 Regulations constituted, like those assets, •possessions• within the meaning of Article 1 of Protocol No. 1. As a result of the House of Lords ruling in the Woolwich 2 litigation (see paragraph 44 above) the applicant societies must be considered to have had enforceable common-law rights to recover their assets, which rights accrued as soon as the money had been paid over to the Inland Revenue pursuant to the invalidated

Regulations. The Government had no defence to their claim for recovery, a point which they had conceded at the costs hearing in the wake of the stifled restitution proceedings brought by the Leeds and the National & Provincial (see paragraph 35 above). Having regard to the principles established by the Court in its Stran Greek Refineries and Stratis Andreadis v. Greece judgment of 9 December 1994 (Series A no. 301-B) and in its Pressos Compania Naviera S.A. and Others v. Belgium judgment of 20 November 1995 (Series A no. 332), they maintained that that right was sufficiently established and certain to constitute possessions and gave each of them a clear legitimate expectation that they would be treated similarly to the Woolwich on the basis of the law as it stood prior to the enactment of section 53 of the 1991 Act. The judicial review proceedings directed at the validity of the Treasury Orders (see paragraphs 38•40 above) and the second set of restitution proceedings (see paragraph 41 above) brought by all the applicant societies were an alternative route to the assertion of their enforceable rights to restitution of their monies. These rights were once again stifled under the impact of section 64 of the 1992 Act.

63. The Government disputed this conclusion and especially the reliance by the applicant societies on the case-law cited. None of the applicant societies' legal claims had ever given rise to a binding enforceable judgment. In fact the two sets of restitution proceedings had never proceeded beyond the issuing of writs (see paragraphs 31, 32 and 41 above) and the judicial review proceedings challenging the validity of the Treasury Orders (see paragraphs 38•40 above) were at an equally embryonic stage with the applicants having, at best, only an arguable chance of success. Furthermore, the first set of restitution proceedings brought by the Leeds and the National & Provincial (see paragraphs 31 and 32 above) and the second set of restitution proceedings brought by all three applicant societies (see paragraph 41 above) were in reality opportunistic legal moves having regard to the dates when the writs were issued and the Government's clear intentions at those times. In fact the second set of restitution proceedings, which were contingent on securing victory in the judicial review proceedings, were bound to fail since they were launched after the Government had officially announced their intention to validate retrospectively the Treasury Orders (see paragraph 42 above).

64. For the above reasons the Government requested the Court to find that Article 1 of Protocol No. 1 was not applicable since the applicant societies could not validly claim to have •possessions•.

65. The Commission considered that the restitution proceedings initiated by the Leeds and the National & Provincial (see paragraphs 31 and 32 above) were "possessions" having regard to the scope of the decision of the House of Lords in the Woolwich 2 litigation. Had the Government not acted as they did and secured the passage of section 53 of the 1991 Act through Parliament (see paragraphs 33 and 34 above), there was nothing to suggest that the authorities would have had any sustainable defence to the restitution claim.

66. In the view of the Commission, it was less certain, however, whether the judicial review proceedings and the second set of restitution proceedings (see paragraphs 38•40 and paragraph 41 above) amounted to "possessions". Nevertheless, the Commission was prepared to assume that those claims were possessions, having regard to the background to the proceedings and to the fact that they were in effect alternative routes to the assertion of the restitution claims which had been extinguished by section 53 of the 1991 Act. Before the Court the Delegate of the Commission stated that the Commission had in fact assumed that the legal claims asserted by each of the applicant societies were possessions in order to bring into play the third sentence of Article 1 of Protocol No. 1 which preserves the right of a Contracting State to pass laws which it deems necessary to secure the payment of taxes.

67. The Court notes that the decision of the House of Lords in the Woolwich 2 litigation lies at the heart of the applicant societies• contention that the claims which they sought to assert in each of the three sets of legal proceedings amounted to "possessions" within the meaning of Article 1 of Protocol No. 1. In that landmark decision the House of Lords established that a plaintiff had a prima facie common-law right to repayment of sums paid to a public authority in the form of taxes pursuant to a demand which is found to be *ultra vires* (see paragraph 44 above). The Woolwich recovered the interest owing on sums paid to the Inland Revenue on the strength of the law on

restitution as so clarified, having already been repaid towards the end of 1987 the monies which had been collected from it by the Inland Revenue under the Regulations which, by that stage, had been declared invalid by the High Court (see paragraph 26 above). However, the Leeds and the National & Provincial had not themselves secured an enforceable final judgment in their favour at the time of instituting the first set of restitution proceedings and it may be questioned whether they could be considered in the circumstances to have had an acquired right to the recovery of their monies at that time (see, *mutatis mutandis*, the Stran Greek Refineries and Stratis Andreadis judgment cited above, p. 85, §§ 61•62). The strength of their contention on this aspect lies essentially in the fact, firstly, that the Inland Revenue had repaid the Woolwich the principal sum (see paragraph 26 above) when it was discovered that Regulation 11 (4) of the 1986 Regulations was defective, entailing a risk that the transitional arrangements could not be saved despite the enactment of section 47 of the Finance Act 1986 (see paragraph 22 above), and, secondly, that the House of Lords in the Woolwich 1 case (see paragraph 29 above) ultimately found the 1986 Regulations including the transitional arrangements to be void in their entirety. It is significant in this regard that the Government conceded the merits of the cases brought by the Leeds and the National & Provincial (see paragraph 35 above), thereby indicating that in the absence of section 53 of the 1991 Act they would have lost the cases.

68. At the same time it must also be observed that the Leeds and the National & Provincial brought their restitution proceedings at a time when the law on restitution was not in fact favourable to the outcome of their cases. The House of Lords judgment in the Woolwich 2 case, which is central to their claim to have an established right amounting to possessions, was in fact delivered one year after the writs had been issued. Furthermore, while it may be the case that the authorities did not intimate to the applicant societies in the course of the Woolwich 1 litigation that they would seek to restore with retroactive effect the original intention of Parliament should that case go against the Inland Revenue, it is reasonable to question whether these two building societies could have had a "legitimate expectation" (see paragraph 62 above) that the Government would not have reacted as they did to the outcome of the litigation. As the Government have pointed out (see paragraph 63 above), the writs were issued after the decision had been taken to rectify with retrospective effect the inadvertent defects in the 1986 Regulations and in the days immediately preceding the official announcement by the Government of this course of action (see paragraphs 30•32 above).

69. While noting that the Leeds and the National & Provincial may be considered to have at best a precarious basis on which to assert a right amounting to "possessions", the Court is of the view that the claims asserted in the judicial review proceedings (see paragraphs 38•40 above) and the second set of restitution proceedings brought by all three applicant societies in May and June 1992 respectively (see paragraphs 39 and 40 above) could not be said to be sufficiently established or based on any "legitimate expectation" (see paragraph 62 above) that those claims would be determined on the basis of the law as it stood. By that stage Parliament had shown its continuing resolve to reassert its original intention to tax the interest paid in the gap period by enacting section 53 of the 1991 Act; nor could they have any castiron guarantee of obtaining the declaration sought in the judicial review proceedings to enable them to recover their monies in the follow-up restitution proceedings.

70. While expressing no concluded view as to whether any of the claims asserted by the applicant societies could properly be considered to constitute possessions, the Court, like the Commission (see paragraph 66 above), is prepared to proceed on the working assumption that in the light of the Woolwich 2 ruling the applicant societies did have possessions in the form of vested rights to restitution which they sought to exercise in direct and indirect ways in the various legal proceedings instituted in 1991 and 1992. In so doing, it notes that the arguments which have been advanced in support of their contention that they had possessions are indissociably bound up with their complaints that they were unjustifiably deprived of those possessions. It will therefore treat Article 1 of Protocol No. 1 as applicable for the purposes of examining whether there was an interference with their legal claims and, if so, whether that interference was justified in the circumstances.

2. Whether there was an interference

71. The applicant societies asserted that the concrete effect of section 53 of the 1991 Act was to stifle the restitution proceedings instituted by the Leeds and the National & Provincial (see paragraph 35 above). The subsequent enactment of section 64 of the 1992 Act (see paragraphs 42 and 43 above) effectively removed any prospect of securing redress in the domestic courts against the "unlawful expropriation" of their assets. There was accordingly an interference with their possessions.

72. The Government did not deny that the retrospective effects of the impugned measures brought an end to the applicant societies• claims to recover the amounts which they had paid to the Inland Revenue.

73. The Commission concluded that the retrospective measures had the effect of interfering with the applicant societies' possessions on the hypothesis that the various claims did amount to such.

74. The Court notes that it is common ground that the retroactive measures operated in a way which constituted an interference with the enjoyment of the applicant societies• possessions. On the working assumption that the legal claims in issue amounted to possessions within the meaning of Article 1 of Protocol No. 1 (see paragraph 70 above), the Court sees no reason to reach a contrary conclusion. It will therefore assess whether or not that interference was justified.

3. Whether the interference was justified

75. The applicant societies reiterated that they were fairly and reasonably entitled to consider themselves in exactly the same position as the Woolwich with vested rights to recover the monies which had been expropriated from them under the 1986 Regulations (see paragraph 62 above). However, the Government intentionally procured the enactment of retrospective primary legislation in order to stifle the opportunity to assert those rights in a way which was repugnant to principles of legal certainty and legitimate expectation. The retrospective measures constituted a disproportionate and discriminatory interference with their rights which left them without any compensation. The measures were solely motivated by the intent of the authorities to retain the applicant societies• assets and could not be considered justified as being necessary to secure the payment of taxes within the meaning of the second paragraph of Article 1 of Protocol No. 1. The monies expropriated were not tax since all liability to pay tax on the interest earned by their investors in the gap period had been discharged (see paragraphs 51 and 52 above). In any event that provision only concerned procedural measures taken to enforce tax legislation and could not be invoked to justify substantive tax legislation such as the Finance Acts in issue in the instant case.

76. The Government argued that the ultimate aim of the impugned measures was, in line with the original intention of Parliament, to secure the payment of tax on the interest paid by building societies during the gap period and, in the case of section 64 of the 1992 Act, also to secure GBP 15 billion of revenue which had been collected from 1986 onwards from building societies, banks and other deposit institutions (see paragraph 42 above).

Having regard to a Contracting State's margin of appreciation in the tax field and to the publicinterest considerations at stake, it could not be said that the decisions taken by Parliament to enact these measures with retrospective effect were manifestly without reasonable foundation or failed to strike a fair balance between the demands of the general interest of the community and the protection of the rights of the applicant societies. The latter were in fact seeking by means of opportunistic legal proceedings to exploit technical defects in the 1986 Regulations and to frustrate the original intention of Parliament. They clearly understood what that intention was and they could not have had any legitimate expectations following the Woolwich 1 litigation that Parliament would be content to leave the law as it then stood and allow them to retain a windfall.

77. The Commission found that the interference with the applicant societies• legal claims was justified and that there was no violation of Article 1 of Protocol No. 1. Parliament intended by section 47 of the 1986 Act to authorise the Inland Revenue to charge to tax the interest paid to investors in the gap period. The aim of section 53 of the 1991 Act (see paragraph 33 above) and section 64 of the 1992 Act (see paragraph 42 above) was to prevent building societies from frustrating that intention by exploiting technical defects in the drafting of the Regulations and benefiting from a windfall. In adopting retrospective measures to reaffirm that intention and to secure the payment of tax, the legislature did not upset the fair balance between the demands of the general interest of the community and the protection of the fundamental rights of the applicant societies.

(a) The applicable rule

78. The Court recalls that Article 1 of Protocol No. 1 guarantees in substance the right to property. It comprises three distinct rules. The first, which is expressed in the first sentence of the first paragraph and is of a general nature, lays down the principle of the peaceful enjoyment of possessions. The second, in the second sentence of the same paragraph, covers deprivation of possessions and makes it subject to certain conditions. The third, contained in the second paragraph, recognises that the Contracting States are entitled to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties. However, the three rules are not "distinct" in the sense of being unconnected: the second and the third rules are concerned with particular interferences 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 (see, among many other authorities, the Gasus Dosier- und F•rdertechnik GmbH v. the Netherlands judgment of 23 February 1995, Series A no. 306-B, pp. 46•47 § 55).

79. Having regard to the fact that the background to the alleged deprivation of the applicant societies• rights is constituted by the first unsuccessful steps taken by Parliament to ensure that interest paid in the gap period was charged to tax, it would appear to the Court to be the most natural approach to examine their complaints from the angle of a control of the use of property in the general interest "to secure the payment of tax", which falls within the rule in the second paragraph of Article 1. In so proceeding, it recalls that it has already found that the transitional arrangements contained in the 1986 Regulations did not, contrary to the assertions of the applicant societies, impose double taxation on the interest paid to their investors in the gap period or amount to a wrongful expropriation of their assets (see paragraph 61 above). On that factual understanding, the efforts to secure a firm legal basis firstly, and unsuccessfully, in section 47 of the Finance Act 1986 (see paragraphs 22 and 30 above), and secondly in section 53 of the 1991 Act (see paragraphs 33•35 above) to give effect to Parliament's legitimate aim when adopting the defective Regulations (see paragraphs 15•18 above) could be considered equally to be measures to secure the payment of tax. It is to be recalled in this regard that irrespective of the move to the actual-year system the interest in issue would always have been liable to be brought into account for tax purposes (see paragraphs 58 and 59 above).

(b) Compliance with the conditions laid down in the second paragraph

80. According to the Court's well-established case-law (see, among many other authorities, the Gasus Dosier- und F•rdertechnik GmbH judgment cited above, p. 49, § 62), an interference, including one resulting from a measure to secure the payment of taxes, must strike a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual•s fundamental rights. The concern to achieve this balance is reflected in the structure of Article 1 as a whole, including the second paragraph: there must therefore be a reasonable relationship of proportionality between the means employed and the aims pursued. Furthermore, in determining whether this requirement has been met, it is recognised that a Contracting State, not least when framing and implementing policies in the area of taxation, enjoys a wide margin of appreciation and the Court will respect the legislature's assessment in such

matters unless it is devoid of reasonable foundation (see the Gasus Dosier- und F•rdertechnik GmbH judgment cited above, pp. 48•49, § 60).

81. Against that background, the Court notes that in enacting section 53 of the 1991 Act with retroactive effect Parliament was concerned to restore and reassert its original intention which had been stymied by the finding of the House of Lords in the Woolwich 1 litigation that the 1986 Regulations were *ultra vires* on technical grounds (see paragraphs 29 and 30 above). The decision to remedy the technical deficiencies of the Regulations with retroactive effect was taken before 7 March 1991, namely before the date when the Leeds and the National & Provincial issued their writs (see paragraphs 30 and 33 above) and without regard to the imminent launch of the first set of restitution proceedings. Although section 53 had the effect of extinguishing the restitution claims of those two applicant societies, it does not appear to the Court that the ultimate aim of the measure was without reasonable foundation having regard to the public-interest considerations which underpinned the proposal to legislate with retroactive effect and Parliament's endorsement of that proposal. There is in fact an obvious and compelling public interest to ensure that private entities do not enjoy the benefit of a windfall in a changeover to a new tax-payment regime and do not deny the Exchequer revenue simply on account of inadvertent defects in the enabling tax legislation, the more so when such entities have followed the debates on the original proposal in Parliament and, while disagreeing with that proposal, have clearly understood that it was Parliament's firm intention to incorporate it in legislation. Nor can the applicant societies maintain that the effect of the measure imposed an excessive and individual burden on them given that the interest they had paid to investors in the gap period would have been brought into account for tax purposes had the voluntary arrangements continued in force (see paragraph 58 above). They cannot assert that they had suffered prejudice other than in the sense that they were treated differently from the Woolwich. However, the substance of the latter allegation falls to be considered under their complaint under Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 (see paragraph 84 below).

82. Furthermore, it is to be noted that the history of the enactment of section 64 of the 1992 Act must also be seen in terms of the same struggle between the legislature's efforts to safeguard the tax paid by the applicant societies and the latter's attempts to frustrate by all legal means possible those efforts and recover that tax. The challenge to the validity of the Treasury Orders was in reality an initiative on the part of all three applicant societies to recover indirectly what two of them had been denied under the effect of section 53 of the 1991 Act (see paragraph 35 above). If the enactment of the latter provision can be considered to be justified on public-interest grounds (see paragraph 81 above), it must also be the case that the same public-interest justification can be lawfully asserted by the respondent State to thwart the challenge to the Treasury Orders. Indeed, on that occasion much more was at stake than the assertion of Parliament's right to secure tax on the interest paid by building societies over the course of the gap period since the vulnerability of the Treasury Orders to legal challenge placed at risk very substantial amounts of revenue collected from 1986 onwards from institutions other than building societies. The public-interest considerations in removing any uncertainty as to the lawfulness of the revenue collected must be seen as compelling and such as to outweigh the interests defended by the applicant societies in contesting the legality of the rate set by the Treasury Orders in order to try once again to circumvent Parliament•s original intention.

83. The Court considers therefore that the actions taken by the respondent State did not upset the balance which must be struck between the protection of the applicant societies• rights to restitution and the public interest in securing the payment of taxes. There has accordingly been no violation of Article 1 of Protocol No. 1.

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 taken IN CONJUNCTION WITH ARTICLE 14 OF THE CONVENTION

84. The applicant societies maintained that the impugned measures gave rise to a breach of Article 1 of Protocol No. 1 taken in conjunction with Article 14 of the Convention, having regard to their discriminatory effect. Article 14 of the Convention is worded as follows:
"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."

85. The applicant societies contended that they were in a materially identical situation to that of the Woolwich as regards the application of the 1986 Regulations. Like the Woolwich they enjoyed the same rights to restitution of the monies which they had paid to the Inland Revenue pursuant to an unlawful demand. The Leeds in particular had closely associated itself with the Woolwich•s decision to seek judicial review of the 1986 Regulations and all the applicant societies had at various stages made formal demands for repayment. They were not required to join the Woolwich•s judicial review proceedings given that the outcome of the action would have been declaratory of the law applicable to all taxpayers. They were thus entitled to await the result of that litigation. On the strength of the House of Lords ruling in the Woolwich 1 case the Leeds and the National & Provincial issued writs to institute their own restitution proceedings against the authorities.

86. Furthermore, section 64 of the 1992 Act could not be said to be non-discriminatory as between the Woolwich and the applicant societies merely because it was of general application. This provision in fact favoured the Woolwich since the Woolwich had recovered all the monies owing to it.

87. The Commission, with whom the Government agreed, concluded that there had been no breach under this head. In contrast with the Woolwich, none of the applicants had instituted proceedings to challenge the validity of the 1986 Regulations. The Woolwich alone had borne the costs and incurred the risks of litigation. The applicant societies could not therefore be considered to have been in a relevantly similar situation to that of the Woolwich. In any event there was a reasonable and objective justification for the difference in treatment, having regard to the public-interest considerations motivating the enactment of section 53 of the 1991 Act and the appropriateness of excluding the Woolwich from the retroactive effects of that measure given that that building society had secured a final court judgment in its favour. As to section 64 of the 1992 Act, the Commission found that this provision applied across the board and could not be considered to be discriminatory in its effect. The Government supported this conclusion.

88. The Court reiterates that Article 14 of the Convention affords protection against discrimination in the enjoyment of the rights and freedoms safeguarded by the other substantive provisions of the Convention. However, not every difference in treatment will amount to a violation of this Article.
Instead, it must be established that other persons in an analogous or relevantly similar situation enjoy preferential treatment, and that there is no reasonable or objective justification for this distinction. Furthermore, Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law (for a recent authority, see the Stubbings and Others v. the United Kingdom judgment of 22 October 1996, *Reports of Judgments and Decisions* 1996-IV, p. 1507, § 72).

89. It is clear that the applicant societies were in an analogous if not identical situation with respect to the impact of the transitional mechanism in the 1986 Regulations on the monies held in their reserves. However, the Woolwich alone took an independent and bold stance by mounting a legal challenge to the validity of the Regulations (see paragraph 21 above). That building society was undeterred by the attempt of Parliament to stifle the litigation by enacting section 47 of the Finance Act 1986 (see paragraph 22 above). Admittedly, the Woolwich's action was backed by the applicant societies and the Leeds in particular may be considered to have conspicuously manifested its solidarity with the Woolwich (see paragraph 20 above). However, the Court shares the view of the Commission that the Woolwich alone showed its readiness to bear the costs and risks of the litigation, taking complex and expensive proceedings against the Inland Revenue on two occasions as far as the House of Lords. By

the time section 53 of the 1991 Act was enacted, the Leeds and the National & Provincial had not proceeded beyond the stage of issuing writs, whereas the Woolwich had secured a victory in the House of Lords (see paragraphs 29 and 30 above) and there were reasonable prospects that the House of Lords would uphold the decision of the Court of Appeal in its restitution proceedings allow ng it interest on the sums paid (see paragraphs 36 and 37 above). It is also to be noted that the authorities had already repaid to the Woolwich the tax which had been collected from it with interest from 31 July 1987 (see paragraph 26 above). In these circumstances, the Court does not accept that the applicant societies were in fact in a relevantly similar situation to that of the Woolwich.

90. The Court also considers that, even if it were possible to regard the applicant societies as having been in a relevantly similar situation to the Woolwich in view of their arguments on the *erga omnes* effect of the remedy sought by the Woolwich (see paragraph 85 above), there was nevertheless a reasonable and objective justification for the distinction made in section 53 of the 1991 Act (see paragraph 34 above). It was the aim of Parliament in enacting that provision to restore its original intention to secure the liability to tax of the interest paid to investors in the gap period and to make the Regulations immune from any further exploitation on technical grounds. The decision to do so retrospectively has been found by the Court to be justified in the public interest (see paragraph 81 above). To exclude the Woolwich from the retroactive effect of section 53 could be considered on reasonable and objective grounds to be justified given that by the time of enactment of that section the Woolwich had secured a final judgment in its favour from the House of Lords and it was understandable that Parliament did not wish to interfere with a judicial decision which brought to an end litigation which had lasted over three years.

91. As to the effect of section 64 of the 1992 Act (see paragraphs 33•35 above), the Court notes that the measure applied generally to building societies, banks and other deposit institutions. Admittedly the Woolwich was not concerned about the validity of the Treasury Orders since it had no interest in challenging them. However, it cannot be maintained that section 64 perpetuated any difference in treatment between the Woolwich and the applicant societies which resulted from section 53 of the 1991 Act given the Court's earlier conclusions on that complaint (see paragraphs 89 and 90 above).

92. Having regard to the above considerations, the Court concludes therefore that there has been no breach of Article 1 of Protocol No. 1 taken in conjunction with Article 14 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 6 • 1 OF THE CONVENTION

93. The applicant societies further maintained that the measures taken by the respondent State deprived them of their right of access to a court for a determination of their civil rights to restitution of monies to which they were lawfully entitled. They alleged that there had been a breach of Article 6 § 1 of the Convention, which provides to the extent relevant:

"In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."•

A. Applicability of Article 6 • 1

94. The applicant societies maintained that the subject matter of the three sets of legal proceedings which they had initiated (see paragraphs 31, 32 and 38•41 above) was pecuniary in nature and the outcome of the litigation in each instance was decisive for their private-law rights to restitution of the monies of which they had been unlawfully deprived by the respondent State. Should any doubts exist about the classification of the judicial review proceedings which each society set in motion between 10 July 1991 and 3 March 1992 (see paragraphs 38•40 above), the Court should find, like the Commission, that these proceedings were in fact an alternative route to the recovery of their monies. As such, the proceedings could not therefore be considered to be purely of a public-law nature.

95. The Government disputed the applicability of Article 6 § 1 of the Convention to the various proceedings instituted by the applicant societies. While the first set of restitution proceedings instituted by the Leeds and the National & Provincial (see paragraphs 31 and 32 above) may ostensibly have borne the hallmark of private-law proceedings, they nonetheless concerned a determination of rights and obligations which derived from tax legislation and which were therefore fiscal in nature. The judicial review proceedings instituted by the applicant societies (see paragraphs 38•40 above) were directed at obtaining a discretionary public-law remedy and were not concerned with securing restitution of the monies which they had paid pursuant to the 1986 Regulations. Furthermore, the second set of restitution proceedings brought by the applicant societies (see paragraph 41 above) depended on the outcome of the judicial review proceedings and for this reason could not be considered to be of a private-law nature. For the above reasons, the Government maintained that the applicant societies could not rely on Article 6 § 1.

96. The Commission concluded that Article 6 § 1 was applicable. The two sets of restitution proceedings (see paragraphs 30, 31 and 41 above) were pecuniary in nature. The judicial review proceedings (see paragraphs 38•40 above) were closely linked to the second set of restitution proceedings (see paragraph 41 above) and formed part of a sequence of litigation which had its roots in the defective draftsmanship of section 40 of the Finance Act 1985 and the transitional provisions of the 1986 Regulations.

97. The Court considers that both sets of restitution proceedings (see paragraphs 30, 31 and 41 above) were private-law actions and were decisive for the determination of private-law rights to quantifiable sums of money. This conclusion is not affected by the fact that the rights asserted in those proceedings had their background in tax legislation and the obligation of the applicant societies to account for tax under that legislation (see, *mutatis mutandis*, the Editions P•riscope v. France judgment of 26 March 1992, Series A no. 234-B, p. 66, § 40).

98. As to the judicial review proceedings (see paragraphs 38•40 above), it is to be noted that these were closely interrelated with the second set of restitution proceedings and were part of a calculated strategy to reassert the private-law claims which had been extinguished by section 53 of the 1991 Act. In these circumstances and irrespective of the public-law nature of that litigation, the judicial review proceedings must also be considered to have been decisive of private-law rights.

99. The Court concludes therefore that Article 6 § 1 of the Convention is applicable.

B. Compliance with Article 6 § 1

100. The applicant societies contended that the Government of the respondent State intentionally procured the enactment of retrospective legislation to thwart their access to a court to assert their vested rights to restitution of their assets. They argued that the legal victories secured by the Woolwich (see paragraphs 29 and 44 above) left the authorities with no defence to their claims. Indeed, the authorities had in fact conceded this by paying the costs incurred by the Leeds and the National & Provincial in bringing the first set of restitution proceedings (see paragraph 35 above). It was equally significant that the Government minister at the time of the passage through Parliament of the bill which eventually became the 1992 Act declared that section 64 thereof was designed to interfere with ongoing legal proceedings, namely the legal challenge to the validity of the Treasury Orders (see paragraph 42 above).

101. While accepting that limitations on the right of access to a court guaranteed by Article 6 § 1 may in certain well-defined circumstances be justified having regard to a Contracting State's margin of appreciation, the applicant societies stressed that any such margin cannot for the purposes of that provision be as broad as the one which may be invoked by a Contracting State under Article 1 of Protocol No. 1. With reference to the Court's own case-law governing the scope of limitations to the right of access to a court, they insisted that the retrospective measures did not pursue a legitimate aim given that the Government's overriding concern was to legalise the unlawful expropriation of their

assets. The resulting interference was also disproportionate. More importantly, the very essence of their right of access to a court had been impaired since the concrete result of section 53 of the 1991 Act and section 64 of the 1992 Act was to remove with retrospective effect the causes of action and render fruitless any attempt to secure redress before the courts.

102. The Government reasoned that the •possessions• of which the applicant societies claimed they had been deprived in breach of Article 1 of Protocol No. 1 were in reality their claims to restitution of the monies which they had been required to pay to the Inland Revenue. It must follow therefore that the lawful deprivation of the substance of their claims justified the removal of the procedural protection of those claims. For this reason, a finding by the Court that there had been no violation of Article 1 of Protocol No. 1 compelled a similar finding in respect of the applicant societies' complaints under Article 6.

103. The Government further maintained that there was no absolute rule which prohibited the intervention of the legislature in pending legal proceedings to which the State was a party. Whether or not retrospective legislation having this effect was lawful or not from the angle of Article 6 needed to be assessed in the light of factors such as the background to the litigation, the stage reached in the legal proceedings and the reasons which motivated legislative intervention. Referring therefore to the arguments which they advanced both to dispute that the applicant societies' legal claims amounted to possessions and to justify the deprivation of the applicant societies' legal claims under Article 1 of Protocol No. 1 (see paragraphs 63 and 76 above), the Government requested the Court to find that the same justifications operated in defence of the alleged violation of Article 6.

104. The Commission concluded that there had been a violation of Article 6 • 1. While there may have been legitimate reasons for the introduction of section 53 of the 1991 Act and section 64 of the 1992 Act, by retrospectively validating the 1986 Regulations and the Treasury Orders which were the subject of pending litigation, the respondent State had intervened through the legislature in a manner which was decisive to ensure a favourable outcome of proceedings to which it itself was party. The effect of the measures was thus to deprive the applicant societies of their right to a determination of their civil rights and obligations following a fair hearing before a court.

105. The Court recalls that Article 6 § 1 of the Convention embodies the "right to a court", of which the right of access, that is, the right to institute proceedings before a court in civil matters, constitutes one aspect. However, this right 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 Stubbings and Others judgment cited above, p. 1502, § 50).

106. It is to be noted at the outset that the effect of section 53 of the 1991 Act was to deprive the Leeds and the National & Provincial of their chances of winning their restitution proceedings against the Inland Revenue (see paragraph 35 above). Section 64 of the 1992 Act effectively removed any hope which all three applicant societies may have had of restoring their chances of securing a favourable outcome against the Inland Revenue and recovering the tax they had paid. At no stage did the legislature intervene directly to bar the applicant societies• access to a court to seek a determination of the rights which they wished to assert. Admittedly, the end result of sections 53 and 64 was to condemn to failure any attempt by the applicant societies to proceed with their claims since Parliament, by means of primary legislation, had rendered both the 1986 Regulations and the Treasury Orders immune from judicial scrutiny. The applicant societies accordingly took the decision to discontinue the various proceedings which they had launched in the knowledge that they had no prospects of success.

107. Having regard to the above considerations, the Court must examine whether the action taken by the legislature on both occasions to deprive the applicant societies of their chances of winning litigation against the respondent State constituted an interference with their right of access to a court. In so doing, it will have regard to all the circumstances of the case and will subject to close scrutiny the reasons adduced by the respondent State for justifying any intervention which may have occurred in pending litigation as a result of the retrospective effects of section 53 of the 1991 Act and section 64 of the 1992 Act.

108. It is to be noted firstly that the applicant societies disputed from the very beginning their liability to pay tax on the interest they had paid to their investors in the gap period. The concerns of building societies were made known to Parliament during the passage of section 40 of the Finance Act 1985 (see paragraphs 15 and 16 above) and section 47 of the Finance Act 1986 (see paragraph 22 above). However, by enacting those measures Parliament clearly affirmed its intention to bring the interest paid in the gap period into account for tax purposes in the manner indicated in the 1986 Regulations.

109. The applicant societies subsequently became involved in a struggle with the Treasury through the courts in order to circumvent that intention, relying firstly on technical defects in the 1986 Regulations and secondly on alleged defects in the Treasury Orders. They followed closely the outcome of the Woolwich 1 litigation, and when the latter building society succeeded in having the 1986 Regulations invalidated on technical grounds the Leeds and the National & Provincial launched their own proceedings in the form of restitution actions (see paragraphs 31 and 32 above) in order to take advantage of the loophole exposed by the House of Lords in the Woolwich 1 case (see paragraphs 29 and 30 above). However, having regard to the clear aim of Parliament in adopting the impugned measures (see paragraph 108 above), these two applicant societies must reasonably be considered to have anticipated at the close of the Woolwich 1 litigation that the Treasury would seek Parliament's approval to cure the technical defects in the 1986 Regulations and would not be content on public-interest grounds to allow a substantial amount of already collected revenue to be lost on account of a technicality. It is to be noted in this respect that the Director-General of the Building Societies Associations was not surprised by the Treasury•s announcement that retrospective legislation would be introduced in the form of section 53 of the 1991 Act (see paragraph 35 above). It is also to be noted that the Leeds and the National & Provincial instituted their restitution proceedings after the authorities had formally decided to seek Parliament•s approval for the retrospective validation of the 1986 Regulations and in the days immediately before the official announcement of that decision (see paragraphs 30•33 above). In these circumstances, those proceedings must be considered to have been an attempt to benefit from the vulnerability of the authorities' situation following the outcome of the Woolwich 1 litigation and to pre-empt the enactment of remedial legislation.

110. Furthermore, the decision of the authorities to legislate with retrospective effect to remedy the defect in the 1986 Regulations was taken without regard to pending legal proceedings and with the ultimate aim of restoring Parliament's original intention with respect to all building societies whose accounting periods ended in advance of the start of the fiscal year. That the extinction of the restitution proceedings was a significant consequence of the implementation of that aim cannot be denied. Nevertheless, it cannot be maintained that the Leeds and the National & Provincial were the particular targets of the authorities' decision.

111. While it is true that it was openly acknowledged by the authorities that the enactment of section 64 of the 1992 Act was intended to bring an end to the judicial review proceedings brought by all three applicant societies (see paragraph 42 above), those proceedings were in reality a next stage in the struggle with the Treasury and a deliberate strategy to frustrate the original intention of Parliament. This is borne out by the aim of the applicant societies in bringing the contingent restitution n proceedings to recover no more than they had paid to the Inland Revenue under the 1986 Regulations (see paragraph 41 above). Given the reaction of the authorities to the outcome of the Woolwich 1 litigation, the applicant societies could not safely rely on the Treasury remaining inactive in the face of a further challenge to Parliament's original intention, the more so since that

challenge was directed at the validity of the Treasury Orders which formed the legal basis for the very substantial amounts of revenue collected from 1986 onwards, not just from building societies but also from banks and other deposit institutions (see paragraph 42 above).

112. As noted above (see paragraph 107) the Court is especially mindful of the dangers inherent in the use of retrospective legislation which has the effect of influencing the judicial determination of a dispute to which the State is a party, including where the effect is to make pending litigation unwinnable. Respect for the rule of law and the notion of a fair trial require that any reasons adduced to justify such measures be treated with the greatest possible degree of circumspection (see the Stran Greek Refineries and Stratis Andreadis judgment cited above, p. 82, § 49). However, Article 6 § 1 cannot be interpreted as preventing any interference by the authorities with pending legal proceedings to which they are a party. It is to be noted that in the present case the interference caused by section 64 of the 1992 Act was of a much less drastic nature than the interference which led the Court to find a breach of Article 6 § 1 in the Stran Greek Refineries and Stratis Andreadis case (cited above). In that case the applicants and the respondent State had been engaged in litigation for a period of nine years and the applicants had an enforceable judgment against that State in their favour. The judicial review proceedings launched by the applicant societies had not even reached the stage of an *inter partes* hearing. Furthermore, in adopting section 64 of the 1992 Act with retrospective effect the authorities in the instant case had even more compelling publicinterest motives to make the applicant societies' judicial review proceedings and the contingent restitution proceedings unwinnable than was the case with the enactment of section 53 of the 1991 Act. The challenge to the Treasury Orders created uncertainty over the substantial amounts of revenue collected from 1986 onwards (see paragraph 42 above). It must also be observed that the applicant societies in their efforts to frustrate the intention of Parliament were at all times aware of the probability that Parliament would equally attempt to frustrate those efforts having regard to the decisive stance taken when enacting section 47 of the Finance Act 1986 and section 53 of the 1991 Act. They had engaged the will of the authorities in the tax sector, an area where recourse to retrospective legislation is not confined to the United Kingdom, and must have appreciated that the public-interest considerations in placing the 1986 Regulations on a secure legal footing would not be abandoned easily.

113. For the above reasons, the Court concludes that the applicant societies cannot in the circumstances justifiably complain that they were denied the right of access to a court for a judicial determination of their rights. There has accordingly been no breach of Article 6 § 1 of the Convention.

IV. ALLEGED violation OF ARTICLE 6 § 1 of THE CONVENTION taken IN CONJUNCTION WITH ARTICLE 14

114. The applicant societies complained in addition that the impugned measures violated Article 6 • 1 of the Convention taken in conjunction with Article 14.

115. They reiterated that they were in a virtually identical situation to that of the Woolwich. Like the latter building society they possessed common-law rights to restitution of monies expropriated by the respondent State. The Woolwich had been allowed to recover in full following independent judicial determinations of its claims. Unlike the applicant societies, the Woolwich was excluded from the retrospective effects of section 53 of the 1991 Act. The Government minister responsible for the passage through Parliament of the 1992 Act had expressly acknowledged that there had been a disparity of treatment between the Woolwich and other building societies (see paragraph 42 above). That disparity was maintained in section 64 of the 1992 Act on account of the fact that the Woolwich had recovered everything owing to it and was not therefore concerned about the validity of the Treasury Orders.

116. The Government contended that the applicant societies were not in a relevantly similar position to the Woolwich and, further, that there existed a reasonable and objective justification for

the difference in treatment. They relied on the reasoning used by the Commission to reach its finding that there had been no breach of Article 1 of Protocol No. 1 taken in conjunction with Article 14 of the Convention (see paragraph 87 above).

117. The Commission did not find it necessary to examine the applicant societies• complaints under this head, having regard to its conclusion under Article 6 § 1 of the Convention (see paragraph 104 above).

118. The Court observes that the complaints raised by the applicant societies under this head reflect the substance of their earlier complaints under Article 1 of Protocol No. 1 taken in conjunction with Article 14 (see paragraphs 84•86 above). It concluded in connection with those complaints that the Woolwich and the applicant societies were not in a relevantly similar situation and that in any event there was a reasonable and objective justification for excluding the Woolwich from the retrospective effects of section 53 of the 1991 Act. Furthermore, it could not be validly contended that section 64 of the 1992 Act was discriminatory in its effect (see paragraphs 89•92 above).

119. The Court considers that the reasons which it has adduced in respect of the above finding equally support the conclusion that there has been no violation of Article 6 § 1 taken in conjunction with Article 14 of the Convention. The Court finds therefore that the applicant societies were not victims of a violation under this head.

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been no violation of Article 1 of Protocol No. 1;
2. *Holds* by eight votes to one that there has been no violation of Article 1 of Protocol No. 1 taken in conjunction with Article 14 of the Convention;
3. *Holds* unanimously that there has been no violation of Article 6 • 1 of the Convention;
4. *Holds* by eight votes to one that there has been no violation of Article 6 • 1 of the Convention taken in conjunction with Article 14 of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 23 October 1997.
Signed: Rolv RYSSDAL
President *Signed*: Herbert PETZOLD
Registrar In accordance with Article 51 • 2 of the Convention and Rule 53 § 2 of Rules of Court A, the partly concurring, partly dissenting opinion of Mr Jambrek is annexed to this judgment.
Initialled: R. R.
Initialled: H. P.

partly concurring, partly DISSENTING OPINION OF JUDGE JAMBREK

1. I voted for non-violation of Article 1 of Protocol No. 1 and for non-violation of Article 6 § 1 of the Convention. I disagree, however, with the majority as to whether there has been a violation of both provisions taken in conjunction with Article 14 of the Convention.

2. In respect of Article 1 of Protocol No. 1 taken in conjunction with Article 14, the applicants were in my opinion in a relevantly similar situation to that of the Woolwich. In this respect I do not find it decisive that they did not formally protest by instituting proceedings to challenge the validity of the Regulations. In my view the effect of the Woolwich 1 litigation was to declare the impugned Regulations invalid *erga omnes*. Other building societies were justified in believing that the ruling of the House of Lords would also apply to them. It is quite common to use a class action when many potential litigants are involved. The Woolwich may be considered to have taken a test case on behalf of other building societies. The other building societies identified themselves with the Woolwich and awaited the outcome of the litigation. This sort of procedure is therefore in line with the proper administration of justice. It is legitimate for one litigant to pave the way for others. The

applicants made it clear, especially the Leeds, that they contested any obligation to pay the amounts required by the Regulations.

3. I therefore consider that there was no sufficient objective and reasonable justification for distinguishing between the Woolwich and the applicants in section 53 of the Finance Act 1991.

4. In respect of Article 6 of the Convention taken in conjunction with Article 14, I have serious reservations as to whether it is permissible for the State to intervene by legislating in order to determine the outcome of pending litigation which may thwart their policy objectives. The legislative power to intervene in such a manner to prevent the individual from obtaining justice should only be justified in exceptional cases. Like the Woolwich, the applicants would have won their cases if the law had not been amended. The applicant societies had good reasons to take proceedings in view of the outcome of the Woolwich litigation.

5. I consider therefore that the principle of the rule of law and the notion of a fair trial enshrined in Article 6 precluded in this case the interference by the legislator with the administration of justice in a way designed to influence the judicial determination of the dispute, given that this interference also gave rise to inequality of treatment of parties in a relevantly similar situation, in breach of Article 14 of the Convention. The Woolwich was able to litigate (twice) the whole way to the House of Lords and to recover all the monies it had paid to the Inland Revenue. Even the Government minister during the parliamentary debates on section 64 of the Finance (No. 2) Act 1992 acknowledged that there had been undoubted disparity of treatment between the Woolwich and the other building societies.

6. In conclusion, I find that there was insufficient objective and reasonable justification for the discrimination suffered by the applicants in the enjoyment of their rights set forth in Article 6 of the Convention, given that the legal proceedings for restitution initiated by the applicants following the Woolwich 1 and 2 decisions were effectively stifled by the legislative action.

B. PRONUNCE RESE NEI CONFRONTI DI ALTRI PAESI

Retroattività della legge “civile”

Art. 1 del Protocollo n. 1 (diritto al rispetto dei beni); omesso esame della censura riferita all'art. 6 § 1 della Convenzione (equo processo)

In materia di responsabilità civile

Sentenza del 6 ottobre 2005, Grande Camera, causa DRAON c. Francia (in particolare, par. 59-86 e 92-95)

In the case of Draon v. France,

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

Mr L. WILDHABER, *President*,
Mr C.L. ROZAKIS,
Mr J.-P. COSTA,
Sir Nicolas BRATZA,
Mr G. BONELLO,
Mr L. CAFLISCH,
Mr L. LOUCAIDES,
Mr C. BÎRSAN,
Mr P. LORENZEN,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mr A.B. BAKA,
Mr M. UGREKHELIDZE,
Mr V. ZAGREBELSKY,
Mr K. HAJIYEV,
Mrs R. JAEGER,
Mrs D. JOČIENĖ, *judges*,

and Mr T. L. EARLY, *Deputy Grand Chamber Registrar*,

Having deliberated in private on 23 March and 31 August 2005,

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

PROCEDURE

1. The case originated in an application (no. 1513/03) against the French Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two French nationals, Mr Lionel Draon and Mrs Christine Draon ("the applicants"), on 2 January 2003.

2. The applicants were represented by Mr F. Nativi and Ms H. Rousseau-Nativi, lawyers practising in Paris. The French Government ("the Government") were represented by their Agent, Mrs Edwige Belliard, Director of Legal Affairs, Ministry of Foreign Affairs.

3. The application concerns the birth of a child with a disability not detected during pregnancy on account of negligence in establishing a prenatal diagnosis. The applicants claimed compensation, but during the course of the proceedings the action was barred by new legislation applicable to pending cases. The applicants relied on Articles 6 § 1, 8, 13 and 14 of the Convention and Article 1 of Protocol No. 1, complaining of

the retrospective nature of the new legislation and challenging its substantive provisions.

4. The application was allocated to the Court's Second Section (Rule 52 § 1 of the Rules of Court). On 9 September 2003 a Chamber of that Section decided to give notice of the application to the respondent Government (Rule 54 § 2 (b)) and to give it priority (Rule 41).

5. On 6 July 2004 the application was declared partly admissible by a Chamber of the Second Section composed of the following judges: Mr A.B. Baka, Mr J.-P. Costa, Mr L. Loucaides, Mr K. Jungwiert, Mr V. Butkevych, Mrs W. Thomassen and Mr M. Ugrekhelidze, judges, and also of Mrs S. Dollé, Section Registrar.

6. On 19 October 2004 the Chamber relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

7. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24 of the Rules of Court. The place of Mr David Thór Björgvinsson, who was originally to have been a member of that Grand Chamber, was taken by Mr G. Bonello, substitute judge. Mr B. Zupančič and Mrs E. Steiner, who were unable to take part in the final deliberations, were replaced by Mr L. Caflisch and Mrs D. Jočienė, substitute judges (Rule 24 § 3).

8. After consulting the parties, the President decided that the present case should be examined together with the case of *Maurice v. France* (no. 11810/03), also pending before the Grand Chamber (Rule 42 § 2).

9. The applicants and the Government each filed written observations on the merits.

10. A hearing in the present case and the above-mentioned *Maurice* case took place in public in the Human Rights Building, Strasbourg, on 23 March 2005 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr J.-L. FLORENT, Deputy Director of Legal Affairs,
Ministry of Foreign Affairs, *Agent,*

Mrs L. NOTARIANNI, administrative court judge, on secondment
to the Legal Department of the Ministry of Foreign
Affairs, Human Rights Section, *Counsel,*

Mr P. DIDIER-COURBIN, Deputy Director responsible for
disabled persons, General Social Action
Department, Ministry of Health,

Mrs J. VILLIGIER, central administrative assistant, General
Social Action Department, Ministry of Health, (Disabled
Children's Office),

Mr S. PICARD and
Mr C. SIMON, legal advisers, General Administration
of Personnel and Budget Department, Legal and
Litigation Division, Ministry of Health,
Mr F. AMEGADJIE, legal officer, European and International
Affairs Service, Ministry of Justice, *Advisers*;

(b) *for the applicants*
Ms H. ROUSSEAU-NATIVI, of the Paris Bar,

Mr A. LYON-CAEN, lawyer with the right of audience in the
Conseil d'Etat and the Court of Cassation *Counsel.*

Mr L. DRAON, applicant, was also present at the hearing.

11. The Court heard addresses by Ms Rousseau-Nativi, Mr Lyon-Caen and Mr Florent, and their replies to judges' questions.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

12. The applicants were born in 1961 and 1962 respectively and live in Rosny-sous-Bois.

13. In the spring of 1996 Mrs Draon began her first pregnancy. The second ultrasound scan, carried out in the fifth month of pregnancy, revealed an anomaly in the development of the foetus.

14. On 20 August 1996 an amniocentesis was carried out at Saint-Antoine hospital, run by Assistance Publique - Hôpitaux de Paris (AP-HP). The amniotic fluid sample was sent for analysis to the establishment's cytogenetics laboratory (headed by Professor T.) with a request for karyotype and digestive enzyme analysis. In September 1996 T. informed the applicants that the amniocentesis showed the foetus had "a male chromosomal pattern with no anomaly detected".

15. R. was born on 10 December 1996. Very soon, multiple anomalies were observed, particularly defective psychomotor development. The examinations carried out led to the conclusion that there was a congenital cardiopathy due to a "chromosomal anomaly".

16. When informed of this T. admitted that his service had made the wrong diagnosis, the anomaly having already been entirely detectable at the time of the amniocentesis. He stated: "Concerning the child Draon R., ... we

regret to have to say that there was indeed an asymmetry between the foetus's two copies of chromosome 11; that anomaly or peculiarity escaped our attention".

17. According to the medical reports, R. presents cerebral malformations causing grave disorders, severe impairment and permanent total invalidity, together with arrested weight gain. This means that it is necessary to make material arrangements for his everyday care, supervision and education, including ongoing specialist and non-specialist treatment.

18. On 10 December 1998 the applicants sent a claim to AP-HP seeking compensation for the damage suffered as a result of R.'s disability.

19. In a letter dated 8 February 1999 AP-HP replied that it "[did] not intend to deny liability in this case" but invited the applicants to "submit an application to the Paris Administrative Court which, in its wisdom, will assess the damage for which compensation should be paid".

20. On 29 March 1999 the applicants submitted to the Paris Administrative Court a statement of their claim against AP-HP, requesting an assessment of the damage suffered.

21. At the same time the applicants submitted to the urgent applications judge at the same court a request for the appointment of an expert and an interim award.

22. In a decision of 10 May 1999 the urgent applications judge of the Paris Administrative Court made a first interim award of FRF 250,000 (EUR 38,112.25) and appointed an expert. He made the following points, among other observations:

> "[AP-HP] does not deny liability for the failure to diagnose the chromosomal anomaly which the boy R. is suffering from; ... having regard to the non-pecuniary damage, the disruption in the conditions of their lives and the special burdens arising for Mr and Mrs Draon from their child's infirmity, AP-HP's liability towards them in the sum of 250,000 francs may be considered, at the current stage of the investigation, not seriously open to challenge".

23. The expert filed his report on 16 July 1999 and confirmed the seriousness of R.'s state of health.

24. On 14 December 1999, in a supplementary memorial on the merits, the applicants requested the Administrative Court to assess the amount of the compensation which AP-HP should be required to pay.

25. AP-HP's memorial in reply was registered on 19 July 2000. The applicants then filed a rejoinder and further documents concerning the modifications to their home and the equipment rendered necessary by R.'s state of health.

26. In addition, the applicants again asked the urgent applications judge to make an interim award. In a decision of 11 August 2001 the urgent applications judge of the Paris Administrative Court made an additional interim award of FRF 750,000 (EUR 114,336.76) to the applicants "in view

of the severity of the disorders from which the boy R. continues to suffer and the high costs of bringing him up and caring for him since 1996".

27. After being prompted several times, verbally and in writing, by the applicants, the Paris Administrative Court informed them that the case had been set down for hearing on 19 March 2002.

28. On 5 March 2002 Law no. 2002-303 of 4 March 2002 was published in the Official Gazette of the French Republic. Section 1 of that Law, being applicable to pending proceedings, affected those brought by the applicants.

29. In a letter of 15 March 2002 the Paris Administrative Court informed the applicants that the hearing had been put back to a later date and that the case was likely to be decided on the basis of a rule over which the court did not have discretion, since it applied to their claim by virtue of section 1 of the Law of 4 March 2002.

30. In a judgment of 3 September 2002 the Paris Administrative Court, acting on a proposal made by the Government Commissioner, deferred its decision and submitted to the *Conseil d'Etat* a request for an opinion on interpretation of the provisions of the Law of 4 March 2002 and their compatibility with international conventions.

31. On 6 December 2002 the *Conseil d'Etat* gave an opinion in the context of the litigation in progress (*avis* contentieux) which is reproduced below (see paragraph 51).

32. On the basis of that opinion, the Paris Administrative Court ruled on the merits of the case on 2 September 2003. It began with the following observations:

> "Liability
>
> The provisions of section 1 of the Law of 4 March 2002, in the absence of provisions therein deferring their entry into force, are applicable under the conditions of ordinary law following publication of that Law in the Official Gazette of the French Republic. Since the rules the Law lays down were framed by Parliament on general-interest grounds relating to ethical considerations, the proper organisation of the health service and the equitable treatment of all disabled persons, they are not incompatible with the requirements of Article 6 of [the Convention], with those of Articles 5, 8, 13 and 14 of [the Convention] or with those of Article 1 of Protocol No. 1 [to the Convention]. The general-interest grounds which Parliament took into consideration when framing the rules set out in the first three paragraphs of section 1 justify their application to situations which arose prior to the commencement of pending proceedings. It follows that those provisions are applicable to the present action, brought on 29 March 1999;
>
> The administrative courts do not have jurisdiction to rule on the constitutionality of legislation; [the applicants'] request that this court review the constitutionality of the Law of 4 March 2002 must therefore be refused;
>
> It appears from the investigation that in the fifth month of Mrs Draon's pregnancy, after an ultrasound scan had shown a manifest problem affecting the growth of the foetus, she and Mr Draon were advised to consider the option of an abortion if karyotype analysis after an amniocentesis revealed a chromosomal abnormality. Mr and Mrs Draon then decided to have that test performed at Saint-Antoine Hospital.

They were informed by the hospital on 13 September 1996 that no anomaly of the foetus's male chromosomal pattern had been detected. However, very soon after the baby's birth on 10 December 1996 magnetic resonance imaging revealed a serious malformation of the brain due to a karyotypic anomaly;

The report of the expert appointed by the court states that this anomaly was entirely detectable; failure to detect it therefore constituted gross negligence on AP-HP's part which deprived Mr and Mrs Draon of the possibility of seeking an abortion on therapeutic grounds and entitles them to compensation under section 1 of the Law of 4 March 2002".

33. The court then assessed the damage sustained by the applicants as follows:

"... firstly, ... the amounts requested in respect of non-specialist care, the specific costs not borne by social security, the costs of building a house suited to the child's needs with a number of modifications to the home and the purchase of a specially adapted vehicle relate to special burdens arising throughout the life of the child from his disability and cannot therefore be sums for which [AP-HP] is liable;

... secondly, ... Mr and Mrs Draon are suffering non-pecuniary damage and major disruption in their lives, particularly their work, regard being had to the profound and lasting change to their lives brought about by the birth of a seriously disabled child; ... these two heads of damage must be assessed, in the circumstances of the case, at 180,000 euros;

... lastly ..., although Mr and Mrs Draon submitted that they could no longer holiday in a property they had purchased in Spain, they are not deprived of the right to use that property; consequently their claim for compensation for loss of enjoyment of real property must be rejected;..."

34. The court concluded by ordering AP-HP to pay the applicants the sum of EUR 180,000, less the amount of the interim awards, interest being payable on the resulting sum at the statutory rate from the date of receipt of the claim on 14 December 1998, the interest due being capitalised on 14 December 1999 and subsequently on each anniversary from that date onwards. AP-HP was also ordered to pay the applicants the sum of EUR 3,000 in respect of costs not included in the expenses and to bear the cost of the expert opinion ordered by the president of the court.

35. On 3 September 2003 the applicants appealed against the judgment. Their appeal is currently pending before the Paris Administrative Court of Appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

36. Before enactment of the Law of 4 March 2002 the legal position was established by the relevant case-law.

A. Relevant case-law before the Law of 4 March 2002

37. An action for damages brought by the parents of a child born disabled and by the child itself may come within the jurisdiction of either the administrative courts or the ordinary courts, depending on the identity of the defendant. If the defendant is a private doctor or a private medical laboratory, the dispute is referred to the ordinary courts. Where, on the other hand, as in the instant case, a public hospital service is involved, the dispute falls within the jurisdiction of the administrative courts.

1. The Conseil d'Etat

38. The *Conseil d'Etat* gave judgment on 14 February 1997 (C.E., Sect., 14 February 1997, Centre hospitalier de Nice v. Quarez, Rec. p.44). Mrs Quarez, then aged 42 years, had undergone an amniocentesis at her own request in order to verify the health of the foetus she was carrying. Although the result of that examination revealed no anomaly, she gave birth to a child suffering from trisomy 21, a condition detectable through the chromosome test carried out. The *Conseil d'Etat* held in the first place that the hospital which had carried out the examination had been guilty of negligence, since Mrs Quarez had not been informed that the results of the amniocentesis might be subject to a higher margin of error than usual on account of the conditions under which the examination had taken place.

39. Secondly, a distinction was drawn between the disabled child's entitlement to compensation and that of its parents.

With regard to the disabled child's right to compensation, the *Conseil d'Etat* ruled: "In deciding that a direct causal link existed between the negligence of the hospital centre ... and the damage incurred by the child M. from the trisomy from which he suffers, when it is not established by the documents in the file submitted to the court which determined the merits that the infirmity from which the child suffers and which is inherent in his genetic make-up was the consequence of an amniocentesis, the Lyon Administrative Court of Appeal made an error of law".

On the other hand, with regard to the parents' right to compensation, the *Conseil d'Etat* noted: "By asking for an amniocentesis, Mrs Quarez had clearly indicated that she wished to avoid the risk of a genetic accident to the child she had conceived, whose probability, given her age at the time, was relatively high." It went on to say that in those conditions the hospital's negligence had "wrongly led Mr and Mrs Quarez to the certainty that the child conceived was not trisomic and that Mrs Quarez's pregnancy could be taken normally to term" and that "this negligence, as a result of which Mrs Quarez had no reason to ask for a second amniocentesis with a view to abortion on therapeutic grounds under Article L.162-12 of the Public Health Code, [should] be regarded as the direct cause of the prejudice caused to Mr and Mrs Quarez by their child's infirmity".

40. With regard to compensation, the *Conseil d'Etat* took into account, under the head of pecuniary damage, the "special burdens, particularly in terms of specialist treatment and education" made necessary by the child's infirmity, and awarded the parents an annuity to be paid throughout the child's life. It also ordered the hospital to pay compensation for their non-pecuniary damage and the disruption to their lives.

41. Thus the *Conseil d'Etat* did not accept that a disabled child was entitled to compensation on the sole ground that the disability had not been detected during the mother's pregnancy. It did accept on the other hand that the parents of the child born with a disability were entitled to compensation and made an award not only in respect of their non-pecuniary damage but also in respect of the prejudice caused by the disruption to their lives and of pecuniary damage, specifying that the latter included the special burdens which would arise for the parents from their child's infirmity (expenditure linked to specialist treatment and education, assistance from a helper, removal to a suitable home or conversion of their present home, etc.).

42. The judgment did not attract particular comment and led to a line of case-law followed thereafter by the administrative courts.

2. The Court of Cassation

43. The case-law of the ordinary courts was laid down by the Court of Cassation on 17 November 2000 (Cass, Ass. Plén., 17 November 2000, Bull. Ass. Plén., no. 9) in a judgment which was widely commented on (the *Perruche* judgment). In the *Perruche* case a woman had been taken ill with rubella at the start of her pregnancy. Having decided to terminate the pregnancy if the foetus was affected, she took tests to establish whether she was immunised against the disease. Because of negligence on the part of both her doctor and the laboratory, she was wrongly informed that she was immunised. She therefore decided not to terminate the pregnancy and gave birth to a child which suffered from grave disabilities resulting from infection with rubella in the womb. The Court of Cassation held: "Since the negligence on the part of the doctor and the laboratory in performing the services for which they had contracted with Mrs X. prevented her from exercising her choice of terminating her pregnancy in order not to give birth to a disabled child, the child may claim compensation for the damage resulting from that disability and caused by the negligence found."

Thus, contrary to the *Conseil d'Etat*, the Court of Cassation accepted that a child born disabled could himself claim compensation for the prejudice resulting from his disability.

In this case therefore account was taken of the pecuniary and non-pecuniary damage suffered by both the child and the parents, including the special burdens arising from the disability throughout the child's life.

44. It thus appears that in the same circumstances both the Court of Cassation and the *Conseil d'Etat* base their approach on a system of liability for negligence. However, the Court of Cassation recognises a direct causal link between the medical negligence and the child's disability, and the prejudice resulting from that disability for the child itself. The *Conseil d'Etat* does not recognise that link but considers that the negligence makes the hospital liable vis-à-vis the parents on account of the existence of a direct causal link between that negligence and the damage they have sustained.

Both lines of case-law allow compensation to be paid in respect of the special burdens arising from the disability throughout the child's life. However, since the *Conseil d'Etat* considers that damage to have been sustained by the parents, whereas the Court of Cassation considers that it is sustained by the child, there may be significant differences in the nature and amount of such compensation, depending on whether the case-law of the former or the latter court is being followed.

45. The judgment of 17 November 2000 was upheld several times by the Court of Cassation, which reaffirmed the principle of compensation for the child born disabled, subject to proof, where appropriate, that the medical conditions for a voluntary termination of pregnancy on therapeutic grounds were satisfied (Cass., Ass. plén., three judgments of 13 July 2001, BICC, no. 542, 1 October 2001; see also Cass., Ass. plén., two judgments of 28 November 2001, BICC, 1 February 2002).

46. The *Perruche* judgment drew numerous reactions from legal theorists, but also from politicians and from associations of disabled persons and practitioners (doctors, obstetrical gynaecologists and echographers). The last-mentioned group interpreted the judgment as obliging them to provide a guarantee, and the insurance companies raised medical insurance premiums.

3. Liability for negligence

47. Both the *Conseil d'Etat* and the Court of Cassation took as their starting point a system of liability for negligence. In French law, under the general rules on the question, the right to compensation for damage can be upheld only if the conditions for liability are first satisfied. That means that there must be prejudice (or damage), negligence and a causal link between the damage and the negligence.

More particularly, with regard to the liability of a public authority, for compensation to be payable the prejudice, which it is for the victim to prove, must be certain. Loss of opportunity constitutes certain prejudice, provided that the opportunity was a serious one.

In the present case the prejudice resulted from a lack of information, or inadequate or incorrect information, about the results of an examination or analysis. In such a case, before the Law of 4 March 2002 was enacted,

negligence falling short of gross negligence was sufficient. As to the relation between cause and effect, a direct causal link was established between the hospital's negligence and the parents' prejudice (see the above-mentioned *Quarez* judgment).

48. Still in the sphere of administrative law, the amount of compensation is governed by the general principle of full compensation for damage (neither impoverishment nor enrichment of the victim). Compensation may take the form of a capital sum or an annuity. According to the principle of the equal validity of claims for all heads of damage, both pecuniary damage and non-pecuniary damage confer entitlement to compensation.

B. Law no. 2002-303 of 4 March 2002 on patients' rights and the quality of the health service, published in the Official Gazette of the French Republic on 5 March 2002

49. The Law of 4 March 2002 put an end to the position established by the case-law mentioned above, of both the *Conseil d'Etat* and the Court of Cassation alike. Its relevant parts provide as follows:

Section 1

"I. No one may claim to have suffered damage by the mere fact of his or her birth.

A person born with a disability on account of medical negligence may obtain compensation for damage where the negligent act directly caused the disability or aggravated it or prevented steps from being taken to attenuate it.

Where the liability of a health-care professional or establishment is established vis-à-vis the parents of a child born with a disability not detected during the pregnancy by reason of gross negligence (*faute caractérisée*), the parents may claim compensation in respect of their damage only. That damage cannot include the special burdens arising from the disability throughout the life of the child. Compensation for the latter is a matter for national solidarity.

The provisions of the present sub-section I shall be applicable to proceedings in progress, except for those in which an irrevocable decision has been taken on the principle of compensation.

II. Every disabled person shall be entitled, whatever the cause of his or her disability, to the solidarity of the national community as a whole.

III. The National Advisory Council for Disabled Persons shall be charged, in a manner laid down by decree, with assessing the material, financial and non-material situation of disabled persons in France, and of disabled persons of French nationality living outside France and receiving assistance by virtue of national solidarity, and with presenting all proposals deemed necessary to Parliament, with the aim of ensuring, through an ongoing pluri-annual programme, that assistance is provided to such persons ..."

50. These provisions entered into force "under the conditions of ordinary law following publication of the Law in the Official Gazette of the French Republic" (see paragraph 51 below)[1]. Law no. 2002-303 was published in the Official Gazette on 5 March 2002 and it therefore came into force on 7 March 2002.

C. The opinion given by the Judicial Assembly of the *Conseil d'Etat* on 6 December 2002 under the Administrative Disputes (Reform) Act (the Law of 31 December 1987) (extracts)

51. The *Conseil d'Etat* observed in particular:

"...II. The date of the Law's entry into force:

The liability criteria set out in the second sub-paragraph of paragraph I of section 1 were enacted in favour of persons born with disabilities resulting from medical negligence whether that negligence directly caused the disability, aggravated it or made it impossible to take steps to attenuate it. They were laid down with sufficient precision to be applied by the relevant courts without the need for further legislation to clarify their scope.

The different liability criteria defined in the third sub-paragraph of paragraph I of section 1 were enacted in favour of the parents of children born with a disability which, on account of gross negligence on the part of a medical practitioner or health-care establishment, was not detected during pregnancy. They are sufficiently precise to be applied without the need for further legislative provisions or regulations. Admittedly, they bar inclusion of the damage consisting in the special burdens arising from the disability throughout the child's life in the damage for which the parents can obtain compensation, and provide that such damage is to be made good through reliance on national solidarity. But the very terms of the Law, interpreted with the aid of its drafting history, show that Parliament intended to exclude compensation for that head of damage on the ground that, although there was a causal link between negligence and damage, that link was not such as to justify making the person who committed the negligent act liable for the resulting damage. In providing that this type of damage should be made good by reliance on national solidarity, Parliament did not therefore make implementation of the rules on liability for negligence which it had introduced subject to the enactment of subsequent legislation laying down the conditions under which national solidarity would be mobilised to assist disabled persons.

It follows that, since the Law does not contain provisions for the deferred entry into force of section 1, and since in addition Parliament's intention, as revealed by the Law's drafting history, was to make it applicable immediately, the provisions of section 1 came into force under the conditions of ordinary law following the Law's publication in the Official Gazette of the French Republic.

III. Law no. 2002-303's compatibility with international law

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1. That is, in accordance with Article 2 of the Decree of 5 November 1870 on the promulgation of laws and decrees, then in force: "in Paris, one clear day after promulgation; everywhere else, within the territory of each administrative district (*arrondissement*), one clear day after the copy of the Official Gazette containing them reaches the chief-town of the district".

(1) ...

The object of section 1 of the Law of 4 March 2002 is to lay down a new system of compensation for the damage suffered by children born with disabilities and by their parents, differing from the system which had emerged from the case-law of the administrative and ordinary courts. The new system provides for compensation, by means of an award to be assessed by the courts alone, for the damage directly caused to the person born disabled on account of medical negligence and the damage directly caused to the parents of the child born with a disability which, on account of gross medical negligence, was not detected during pregnancy. It prevents children born with a disability which, on account of medical negligence, was not detected during pregnancy from obtaining from the person responsible for the negligent act compensation for the damage consisting in the special burdens arising from the disability throughout their lives, whereas such compensation had previously been possible under the case-law of the ordinary courts. It also prevents the parents from obtaining from the person responsible for the negligent act compensation for the damage consisting in the special burdens arising from their child's disability throughout its life, whereas such compensation had previously been possible under the case-law of the administrative courts. Lastly, it makes compensation for other heads of damage suffered by the child's parents subject to the existence of gross negligence, whereas the case-law of the administrative and ordinary courts had formerly been based on the existence of negligence falling short of gross negligence.

This new system, which was put in place by Parliament on general-interest grounds relating to ethical considerations, the proper organisation of the health service and the equitable treatment of all disabled persons, is not incompatible with the requirements of Article 6 § 1 of [the Convention], with those of Articles 5, 8, 13 and 14 of [the Convention], with those of Article 1 of Protocol No. 1 [to the Convention] or with those of Articles 14 and 26 of the Covenant on Civil and Political Rights.

(2) The last sub-paragraph of paragraph I of section 1 makes the provisions of paragraph I applicable to pending proceedings "except for those in which an irrevocable decision has been taken on the principle of compensation".

The general-interest grounds taken into account by Parliament when it laid down the rules in the first three sub-paragraphs of paragraph I show, in relation to the points raised in the request for an opinion, that the intention behind the last sub-paragraph of paragraph I was to apply the new provisions to situations which had arisen previously and to pending proceedings, while rightly reserving final judicial decisions."

D. French national solidarity towards disabled persons

1. Situation before February 2005

52. French legislation (see Law no. 75-534 of 30 June 1975 on orientation in favour of disabled persons, which set up the basic framework, and later legislation) provides compensatory advantages to disabled persons based on national solidarity in a number of fields (such as the right to education for disabled children and adults, technical and human assistance, financial assistance, etc.).

In particular, the families of disabled persons are entitled to a special education allowance (*Allocation d'éducation spéciale* – "the AES"). This is a family benefit paid from the family allowance funds, provided both the

child and its parents are resident in France. The AES is granted by decision of the Special Education Board of the *département* in which the claimant lives, after the file has been studied by a multidisciplinary technical team. First the Special Education Board takes formal note of the child's disability and assesses it. For entitlement to the AES, the level of disability found must at least exceed 50%. Where the disability exceeds 80%, entitlement to the AES is automatic; if the disability is assessed at between 50% and 80%, payment of the allowance is not automatic. It is subject to the child's need for pedagogical, psychological, medical, paramedical and other forms of assistance.

The AES is a two-level benefit: the basic allowance plus top-up payments. The first level is automatically payable where the conditions mentioned above are satisfied. The basic rate of AES is EUR 115 per month (the figure supplied by the Government on 16 March 2003). Where the child's state of health requires substantial expenditure or the assistance of a third person, this may then confer entitlement to one of the six levels of AES top-up payments, which are added to the basic rate.

The first five top-up payments depend on the level of expenditure required by the child's state of health, the time for which the assistance of a third person is necessary, or a combination of both. The sixth level of top-up payment is for the most severe cases, where the child's state of health requires the assistance of a third person all through the day and the families have to provide constant supervision and treatment.

2. Changes made by Law no. 2005-102 of 11 February 2005 on equal rights and opportunities, participation and citizenship for disabled persons, published in the Official Gazette of the French Republic on 12 February 2005

53. The Law of 11 February 2005 emerged from a legislative process launched as far back as July 2002 with the intention of reforming the system of disability compensation in France. It was pointed out in particular that following the enactment of the Law of 4 March 2002 it was necessary to legislate again "to give effective substance to national solidarity" (see the Information Report produced on behalf of the Senate's Social Affairs Committee by Senator P. Blanc, containing 75 proposals for amending the Law of 30 June 1975, appended to the record of the Senate's sitting on 24 July 2002, p. 13).

54. The new law makes a number of substantial changes. In particular, it includes for the first time in French law a definition of disability and introduces a new "compensatory benefit" to be added to existing forms of assistance.

55. To that end, the Law of 11 February 2005 amends the Social Action and Family Code. Its relevant provisions are worded as follows:

Title I: General provisions

Section 2

"I. ... A disability, within the meaning of the present Law, is any limitation of activity or restriction on participation in life in society suffered within his or her environment by any person on account of a substantial, lasting or permanent impairment of one or more physical, sensory, mental, cognitive or psychological functions, a multiple disability, or a disabling health disorder. ...

Every disabled person shall be entitled to solidarity from the whole national community, which, by virtue of that obligation, shall guarantee him or her access to the fundamental rights of all citizens, and the full exercise of citizenship.

The State shall act as the guarantor of equal treatment for disabled persons throughout the national territory and shall lay down objectives for pluriannual action plans. ...

II. – 1. The first three sub-paragraphs of the first paragraph of section 1 of Law no. 2002-303 of 4 March 2002 on patients' rights and the quality of the health service shall become Article L. 114-5 of the Social Action and Family Code.

2. The provisions of Article L. 114-5 of the Social Action and Family Code, as amended by sub-paragraph 1 of the present paragraph II, shall be applicable to proceedings in progress on the date of the entry into force of the above-mentioned Law no. 2002-303 of 4 March 2002, except for those in which an irrevocable decision has been taken on the principle of compensation." ...

Title III: Compensation and resources

Chapter 1: Compensation for the consequences of disability

Section 11

"... A disabled person shall be entitled to compensation for the consequences of his or her disability whatever the origin or nature of the impairment, or his or her age or lifestyle.

That compensation shall consist in meeting his or her needs, including nursery care in early childhood, schooling, teaching, education, vocational insertion, adaptations of the home or workplace necessary for the full exercise of citizenship and of personal autonomy, developing or improving the supply of services, in particular to enable those around the disabled person to enjoy respite breaks, developing mutual support groups or places in special establishments, assistance of all kinds to the disabled person or institutions to make it possible to live in an ordinary or adapted environment, or regarding access to the specific procedures and institutions dealing with the disability concerned or the resources and benefits accompanying implementation of the legal protection governed by Title XI of Book 1 of the Civil Code. The above responses, adapted as required, shall take into account the care or accompaniment necessary for disabled persons unable to express their needs alone.

The forms of compensation required shall be recorded in a statement of needs drawn up in the light of the needs and aspirations of the disabled person as expressed in his or her life plan, written by himself or herself or, failing that, where he or she is unable to express an opinion, with or for him or her by his or her legal representative."

Section 12
Compensatory benefit

"... I. – Every disabled person stably and regularly resident in metropolitan France ... above the age at which entitlement to the disabled child's education allowance [formerly the AES] begins ..., whose age is below the cut-off point to be laid down by decree and whose disability matches the criteria to be laid down by decree, taking into account in particular the nature and scale of the forms of compensation required in the light of his or her life plan, shall be entitled to a compensatory benefit which shall take the form of a benefit in kind payable, at the wishes of the beneficiary, either in kind or in money. ...

III. – The element of the benefit mentioned in point 3 of Article L. 245-3 [of the Social Action and Family Code] may also be claimed, under conditions to be laid down by decree, by beneficiaries of the [disabled child's education] allowance [formerly the AES], where on account of their child's disability they are likely to bear burdens of the type covered by that paragraph. ...

Article L. 245-3 [of the Social Action and Family Code] – Compensatory benefit may be used, under conditions to be laid down by decree, for

1. burdens arising from the need for human assistance, including, where necessary, the assistance provided by family helpers;

2. burdens arising from the need for technical assistance, particularly the costs which remain payable by an insured person where such technical assistance forms one of the categories of benefit contemplated in point 1 of Article 321-1 of the Social Security Code;

3. burdens arising from adaptation of the home or vehicle of the disabled person, and any extra expenditure needed for his or her transport;

4. specific or exceptional burdens, such as those arising from the purchase or maintenance of products needed on account of the disability; ...

... – The element of the benefit mentioned in point 1 of Article L. 245-3 shall be granted to any disabled person either where his or her state of health makes necessary the effective assistance of a third person for the essential acts of his or her existence, or requires regular supervision, or where he or she is obliged to incur additional expenditure through carrying on an occupation or holding elective office."

56. The new compensatory benefit is initially payable in full to persons over the age at which entitlement to the AES (renamed "disabled child's allowance" by the new legislation – see section 12 above) begins. With regard to children, section 13 of the Law of 11 February 2005 provides:

"Within three years from the entry into force of the present Law compensatory benefit shall be extended to disabled children. Within a maximum of five years those provisions of the present Law which distinguish between disabled persons on the ground of age in respect of compensation for the disability and payment of the costs of residence in social and medico-social establishments shall be repealed."

57. The entry into force of the Law of 11 February 2005 is subject to publication of the implementing decrees. Section 101 provides:

"The regulations implementing the present Law shall be published within six months of its publication, after being referred for opinion to the National Advisory Council for Disabled Persons. ..."

58. According to the information supplied by the Government, the new compensatory benefit should come into force on 1 January 2006. It is expected that it will be payable in full to disabled children by 12 February 2008. In the meantime, children will apparently receive only part of the benefit: only the costs of adapting a disabled child's home or vehicle, or his or her additional transport costs, can already be financed by the new system.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 TO THE CONVENTION

59. The applicants complained of section 1 of Law no. 2002-303 of 4 March 2002 on patients' rights and the quality of the health service (see paragraph 49 above). They submitted that that provision had infringed their right to the peaceful enjoyment of their possessions and breached Article 1 of Protocol No. 1 to the Convention, which provides:

> "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."

A. Arguments of the parties

1. The applicants

60. The applicants observed that before the enactment of the Law of 4 March 2002 they had brought proceedings seeking full compensation for the damage they had sustained, and in particular for the damage consisting in the special burdens arising from their child's disability throughout his life. They submitted that since the conditions for declaring AP-HP liable on the basis of the above-mentioned *Quarez* judgment (see paragraphs 38 to 42) were satisfied, their claims should have been met in full. They therefore had a possession within the meaning of Article 1 of Protocol No. 1 to the Convention, namely a compensation claim against AP-HP, in respect of which they had a legitimate expectation of obtaining judgment in their favour (see *Pressos Compania Naviera S.A. and Others v. Belgium,* judgment of 20 November 1995, Series A no. 332). Since the Law of 4 March 2002 was applicable to pending proceedings, including their case,

its effect had been to deprive them of their claim. Its enactment therefore constituted "interference" with their right to the peaceful enjoyment of their possessions, as indeed the Government acknowledged.

As regards the legitimacy of the interference, the applicants submitted that it had not struck a fair balance between the demands of the general interest (regard being had in particular to the reasons for the legislation's enactment, which could not justify making it retrospective) and protection of their fundamental rights, since the effect of the law concerned had been to deprive them of their claim without effective compensation.

They further stressed the enormous and disproportionate impact of the decision to make the new legislation immediately applicable to pending proceedings, bearing in mind in particular the fact that it referred to arrangements for assisting disabled persons through reliance on national solidarity, which they considered inadequate, vague and imprecise. In that connection, they submitted that although the recently enacted Law of 11 February 2005 (see paragraphs 53 to 58 above) had brought in a new benefit to compensate for disability, it could not cancel out the disproportion given the form that this compensatory benefit system was to take, and it still left the applicants to bear an excessive burden.

2. The Government

61. Relying likewise on the Court's above-mentioned *Pressos Compania Naviera S.A. and Others* judgment, the Government submitted that it was not possible to establish as a general rule that before enactment of the Law of 4 March 2002 and in the light of the case-law then applicable the parents of children born with disabilities as a result of a medical error were certain to receive compensation as a matter of course. They did not therefore systematically have a "legitimate expectation" of having their claims met which could have been frustrated by the Law's enactment.

The Government acknowledged, however, that it was a different matter in the present case in so far as AP-HP had explicitly and unreservedly admitted liability towards the applicants. When the new legislation came into force there had therefore been no doubt about the principle of compensation, which, in accordance with the settled case-law established since the time of the above-mentioned *Quarez* judgment, covered the special burdens arising for the parents from their child's infirmity. Before the entry into force of the Law of 4 March 2002 the applicants could therefore legitimately expect to be compensated for those "special burdens", a head of damage which had been excluded by the new legislation. The Government accordingly accepted that there had been interference with the right to the peaceful enjoyment of a "possession".

62. As regards, on the other hand, the legitimacy of that interference, the Government argued that the partial deprivation of possessions the applicants had suffered could not be declared contrary to Article 1 of Protocol No. 1 to

the Convention, given, *inter alia*, the aim of the Law of 4 March 2002, the main object of which had been to clarify a system of liability for medical acts which had been raising legal and ethical problems and which, as the Government stressed at the hearing, had been established by a recent judgment (the *Quarez* judgment not having been delivered until 1997, whereas the applicants' child had been born in 1996). The new legislation had not really been retrospective; after modifying the existing legal situation it had merely made the new rules immediately applicable to pending proceedings – a common practice.

Referring to the opinion given by the *Conseil d'Etat* on 6 December 2002, still with the aim of establishing the legitimacy of the interference, the Government next referred to the general-interest considerations which, they submitted, had justified the enactment of the legislation complained of and its applicability to pending proceedings.

These included, in the first place, ethical reasons, reflected mainly in paragraph I of section 1. In the light of the reactions to the above-mentioned *Perruche* judgment (see paragraphs 43 to 46), Parliament had intervened to provide a coherent solution to a problem that had been the subject of national debate and had raised crucial ethical issues concerning, *inter alia*, human dignity and the status of the unborn child. The main aim had been to exclude recognition of a child's right to complain of being brought into the world with a congenital disability, a matter on which society had been required to make a fundamental decision. That was why there could be no difference in treatment between pending proceedings depending on whether they had been brought before or after the Law's promulgation.

Secondly, there were questions of natural justice. It was argued that the legislation in issue reflected the need to ensure fair treatment for all disabled persons whatever the severity and cause of their disability. Such intervention had been all the more necessary because, following the *Quarez* and *Perruche* judgments, the system of compensation for disabled persons had become unsatisfactory. That concern for fair treatment, it was submitted, was the reason why the legislation had been made immediately applicable, so that no distinction would be drawn between disabled persons in accordance with the date on which their applications had been lodged, whether before or after the Law's promulgation. Natural justice had also prompted the decision to abolish the rule requiring health-care workers and establishments to pay compensation for disabilities not detected during pregnancy, which was perceived as deeply unfair by obstetricians and doctors performing prenatal ultrasound scans.

Lastly and above all, Parliament had intervened for reasons having to do with the proper organisation of the health service, which was under threat as a result of the discontent expressed by health-care practitioners in the wake of the above-mentioned *Perruche* judgment. In the face of strikes, resignations and refusals to carry out ultrasound scans, the legislature had

acted to ensure that there would continue to be sufficiently well-staffed medical services in the fields of obstetrics and ultrasound scanning and that pregnant women and unborn children would receive medical attention in satisfactory conditions.

63. The Government further argued that there had been a fair balance between the objective pursued by the legislature and the means it had employed. They submitted in that connection that neither the parents of disabled children nor the children themselves had been deprived of all forms of assistance and that there was still statutory liability for negligence by health-care workers. Parliament had been obliged to give the need to preserve the health service priority over the hopes of a few parents for additional compensation. In view of the large number of doctors on strike, the immediate application of the new legislation had been necessary in order to limit the flight of private practitioners out of the prenatal diagnosis sector. The Government further emphasised that at first instance, after the entry into force of the legislation in issue, the applicants had obtained compensation which, while it might not have been as much as they had hoped to receive, was far from a token payment, since it amounted to EUR 180,000. That amount had equalled the compensation paid in the above-mentioned *Quarez* case. Consequently, although the applicants had not obtained compensation for all the heads of damage they claimed, they had received a considerable sum of money.

64. In addition, the Government contended, the level of assistance provided by way of national solidarity should not be disregarded. Measures had already been in place before the Law of 4 March 2002 and these had been supplemented by those provided for in the recently enacted Law of 11 February 2005. Thus disabled persons and their families had not suffered excessive consequences as a result of application of the Law of 4 March 2002. They had not been deprived of financial support, the difference being that this would no longer be provided by health-care workers only but also by the State.

B. The Court's assessment

1. Whether there was a "possession" and interference with the right to peaceful enjoyment of that "possession"

65. The Court reiterates that, according to its case-law, an applicant can allege a violation of Article 1 of Protocol No. 1 to the Convention only in so far as the impugned decisions relate to his "possessions" within the meaning of that provision. "Possessions" can be "existing possessions" or assets, including, in certain well-defined situations, claims. For a claim to be capable of being considered an "asset" falling within the scope of Article 1 of Protocol No. 1, the claimant must establish that it has a sufficient basis in

national law, for example where there is settled case-law of the domestic courts confirming it. Where that has been done, the concept of "legitimate expectation" can come into play.

66. As regards the concept of "legitimate expectation", one aspect of this was illustrated in the above-mentioned case of *Pressos Compania Naviera S.A. and Others*, which concerned claims for damages arising from accidents to shipping allegedly caused by the negligence of Belgian pilots. Under the Belgian law of tort, claims came into being as soon as damage had occurred. The Court classified these claims as "assets" attracting the protection of Article 1 of Protocol No. 1. It went on to note that, on the basis of a series of judgments of the Court of Cassation, the applicants could argue that they had a "legitimate expectation" that their claims deriving from the accidents in question would be determined in accordance with the general law of tort.

67. The Court did not expressly state in the *Pressos Compania Naviera S.A. and Others* case that the "legitimate expectation" was a component of, or attached to, the property right claimed. However, it was implicit in the judgment that no such expectation could come into play in the absence of an "asset" falling within the ambit of Article 1 of Protocol No. 1, which in that case was a compensation claim. The "legitimate expectation" identified in the *Pressos Compania Naviera S.A. and Others* case did not in itself constitute a proprietary interest; it related to the way in which the claim qualifying as an "asset" would be treated under domestic law, and in particular to the reliance on the fact that the established case-law of the national courts would continue to be applied in respect of damage which had already occurred.

68. In a line of cases the Court has found that the applicants did not have a "legitimate expectation" where it could not be said that they had a currently enforceable claim that was reasonably established. ... The Court's case-law does not contemplate the existence of a "genuine dispute" or an "arguable claim" as a criterion for determining whether there is a "legitimate expectation" protected by Article 1 of Protocol No. 1. ... The Court takes the view that where the proprietary interest is in the nature of a claim it may be regarded as an "asset" only where it has a sufficient basis in national law, for example where there is settled case-law of the domestic courts confirming it (see *Kopecký v. Slovakia* [GC], no. 44912/98, §§ 35 and 48 to 52, ECHR 2004-IX).

69. Moreover, Article 1 of Protocol No. 1, which guarantees in substance the right of property, comprises three distinct rules. The first, which is expressed in the first sentence of the first paragraph and is of a general nature, lays down the principle of peaceful enjoyment of property. The second rule, in the second sentence of the same paragraph, covers deprivation of possessions and makes it subject to certain conditions. The third, contained 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 second and third rules, which are concerned with particular instances of interference with the right to peaceful enjoyment of property, are to be construed in the light of the general principle laid down in the first rule (see, among other authorities, *Pressos Compania Naviera S.A. and Others*, cited above, § 33).

70. In the present case it is not disputed that there was an interference with the right to peaceful enjoyment of a "possession" within the meaning of Article 1 of Protocol No. 1 to the Convention. The parties accept that, regard being had to the position regarding liability which obtained under French law at the time of the enactment of the Law of 4 March 2002, and particularly to the settled case-law of the administrative courts, which had been established by the *Quarez* judgment mentioned above, the applicants had suffered prejudice caused directly by negligence on the part of AP-HP and had a claim in respect of which they could legitimately expect to obtain compensation for damage, including the special burdens arising from their child's disability.

71. The Law of 4 March 2002, which came into force on 7 March 2002, deprived the applicants of the possibility of obtaining compensation in respect of those special burdens by virtue of the precedent set by the *Quarez* judgment of 14 February 1997, whereas they had lodged their claim with the Paris Administrative Court as early as 29 March 1999, and the domestic courts, in two orders made by the judge responsible for urgent applications, on 10 May 1999 and 11 August 2001, had made interim awards which together amounted to a substantial sum, the liability of AP-HP towards them not being seriously contestable. The law complained of therefore entailed interference with the exercise of the right to compensation which could have been asserted under the domestic law applicable until then, and consequently of the applicants' right to peaceful enjoyment of their possessions.

72. The Court notes that in the present case, in so far as the impugned law applied to proceedings brought before 7 March 2002 which were still pending on that date, such as those brought by the applicants, the interference amounted to a deprivation of possessions within the meaning of the second sentence of the first paragraph of Article 1 of Protocol No. 1 to the Convention. It must therefore determine whether the interference complained of was justified under that provision.

2. *Whether the interference was justified*

(a) "Provided for by law"

73. It is not disputed that the interference complained of was "provided for by law", as required by Article 1 of Protocol No. 1 to the Convention.

74. On the other hand, the parties disagreed about the legitimacy of that interference. The Court must accordingly determine whether it pursued a legitimate aim, in other words whether there was a "public interest", and whether it complied with the principle of proportionality for the purposes of the second rule laid down in Article 1 of Protocol No. 1 to the Convention.

(b) "In the public interest"

75. The Court considers that, because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to decide what is "in the public interest". Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment as to the existence of a problem of public concern warranting measures of deprivation of property. Here, as in other fields to which the safeguards of the Convention extend, the national authorities, accordingly, enjoy a certain margin of appreciation.

76. Furthermore, the notion of "public interest" is necessarily extensive. In particular, the decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues.The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is "in the public interest" unless that judgment is manifestly without reasonable foundation (see *Pressos Compania Naviera S.A. and Others*, cited above, § 37, and *Broniowski v. Poland* [GC], no. 31443/96, § 149, ECHR 2004-V).

77. In the present case the Government submitted that section 1 of the Law of 4 March 2002 was prompted by general-interest considerations of three kinds: ethical concerns, and in particular the need to legislate on a fundamental choice of society; fairness; and the proper organisation of the health service (see paragraph 62 above). In that connection, the Court has no reason to doubt that the French parliament's determination to put an end to a line of case-law of which it disapproved and to change the legal position on medical liability, even by making the new rules applicable to existing cases, was "in the public interest". Whether this public-interest aim was of sufficient weight for the Court to be able to find the interference proportionate is another matter.

(c) Proportionality of the interference

78. An interference with the peaceful enjoyment of possessions must strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (see, among other authorities, *Sporrong and Lönnroth v. Sweden*, judgment of 23 September 1982, Series A no. 52, p. 26, § 69). The concern to achieve this balance is reflected in the structure of Article 1 of Protocol No. 1 as a whole, including therefore the second sentence,

which is to be read in the light of the general principle enunciated in the first sentence. In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of his possessions (see *Pressos Compania Naviera S.A. and Others,* cited above, § 38).

79. Compensation terms under the relevant domestic legislation are material to the assessment whether the contested measure respects the requisite fair balance and, notably, whether it imposes a disproportionate burden on the applicants. In this connection, the Court has already found that the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference and a total lack of compensation can be considered justifiable under Article 1 of Protocol No. 1 only in exceptional circumstances (see *The Holy Monasteries v. Greece*, judgment of 9 December 1994, Series A no. 301-A, p. 35, § 71; *The Former King of Greece and Others v. Greece,* [GC], no. 25701/94, § 89, ECHR 2000-XII; and *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, § 94, ECHR 2005).

80. The Court observes that the *Conseil d'Etat* acknowledged in its *Quarez* judgment of 14 February 1997 that the State and public-law bodies such as AP-HP, a public health institution providing the public hospital service, were subject to the rules of ordinary law on liability for negligence. It notes that that case-law, although relatively recent, was settled and consistently applied by the administrative courts. As the *Quarez* judgment antedated the discovery of R.'s disability and above all the commencement of the applicants' action in the French courts, the latter could legitimately expect to rely on it to their advantage.

81. By cancelling the effects of the *Quarez* judgment, and those of the Court of Cassation's *Perruche* judgment, on pending proceedings, the law complained of applied a new liability rule to facts forming the basis for an actionable claim which had occurred before its entry into force and which had given rise to legal proceedings which were still pending at that time, so that it had retrospective scope. Admittedly, the applicability of legislation to pending proceedings does not necessarily in itself upset the requisite fair balance, since the legislature is not in principle precluded in civil matters from intervening to alter the current legal position through a statute which is immediately applicable (see, *mutatis mutandis*, *Zielinski and Pradal & Gonzalez and Others v. France* [GC], nos. 24864/94 and 34165/96 to 34173/96, § 57, ECHR 1999-VII).

82. In the present case, however, section 1 of the Law of 4 March 2002 abolished purely and simply, with retrospective effect, one of the essential heads of damage, relating to very large sums of money, in respect of which the parents of children whose disabilities had not been detected before birth, like the applicants, could have claimed compensation from the hospital held to be liable. The French legislature thereby deprived the applicants of an

existing "asset" which they previously possessed, namely an established claim to recovery of damages which they could legitimately expect to be determined in accordance with the decided case-law of the highest courts of the land.

83. The Court cannot accept the Government's argument that the principle of proportionality was respected, provision having been made for an appropriate amount of compensation, which would thus constitute a satisfactory alternative, to be paid to the applicants. It does not consider that what the applicants could receive by virtue of the Law of 4 March 2002 as the sole form of compensation for the special burdens arising from the disability of their child was, or is, capable of providing them with payment of an amount reasonably related to the value of their lost asset. The applicants are admittedly entitled to benefits under the system now in force, but the amount concerned is considerably less than the sum payable under the previous liability rules and is clearly inadequate, as the Government and the legislature themselves admit, since these benefits were extended recently by new provisions introduced for that purpose by the Law of 11 February 2005. Moreover, neither the sums to be paid to the applicants under that law nor the date of its entry into force for disabled children have been definitively fixed (see paragraphs 56 to 58 above). That situation leaves the applicants, even now, in considerable uncertainty, and in any event prevents them from obtaining sufficient compensation for the damage they have already sustained since the birth of their child.

Thus, both the very limited nature of the existing compensation payable by way of national solidarity and the uncertainty surrounding the compensation which might result from application of the 2005 Act rule out the conclusion that this important head of damage may be regarded as having been reasonably compensated in the period since enactment of the Law of 4 March 2002.

84. As regards the compensation awarded to the applicants by the Paris Administrative Court to date, the Court notes that it covers non-pecuniary damage and disruption to the applicants' lives, but not the special burdens arising from the child's disability throughout his life. On this point, the Court is led to the inescapable conclusion that the amount of compensation awarded by the Paris Administrative Court was very much lower than the applicants could legitimately have expected and that, in any case, it cannot be considered to have been definitively secured, since the award was made in a first-instance judgment against which an appeal is pending. The compensation thus awarded to the applicants cannot therefore compensate for the claims now lost.

85. Lastly, the Court considers that the grounds relating to ethical considerations, equitable treatment and the proper organisation of the health service mentioned by the *Conseil d'Etat* in its opinion of 6 December 2002 and relied on by the Government could not, in the instant case, legitimise

retrospective action whose result was to deprive the applicants, without sufficient compensation, of a substantial portion of the damages they had claimed, thus making them bear an individual and excessive burden.

Such a radical interference with the applicants' rights upset the fair balance to be maintained between the demands of the general interest on the one hand and protection of the right to peaceful enjoyment of possessions on the other.

86. In so far as it concerned proceedings pending on 7 March 2002, the date of its entry into force, section 1 of the Law of 4 March 2002 therefore breached Article 1 of Protocol No. 1 to the Convention.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN TOGETHER WITH ARTICLE 1 OF PROTOCOL No. 1 TO THE CONVENTION

87. The applicants complained that the Law of 4 March 2002, by setting up a specific liability system, had created an unjustified inequality of treatment between the parents of children whose disabilities were not detected before birth on account of negligence and the parents of children disabled on account of some other form of negligence, to whom the principles of ordinary law would continue to apply. They relied on Article 14 of the Convention, which 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."

A. Arguments of the parties

1. The applicants

88. The applicants complained that the Law of 4 March 2002 had created an unjustified inequality of treatment between the parents of children whose disabilities had not been detected before birth on account of negligence, for whom compensation for the special burdens arising from the disability throughout the child's life was a matter of national solidarity alone, and the victims of other negligent acts which had caused disability, to whom the principles of the ordinary law of tort would continue to apply. They pointed out that there was no longer any dispute as to whether they had a "possession". The Law of 4 March 2002 had infringed their right to the peaceful enjoyment of their possessions by creating inequality of treatment between them and the other category of parents, whereas, in their submission, the two situations were essentially similar, both being concerned with compensation for prejudice resulting from a disability

caused by negligence. In addition, the applicants submitted that no general-interest or public-interest considerations could justify the discriminatory treatment resulting from the new legislation.

2. The Government

89. The Government submitted, as their main argument, that the two categories were not in the same situation. Where the disability had been directly caused by medical negligence, the negligence preceded the disability, was the cause of it and was therefore the original source of the prejudice sustained by the parents through the birth of a disabled child. In the applicants' case, the negligence had not been the direct cause of the disability, which already existed. The only prejudice it had occasioned lay in not having an abortion, or in not having the possibility of aborting. As the causal links between the medical negligence and the disability were different in the two cases, they – rightly, in the Government's opinion – formed the rationale for two different sets of liability rules. It could not therefore be concluded that there had been discrimination since the situations were not the same.

90. In the alternative, the Government argued that reliance on national solidarity to provide assistance with the special burdens arising from the disability of children in R.'s situation was not discriminatory since, like the others, they had the benefit of extensive support measures. In addition, the Government considered that the difference in treatment between the two situations was reasonably proportionate to the legitimate objectives of the Law of 4 March 2002.

B. The Court's assessment

91. Regard being had to its finding of a violation concerning the applicants' right to the peaceful enjoyment of their possessions (see paragraph 86 above), the Court does not consider it necessary to examine the applicants' complaint under Article 14 of the Convention taken together with Article 1 of Protocol No. 1 to the Convention.

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

92. The applicants alleged that the immediate applicability of the Law of 4 March 2002 to pending proceedings, including their case, infringed their right to a fair trial. 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 fair ... hearing ... by an independent and impartial tribunal established by law."

A. Arguments of the parties

1. The applicants

93. Relying on the Court's case-law (particularly *Stran Greek Refineries and Stratis Andreadis v. Greece*, judgment of 9 December 1994, and *Zielinski and Pradal* and *Gonzalez and Others*, cited above), the applicants alleged that the provisions of the Law of 4 March 2002 disregarded the rule that the principle of the rule of law and the notion of fair trial (in particular the principle of the equality of arms) precluded any interference by the legislature with the administration of justice designed to influence the judicial determination of a dispute, save on compelling grounds of the general interest. They argued that no compelling grounds of the general interest justified the retrospective provisions complained of. They submitted that there was no need to define the precise nature of the Law of 4 March 2002 since it did constitute retrospective legislative intervention of the type regularly criticised by the Court in its case-law. The presence of the State as a party in the dispute was not required for that case-law to apply. In any event, in the present case, the State was a party at one remove, since AP-HP was a public administrative establishment under State control. Lastly, the applicants contested the argument that national solidarity made good the prejudice for which they had not been compensated, since the existing provisions for the assistance of disabled persons were inadequate and future measures uncertain, and in any case belated and ineffective as regards compensating for the special burdens arising from their child's disability.

2. The Government

94. The Government submitted that the present case was to be distinguished from those previously examined by the Court in connection with the question of "legislative validations", and particularly from the cases of *Stran Greek Refineries and Stratis Andreadis* and *Zielinski and Pradal & Gonzalez and Others*, cited above. The law complained of was different in nature and could not be classified as "validating" legislation nor be compared to those previously criticised by the Court. The object of the Law of 4 March 2002 had not been to frustrate actions going through the courts but rather, following the debate on the *Perruche* judgment, to clarify liability rules which were causing difficulties. Intervening independently of any particular dispute, in a field which was appropriate for legislative intervention, and without interfering either in pre-existing contractual relations or with the proper administration of justice, Parliament had enacted a law which was not really retrospective but essentially interpretative. Moreover, the State was not in any way a party in the dispute which had given rise to the present case, nor was it defending its own interests. It followed that the legislature's intervention did not amount to

interference and had not been intended to influence the outcome of the dispute. Furthermore, even if it were accepted that there had been such interference, it was justified since the Law of 4 March 2002 pursued several legitimate objectives, to which the *Conseil d'Etat* had drawn attention in its opinion of 6 December 2002 (set out in paragraph 62 above). Lastly, the Government repeated their argument that there was a "reasonable relationship of proportionality" between the objective pursued by the legislature and the means it had employed. It emphasised the level of assistance provided by way of national solidarity, referring not only to the measures already taken domestically but also to those planned for the future.

B. The Court's assessment

95. Regard being had to the particular circumstances of the present case and to the reasoning which led it to find a violation of Article 1 of Protocol No. 1 to the Convention (see paragraphs 65 to 86 above), the Court does not consider it necessary to examine separately the applicants' complaint under Article 6 § 1 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

96. The applicants further alleged that the immediate applicability of the Law of 4 March 2002 to pending proceedings deprived them of an effective remedy, since they could no longer obtain compensation, from the person responsible, for the special burdens arising from their child's disability. They relied on 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."

97. The Court reiterates that 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 might happen to be secured in the domestic legal order. The effect of this Article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of an "arguable" complaint under the Convention and to grant appropriate relief (see, among other authorities, *Aksoy v. Turkey*, judgment of 18 December 1996, *Reports* 1996-VI, p. 2286, § 95).

98. As the Court concluded above that there has been a violation of Article 1 of Protocol No. 1 to the Convention, there is no doubt that the complaint relating to that provision is arguable for the purposes of Article 13 of the Convention. However, according to the Court's case-law, Article 13 does not go so far as to guarantee a remedy allowing a Contracting

State's laws as such to be challenged before a national authority (see, for example, *Gustafsson v. Sweden*, judgment of 25 April 1996, *Reports* 1996-II, § 70). Consequently, the applicants' complaint falls foul of that principle in so far as they complained of the lack of a remedy after 7 March 2002, the date of the entry into force of section 1 of the Law of 4 March 2002 on patients' rights and the quality of the health service (see, *mutatis mutandis*, *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 113, ECHR 2002-VI).

99. Accordingly, the Court finds no violation of Article 13 of the Convention in the present case.

V. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION, AND OF ARTICLE 14 TAKEN TOGETHER WITH ARTICLE 8

100. The applicants submitted that the fact that section 1 of the Law of 4 March 2002 was applied in their case while it was still pending constituted arbitrary interference by the State which infringed their right to respect for their family life. They relied on Article 8 of the Convention, the relevant parts of which provide as follows:

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

A. Arguments of the parties

1. The applicants

101. At the hearing before the Court the applicants asserted that Article 8 of the Convention was applicable to the present case in that it proclaimed the right to a normal family life. They argued that the Law of 4 March 2002 had infringed that right and constituted interference with its exercise. But none of the conditions required for such interference to be compatible with the Convention, namely that it should be in accordance with the law, in pursuit of a legitimate aim and necessary, had been satisfied. In the first place, the legislation was neither clear nor precise, contrary to the requirements established by the Court's case-law, in that the reference to national solidarity remained vague and imprecise. Secondly, and above all, the interference did not pursue a legitimate and compelling objective. In that connection, the applicants submitted, among other arguments, that the considerations linked to improving the organisation of the health service, chief among which was the concern to avoid increases in insurance

premiums for doctors and health-care establishments, could not justify giving these immunity in respect of their negligent acts or omissions. Moreover, the State had not guaranteed the exercise of the applicants' right to a family life, since by depriving them of a remedy whereby they might seek compensation for the prejudice consisting in the special burdens arising from their child's disability the legislature had blocked protection of the family's interests.

102. At the hearing the applicants also invoked, for the first time, Article 14 of the Convention taken together with Article 8, in connection with the right to a normal family life. They asserted that the law complained of introduced unjustified discrimination between the parents of children born disabled as a result of negligence by a doctor who had failed to detect the disability during the mother's pregnancy, who could not obtain full reparation for the consequences of such negligence, like the applicants, and the parents of disabled children who were able to impute the damage to a third party and obtain full reparation.

2. The Government

103. As their main argument, the Government contested the applicability of Article 8 of the Convention. Relying on the Court's case-law (citing *Marckx v. Belgium*, judgment of 13 June 1979, Series A no. 31), they distinguished between patrimonial rights which, by their nature, had a connection with family life (such as successions and voluntary dispositions) and those which had only an indirect link with family life, like the right to compensation for medical negligence. Accepting that Article 8 applied to the latter, and in particular to the present case, would bring within the scope of that provision any material claim a family might have, even one having nothing to do with the family structure. Even though, as the Government accepted, the question whether or not the costs arising from R.'s disability would be reimbursed was likely to affect the life of the applicants' family, it did not have any bearing on the patrimonial relations between parents and children.

104. Even if the Court were to take the view that Article 8 was applicable in the case, the Government further submitted that no interference had been established. Even if that were so, the interference would be in pursuit of a legitimate aim and necessary in a democratic society, regard being had in particular to the legitimate objectives pursued by the Law of 4 March 2002.

B. The Court's assessment

1. General principles

105. While the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, it does not merely require the State to abstain from such interference: there may in addition be positive obligations inherent in effective "respect" for family life. The boundaries between the State's positive and negative obligations under this provision do not always lend themselves to precise definition; nonetheless, the applicable principles are similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and the community as a whole, and in both contexts the State is recognised as enjoying a certain margin of appreciation (see, for example, *Nuutinen v. Finland*, no. 32842/96, 27 June 2000, § 127, and *Kutzner v. Germany*, no. 46544/99, 26 February 2002, §§ 61 and 62). Furthermore, even in relation to the positive obligations flowing from the first paragraph, "in striking [the required] balance the aims mentioned in the second paragraph may be of a certain relevance" (see *Powell and Rayner v. the United Kingdom*, judgment of 21 February 1990, Series A no. 172, § 41).

106. "Respect" for family life ... implies an obligation for the State to act in a manner calculated to allow ties between close relatives to develop normally (see *Marckx*, cited above, § 45). The Court has held that a State is under this type of obligation where it has found a direct and immediate link between the measures requested by an applicant, on the one hand, and his private and/or family life on the other (see *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, § 32; *X and Y v. the Netherlands*, judgment of 26 March 1985, Series A no. 91, p. 11, § 23; *López Ostra v. Spain*, judgment of 9 December 1994, Series A no. 303-C, p. 55, § 55; *Guerra and Others v. Italy*, judgment of 19 February 1998, *Reports* 1998-I, p. 227, § 58; *Botta v. Italy*, judgment of 24 February 1998, *Reports* 1998-I, § 35; and *Zehnalova and Zehnal v. the Czech Republic* (dec.), no. 38621/97, ECHR 2002-V).

107. However, since the concept of respect is not precisely defined, States enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals (see *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, § 67, and *Zehnalova and Zehnal*, cited above).

108. At the same time, the Court reiterates the fundamentally subsidiary role of the Convention. The national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions (see, for example, *Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A no. 24, p. 22, § 48, and *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 97, ECHR 2003-VIII). In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should

be given special weight (see *James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A no. 98, p. 32, § 46, where the Court found it natural that "the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one").

2. Application of the above principles

109. In the present case, in so far as the complaints submitted to the Court may be distinguished from those already examined under Article 1 of Protocol No. 1 to the Convention, the applicants complained of an unjustified interference, but also, in substance, of inaction by the State, which had not set up an effective system to provide compensation for the special burdens arising from their child's disability.

110. The first question to arise is whether Article 8 of the Convention is applicable, that is to say whether the measures taken by the respondent State in relation to disabled persons have anything to do with the applicants' right to lead a normal family life.

111. However, the Court does not consider it necessary in the present case to determine that issue since, even supposing that Article 8 of the Convention may be considered applicable, it considers that the situation complained of by the applicants did not constitute a breach of that provision.

112. It notes that section 1 of the Law of 4 March 2002 altered the existing legal position on the question of medical liability. In response to the *Perruche* judgment and the stormy nation-wide debate which ensued, reflecting the major differences of opinion on the question within French society, the French parliament, after consulting the various persons and interest groups concerned, decided to intervene to establish a new system of compensation for the prejudice sustained by children born with disabilities and their parents, different from the one resulting from the case-law of the administrative and civil courts. One of the main effects of the new rules established in consequence, spelled out by the *Conseil d'Etat* in its opinion of 6 December 2002, is that parents may no longer obtain compensation from the negligent party for damage in the form of the special burdens arising from their children's disabilities throughout their lives. These rules were the result of comprehensive debate in Parliament, in the course of which account was taken of legal, ethical and social considerations, and concerns relating to the proper organisation of the health service and the need for fair treatment for all disabled persons. As the *Conseil d'Etat* pointed out in the opinion already mentioned, Parliament based its decision on general-interest grounds, and the validity of those grounds cannot be called into question by the Court (see paragraph 77 above). In doing so it was pursuing at least one of the legitimate aims set out in the second paragraph of Article 8 of the Convention, namely protection of health or morals.

113. Admittedly, being immediately applicable, the provisions in issue retrospectively deprived the applicants of an essential part of the compensation to which they could lay claim, and the Court can only repeat that finding (see paragraphs 78 to 86 above).

114. However, in deciding that the costs of caring for disabled children should be borne by reliance on national solidarity, the French legislature took the view that it was better to deal with the matter through the legislation laying down the conditions for obtaining compensation for disability than to leave to the courts the task of ruling on actions under the ordinary law of liability. Moreover, the Court notes that the previous legal dispensation, which had obtained since 1975, was thoroughly overhauled by the Law of 11 February 2005 (see paragraphs 53 to 58 above). It is certainly not for the Court to take the place of the national authorities in assessing the advisability of such a system or in determining what might be the best policy in this difficult social sphere. This is an area where the Contracting States are to be recognised as enjoying a wide margin of appreciation (see, *mutatis mutandis*, *Powell and Rayner v. the United Kingdom*, cited above, § 44).

115. Consequently, there is no serious reason for the Court to declare contrary to Article 8, in either its positive or its negative aspect, the way in which the French legislature dealt with the problem or the content of the

specific measures taken to that end. It cannot reasonably be claimed that the French parliament, by deciding to reorganise the system of compensation for disability in France, overstepped the wide margin of appreciation left to it on the question or upset the fair balance that must be maintained.

116. There has accordingly been no violation of Article 8 of the Convention.

117. As regards the complaint under Article 14 of the Convention taken together with Article 8, the Court notes that it was raised for the first time before it at the hearing on 23 March 2005 (see paragraph 102 above). It is therefore not covered by the decision on admissibility of 6 July 2004 which delimits the scope of the Court's jurisdiction (see, among other authorities, *Göç v. Turkey* [GC], no. 36590/97, § 36, ECHR 2002-V, and *Assanidze v. Georgia* [GC], no. 71503/01, § 162, ECHR 2004). It follows that this complaint falls outside the scope of the case as submitted to the Grand Chamber.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

118. 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. Pecuniary and non-pecuniary damage

119. The applicants alleged that they had sustained pecuniary damage corresponding to the sums they would have received if the legal situation prior to the Law of 4 March 2002 had continued to obtain. Supplying the relevant vouchers, they claimed the following sums:

a. EUR 38,701.32 and EUR 6,922.40 for the disruption to their working lives suffered by Mrs and Mr Draon respectively;

b. EUR 22,867.35 for the loss of enjoyment of a piece of real property;

c. EUR 91,469.40 for their non-pecuniary damage;

d. EUR 45,734.70 for disruption to their lives;

e. EUR 365,499 for the additional costs of constructing a purpose-built house;

f. EUR 42,779 for indispensable adaptations within the home;

g. EUR 5,092,588 for non-specialist care (assistance of a third person) ;

h. EUR 52,567.47 for specific outlays remaining at their expense (non-reimbursable purchases);

i. EUR 35,940.99 for a specially equipped motor vehicle.

120. As regards in particular the sums corresponding to "special burdens" (listed under e. to i. above), the applicants emphasised that the law

enacted on 11 February 2005 would not be immediately applicable to children and that it would not ensure compensation for the prejudice they had already sustained since R.'s birth. In addition, in their submission, the benefits provided for in that law were inadequate.

From the amounts indicated above, the applicants deducted the sum of EUR 180,000 awarded by the Paris Administrative Court. Their claim for pecuniary damage therefore amounted in total to EUR 5,615,069.63.

The applicants requested a further EUR 12,000 as compensation for the non-pecuniary damage resulting from the violations of the Convention they complained of.

121. The Government contested all of the above claims, considering them to be unreasonable. As regards the claims under the head of pecuniary damage, they submitted in particular that the sums claimed under a. to d. above related to damage already made good by the domestic courts. As to the sums corresponding to the "special burdens" arising from R.'s disability (itemised under e. to i. above), these were already partly covered by the allowances paid by way of national solidarity, which were later to be supplemented by the provisions of the Law of 11 February 2005. It followed, in the Government's submission, that the applicants should not be awarded a specific sum for pecuniary damage.

The Government likewise considered that, in respect of the alleged non-pecuniary damage, if the Court were to find a violation that finding would constitute sufficient just satisfaction.

122. The Court considers that, in the circumstances of the case, and regard being had in particular to the state of the proceedings in the national courts, the question of the application of Article 41 is not yet ready for decision in respect of pecuniary and non-pecuniary damage. It should therefore be reserved, account being taken of the possibility of an agreement between the respondent State and the applicants (Rule 75 §§ 1 and 4).

B. Costs and expenses

123. With supporting vouchers, the applicants claimed EUR 15,244 for costs and expenses incurred before the Court.

124. The Government acknowledged that the applicants had used the services of a lawyer and that the case was of a certain complexity. They left assessment of the amount to be awarded under this head to the Court's discretion, while submitting that it should not exceed EUR 7,500.

125. The Court notes that the applicants supported their claims by supplying a bill of costs containing an itemised breakdown of work done. Considering that the amounts claimed are not excessive in the light of the nature of the dispute, which was incontestably of a certain complexity, the Court allows the applicants' claims in full and awards them the sum of EUR 15,244, including all taxes.

C. Default interest

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

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been a violation of Article 1 of Protocol No. 1 to the Convention;

2. *Holds* unanimously that it is not necessary to examine the complaint relating to Article 14 of the Convention taken together with Article 1 of Protocol No. 1 to the Convention;

3. *Holds* by twelve votes to five that it is not necessary to examine separately the complaint under Article 6 § 1 of the Convention;

4. *Holds* unanimously that there has been no violation of Article 13 of the Convention;

5. *Holds* unanimously that, even supposing that Article 8 of the Convention is applicable, there has been no violation of that provision;

6. *Holds* unanimously that the complaint under Article 14 of the Convention taken together with Article 8 falls outside the scope of its examination;

7. *Holds* unanimously that, as regards the sum to be awarded to the applicants in respect of any pecuniary and non-pecuniary damage resulting from the violation found, the question of the application of Article 41 is not ready for decision and accordingly
(a) *reserves* the said question in whole;
(b) *invites* the Government and the applicants to submit, within six months from the date of notification of this judgment, their written observations on the matter and, in particular, to notify the Court of any agreement that they may reach;
(c) *reserves* the further procedure and *delegates* to the President of the Court the power to fix the same if need be;
8. *Holds* unanimously
(a) that the respondent State is to pay the applicants, within three months, EUR 15,244 (fifteen thousand two hundred and forty-four euros) in respect of the costs and expenses incurred up to the present

stage of the proceedings before the Court, 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.

Done in French and in English, and delivered at a public hearing in the

Luzius WILDHABER
President

T.L. EARLY
Deputy to the Registrar

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

(a) joint partly dissenting opinion of Mr Rozakis, Sir Nicolas Bratza, Mr Bonello, Mr Loucaides and Mrs Jočienė;

(b) separate opinion of Mr Bonello.

JOINT PARTLY DISSENTING OPINION OF JUDGES ROZAKIS, Sir Nicolas BRATZA, BONELLO, LOUCAIDES AND JOČIENĖ

1. We are in agreement with the conclusion and reasoning of the majority on all aspects of the case, save as to their conclusion that it is unnecessary to examine separately the applicants' complaint under Article 6 § 1 of the Convention. In our view such an examination is called for in the present case, consistently with the approach of the Court in the cases of *Stran Greek Refineries and Stratis Andreadis v. Greece* (judgment of 9 December 1994, Series A no. 301-B) and *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom* (judgment of 23 October 1997, *Reports of Judgments and Decisions*, 1997-VII, p. 2326). Article 6 of the Convention and Article 1 of Protocol No. 1 reflect two separate and distinct Convention values, both of fundamental importance – the rule of law and the fair administration of justice on the one hand and the peaceful enjoyment of possessions, on the other. While the facts at the basis of the complaints under the two articles are the same, the issues raised and the relevant governing principles are not and, unlike the majority, we do not consider that the Court's conclusion that Article 1 has been violated is such as to relieve the Court of the duty of examining the applicants' complaint under Article 6.

2. The Court has previously held that the legislature is not in principle precluded in civil matters from regulating rights arising from legislation in force through new retrospective provisions. However, the principle of the rule of law and the notion of fair trial enshrined in Article 6 preclude any interference by the legislature – other than on compelling grounds of the general interest – with the administration of justice designed to influence the judicial determination of a dispute (see *Zielinski and Pradal & Gonzales and Others v. France* [GC], nos. 24864/94 and 34165/96 to 34173/96, ECHR 1999-VII and, among other authorities, *Anagnostopoulos and Others v. Greece*, judgment of 7 November 2000, *Reports of Judgments and Decisions* 2000-XI, §§ 20 and 21).

3. In the present case, the Law of March 2002, which introduced a new system of compensation for the prejudice sustained by a person born with a disability, provided, in paragraph I *in fine* of section 1, that its provisions were to be applicable to pending proceedings, with the exception of those in which there had been an irrevocable decision on the principle of compensation. As a result of the application of that provision, the parents of children whose disability had not been detected before birth on account of negligence, like the applicants, were deprived of a considerable part of the compensation they could previously have claimed by virtue of the precedent set in the *Quarez* case. Thus the law complained of, being applicable to the judicial proceedings which the applicants had brought and which were still

in progress, had the effect of changing their outcome once and for all by retrospectively limiting the damages potentially recoverable in the proceedings to the applicants' disadvantage (see paragraph 78 above).

4. The Government submitted that the Law of 4 March 2002 was not directed specifically at the dispute which gave rise to the present case, or any particular dispute. While it is true that, unlike the situation in the *Stran Greek* case, the impugned legislation in the present case did not target particular litigation, this is not in our view decisive. Of greater significance is the fact that the contested provisions manifestly had the aim, and the effect, of radically altering the applicable compensation rules and were, by their express terms, designed to apply to all pending judicial proceedings, including those of the applicants, in which no irrevocable decision had been taken on the principle of compensation.

5. The Government further relied on the fact that, in further contrast to the *Stran Greek* case, the State was not itself directly party to the dispute which gave rise to the present case. This fact, again, is not in our view of central importance, the principle which precludes intervention by the legislature in pending legal proceedings being founded not only the requirement of equality of arms between the parties to the proceedings but also on more general requirements of Article 6 of the Convention relating to the rule of law and the separation of powers. In any event, while the State was not as such a party to the proceedings in question in the present case, we note that the participation of AP-HP, a public administrative establishment under the supervision of four Ministers, necessarily had major implications for the public finances and that the State was, accordingly, directly affected by the outcome of the proceedings to which the legislation expressly related.

6. While, as in the case of the complaint under Article 1 of the Protocol, we do not seek to question the validity of the general-interest considerations which motivated the introduction of the Law of 4 March 2002, the question remains whether those reasons were, individually or collectively, sufficiently cogent to justify the legislature in extending the measures to legal proceedings which were already in progress. In our view, neither the parliamentary proceedings which preceded the enactment of the provisions in question - in which the main concern raised was the need to end the effects of the *Perruche* judgment - nor the considerations set out by the *Conseil d'Etat* in its opinion of 6 December 2002 and relied on by the Government (see paragraphs 51 and 62 above), can be regarded as affording sufficiently compelling grounds of the general interest to justify making the provisions of the first paragraph of section 1 applicable to pending proceedings.

7. Consequently, we consider that the application of section 1 of the Law of 4 March 2002 to the proceedings brought by the applicants, and pending at the time the Law entered into force, violated the applicants' rights under Article 6 § 1 of the Convention

SEPARATE OPINION OF JUDGE BONELLO

1. I voted for the minority's finding that in the present case there has been a violation of both Article 6 § 1 and of Article 1 of Protocol No. 1, for the reasons set out in the joint dissenting opinion which I fully endorse.

2. While agreeing with the reasons of the Court for finding a violation of Article 1 of Protocol No. 1, and with the minority in finding a violation of Article 6 § 1, I would add another set of considerations which influenced my resolution to vote for a double breach.

3. Law no. 303 of 4 March 2002 (hereinafter "the 2002 Law") bred two consequences which, in my view, were both equally unacceptable. Firstly, it interfered in a manipulative manner with the outcome of an already pending court case, with highly adverse results for the applicants' Convention rights. Secondly, it did this by spawning a new, privileged, immune class of culpable doctors.

4. The 2002 Law peremptorily introduced the novelty of exempting some health professionals or establishments retroactively from the consequences of proved medical error. *All* other medical practitioners and establishments were previously answerable, and still are fully answerable, for the moral and material damage arising from their deficiencies. Professionals and establishments which fail in their function to detect disabilities in the foetus before birth have now been rewarded with a blanket exemption from liability for any material damage arising from their negligence.

5. Before 2002 all doctors in France were equal before the law. Like all other professionals (lawyers, architects etc.) they were fully liable in negligence. By virtue of the 2002 Law, those who practice pre-natal detection are now less equal than others. Their negligence carries a considerably lighter price tag than that of all other professionals. In my book, unequal disposal of equal guilt is no less pernicious than equal disposal of unequal guilt.

6. The internationally accepted norm remains the principle of liability. Every person who has, through malice or negligence, caused harm to others is bound to make good all damage occasioned. The 2002 Law has derogated from this principle. All medical practitioners remain subject to the principle and consequences of liability, except those working in one particular branch of medicine. The latter the 2002 Law has protected in an eminently privileged fortress, totally immune from suits in material damages. I see this discriminatory immunity not so much in the light of Article 14, but rather as another element to factor in when assessing the proportionality of the interference.

7. The 2002 Law not only improperly thwarted the applicants' Convention rights, but did this through the medium of an improper agency: the creation of a total immunity from the risk of material damages. Immunity, detestable by nature, appears doubly so when wielded to maim fundamental rights.

8. Some immunities, like diplomatic immunity, judicial immunity and partial parliamentary immunity, are the result of historical imperatives and functional necessities. They enjoy the legitimation of long-standing acceptance and tradition, and a proven advantageousness that somehow neutralises the odium of a protection that is unequal between the immune and the non-immune.

9. But to ring in, *pace* the 21st century, a new immunity tailored to the comfort of one handpicked class of one handpicked profession was, to my way of thinking, the most efficient way of achieving a disagreeable disturbance of Convention rights.

10. The creation of brand-new immunities from suit, as in the present case, automatically brings into play a new suspect classification, which should have had the double effect of shifting the onus of justification onto the Government and of burdening the Court with a duty of more stringent scrutiny.

11. The impunity engineered by the 2002 Law was intended to salvage some medical practitioners from the consequences of their own deficit of diligence, while abandoning all others to full responsibility in negligence and tort. This has nothing to do with other so-called acceptable "immunities", like the capping of the liability of air carriers. That limitation comes into being by prior international agreement and is contractually accepted beforehand by the eventual victim of damage through the mere purchase of an air ticket publicising that limitation.

12. The Government, which lost no opportunity of re-crafting the law to their own financial advantage, have lost the opportunity of justifying, by compelling reasons, the creation of a suspect unequal protection; and the Court has not scrutinized all the more stringently the emergence of this "parvenu" immunity.

Sentenza del 6 ottobre 2005, Grande Camera, caso MAURICE c. Francia (in particolare, par. 60-94 e 101-104)

In the case of Maurice v. France,

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

Mr L. WILDHABER, *President*,
Mr C.L. ROZAKIS,
Mr J.-P. COSTA,
Sir Nicolas BRATZA,
Mr G. BONELLO,
Mr L. CAFLISCH,
Mr L. LOUCAIDES,
Mr C. BÎRSAN,
Mr P. LORENZEN,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mr A.B. BAKA,
Mr M. UGREKHELIDZE,
Mr V. ZAGREBELSKY,
Mr K. HAJIYEV,
Mrs R. JAEGER,
Mrs D. JOČIENĖ, *judges*,

and Mr T.L. EARLY, *Deputy Grand Chamber Registrar*,

Having deliberated in private on 23 March and 31 August 2005,

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

PROCEDURE

1. The case originated in an application (no. 11810/03) against the French Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two French nationals, Mr Didier Maurice and Mrs Sylvia Maurice ("the applicants"), on 28 February 2003. The applicants acted both in their own right and as the legal representatives of their minor children.

2. The applicants were represented by Arnaud Lyon-Caen, Françoise Fabiani, Frédéric Thiriez, a law firm authorised to practise in the *Conseil d'Etat* and the Court of Cassation. The French Government ("the Government") were represented by their Agent, Mrs E. Belliard, Director of Legal Affairs at the Ministry of Foreign Affairs.

3. The application concerns the birth of a child with a disability not detected during pregnancy on account of negligence in establishing a prenatal diagnosis. The applicants claimed compensation, but during the course of the proceedings the action was barred by new legislation

applicable to pending cases. The applicants relied in particular on Articles 6 § 1, 8, 13 and 14 of the Convention and Article 1 of Protocol No. 1, complaining of the retrospective nature of the new legislation and challenging its substantive provisions.

4. The application was allocated to the Court's Second Section (Rule 52 § 1 of the Rules of Court). Within that Section a Chamber composed of Mr A.B. Baka, President, Mr J.-P. Costa, Mr L. Loucaides, Mr K. Jungwiert, Mr V. Butkevych, Mrs W. Thomassen, Mr M. Ugrekhelidze, judges, and Mrs S. Dollé, Section Registrar, decided on 17 June 2003 to give notice of the application to the respondent Government (Rule 54 § 2 (b)) and to give it priority (Rule 41).

5. On 6 July 2004 the Chamber declared the application partly admissible.

6. On 19 October 2004 the Chamber relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

7. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24. The place of Mr Davíd Thór Björgvinsson, who was originally to have been a member of that Grand Chamber, was taken by Mr G. Bonello, substitute judge. Mr B. Zupančič and Mrs E. Steiner, who were unable to take part in the final deliberations, were replaced by Mr L. Caflisch and Mrs D. Jočienė, substitute judges (Rule 24 § 3).

8. After consulting the parties, the President decided that the present case should be examined together with *Draon v. France* (no. 1513/03), also pending before the Grand Chamber (Rule 42 § 2).

9. The applicants and the Government each filed observations on the merits.

10. A hearing in the present case and the above-mentioned *Draon* case took place in public in the Human Rights Building, Strasbourg, on 23 March 2005 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr J.-L. Florent, Deputy Director of Legal Affairs, Ministry of Foreign Affairs, *Agent*,

Mrs L. Notarianni, administrative court judge, on secondment to the Legal Affairs Department of the Ministry of Foreign Affairs, Human Rights Section, *Counsel*,

Mr P. Didier-Courbin, Deputy Director responsible for disabled persons, General Social Action Department, Ministry of Health,

Mrs J. Villiger, central administrative assistant,
General Social Action Department, Ministry of Health,
(Disabled Children's Office),
Mr S. Picard and Mr C. Simon, legal advisers,
General Administration of Personnel and
Budget Department, Legal and Litigation Division,
Ministry of Health,
Mr F. Amegadjie, legal officer, European and
International Affairs Service, Ministry of Justice, *Advisers*;

(b) *for the applicants*
Mr A. Lyon-Caen, of the *Conseil d'Etat* and Court
of Cassation Bar, *Counsel*.

11. The Court heard addresses by Mr Lyon-Caen and Mr Florent, and their replies to judges' questions.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

12. The applicants were born in 1962 and 1965 respectively and live in Bouligny.

13. In 1990 the applicants had their first child, A., who was born with type 1 infantile spinal amyotrophy, a genetic disorder causing atrophy of the muscles.

14. In 1992 Mrs Maurice became pregnant again. A prenatal diagnosis conducted at Nancy University Hospital revealed that there was a risk of the unborn child's being afflicted by the same genetic disorder. The applicants chose to terminate the pregnancy.

15. In 1997 Mrs Maurice, who was pregnant for the third time, again requested a prenatal diagnosis. This was conducted at Briey General Hospital, which sent the sample to the molecular diagnosis laboratory of the Necker Children's Hospital Group, run by Assistance publique-Hôpitaux de Paris ("AP-HP"). In June 1997, in the light of that laboratory's diagnosis, Briey General Hospital assured the applicants that the unborn child was not suffering from infantile spinal amyotrophy and was "healthy".

16. C. was born on 25 September 1997. Less than two years after her birth it became apparent that she too suffered from infantile spinal amyotrophy. On 22 July 1999 a report by the head of the laboratory at the Necker Children's Hospital in Paris revealed that the mistaken prenatal diagnosis was the result of transposing the results of the

analyses relating to the applicants' family and those of another family, caused by the switching of two bottles.

17. According to medical reports, C. presents grave disorders and objective signs of functional deficiency – frequent falls from which she is unable to get up unassisted, unsteady walk, tiredness at any effort. She needs the assistance of another person (particularly at night in order to turn her over so as to prevent her from suffocating, since she is unable to turn over alone). She cannot sit on her own and moves around with an electric scooter. She has to receive treatment several times a week and cannot be admitted to school because the latter is not suitably equipped. Her family doctor has expressed the view that "one must have reservations until the time of puberty both about motor and respiratory functions and about possible orthopaedic deformations". These facts gave rise to several sets of proceedings.

A. Applications under the urgent procedure

18. On 13 November 2000 the applicants submitted a claim to AP-HP seeking compensation for the pecuniary and non-pecuniary damage suffered as a result of C.'s disability.

19. They also submitted to the urgent applications judge at the Paris Administrative Court a request for an interim award and for an expert to be appointed. The latter was appointed by an order issued on 4 December 2000.

20. In an order made on 26 April 2001, the urgent applications judge at the Paris Administrative Court dismissed the request for an interim award on the ground that, as the expert had not yet delivered his report, "AP-HP's obligation to pay [could] not be regarded as indisputable".

21. The expert submitted his report on 11 June 2001, concluding that on the occasion of the prenatal diagnosis conducted at the AP-HP laboratory there had not been medical negligence, because "the techniques employed [had been] consistent with the known scientific facts", but there had been "negligence in the organisation and functioning of the service causing the transposition of results between two families tested at the same time".

22. The applicants lodged a further application, asking for the hospital to be ordered to pay them an advance of 594,551 euros (EUR). In an order made on 19 December 2001, the urgent applications judge at the Paris Administrative Court ordered AP-HP to pay an advance of EUR 152,449. He observed in particular:

> "... it is apparent from the investigation that in May 1997, at Briey General Hospital, a sample of amniotic fluid was taken from [Mrs Maurice] ...; that the analysis of that amniotic fluid was carried out by Assistance publique-Hôpitaux de Paris; that while the

results given [to the applicants] indicated that the unborn child was not suffering from infantile spinal amyotrophy, they related to a sample taken from another family tested at the same time and did not mention that, the sample of amniotic fluid having been contaminated by the mother's blood, they were attended by uncertainty; that [the applicants] are therefore entitled to argue that Assistance publique-Hôpitaux de Paris was guilty of negligent acts or omissions; that those negligent acts wrongly led [the applicants] to the certainty that the child conceived was not suffering from infantile spinal amyotrophy and that [Mrs Maurice's] pregnancy could be carried to term in the normal way; that these negligent acts must be regarded as the direct causes of the damage sustained by [the applicants] from the disorder from which C. suffers; and that, this being the case, the existence of the obligation claimed by [the applicants] is not seriously open to challenge."

23. AP-HP appealed. In its submissions it argued that, while the transposition of the analyses had indeed constituted negligence in the organisation and functioning of the public hospital service, the only result of that negligence had been to deprive the applicants of information apt to enlighten their decision to seek a termination of the pregnancy. On the basis of the above-mentioned expert report, AP-HP submitted that even if the samples had not been transposed, the results would have been uncertain, having regard to the presence of the mother's blood in the sample taken. Consequently, the applicants would not in any case have had reliable information available to them.

24. In a judgment of 13 June 2002, the Paris Administrative Court of Appeal varied the order issued by the urgent applications judge, reducing from EUR 152,449 to EUR 15,245 the amount of the interim award to the applicants. In its judgment it observed:

"Liability:

... after the birth [of C.], as the child had been found to be suffering from [infantile spinal amyotrophy], it emerged that the reason incorrect information had been given to the parents was that the results of the analyses carried out on two patients had been switched. It is not contested that the results were switched by the staff of [AP-HP] ... The negligence thus committed, as a result of which [Mrs Maurice] had no reason to request an additional examination with a view to termination of the pregnancy on therapeutic grounds, must be regarded as the direct cause of the prejudice suffered by [the applicants]."

The court went on to say:

"Entitlement to the interim award requested:

... the infantile spinal amyotrophy from which the child C. suffers is not the direct consequence of the above-mentioned negligence ... Accordingly, pursuant to the provisions ... of paragraph I of section 1 of the Law of 4 March 2002 [on patients' rights and the quality of the health service – "the Law of 4 March 2002"], [AP-HP] would only be required to compensate the damage sustained by [the applicants], to the exclusion of the 'special burdens arising throughout the life of the child' from the latter's disability, compensation for disability being a matter for national solidarity according to those same provisions. That being so, [AP-HP]'s plea that, for assessment of [the

applicants'] right to compensation, the above-mentioned provisions of the Law of 4 March 2002 should have been applied to the dispute constitutes a serious defence against the applicants' claim at first instance, in the amount awarded by the court below. If the above-mentioned legislative provisions ... are held to be applicable in the main proceedings now pending in the Paris Administrative Court, the only obligation [on AP-HP] which could be regarded as not seriously open to challenge would be the obligation to compensate [the applicants] for their non-pecuniary damage, which should be fixed, in the circumstances of the case, at 15,245 euros. Consequently, the interim award [AP-HP] is required to pay should be reduced to that sum ..."

25. The applicants and AP-HP appealed on points of law. The applicants submitted only one ground of appeal to the *Conseil d'Etat*. Relying on Article 6 § 1 of the Convention and Article 1 of Protocol No. 1, they argued that the immediate applicability of the Law of 4 March 2002 to pending proceedings was contrary to the Convention.

26. Having been seised in the context of a similar case (*Draon*, also submitted to the Court, application no. 1513/03), the *Conseil d'Etat* ruled, in an opinion delivered on 6 December 2002, that the Law of 4 March 2002 was indeed applicable to pending proceedings and was compatible with the provisions of the Convention (see paragraph 52 below).

27. In a judgment of 19 February 2003 the *Conseil d'Etat*, ruling on the above-mentioned appeal on points of law, followed the line set out in that opinion, observing:

"It is not seriously open to challenge that such facts constituting gross negligence [*faute caractérisée*] which deprived [the applicants] of the possibility of terminating the pregnancy on therapeutic grounds, confer entitlement to compensation pursuant to section 1 of the Law of 4 March 2002, which came into force after the ruling of the urgent applications judge at the Paris Administrative Court and is applicable to pending proceedings. It is appropriate, in the particular circumstances of the case, to set at 50,000 euros the amount of the interim award [AP-HP] is required to pay on account of the prejudice sustained by [the applicants] personally."

B. The main proceedings (action for damages against AP-HP)

28. Having received no reply from AP-HP two months after submitting their claim on 13 November 2000, and the absence of any reply amounting to implicit rejection, the applicants brought proceedings in the Paris Administrative Court. In their application they requested that the implicit rejection be set aside and AP-HP ordered to pay them, in particular, the following amounts: 2,900,000 French francs (FRF) (EUR 442,102) for the construction of a house and the purchase of a vehicle and a wheelchair; FRF 500,000 (EUR 76,225) in respect of non-pecuniary damage and disruption to their lives; FRF 10,000,000 (EUR 1,524,490) for pecuniary damage; and FRF 30,000 (EUR 4,573) in respect of the non-pecuniary damage suffered by their eldest daughter.

29. Following the opinion given by the *Conseil d'Etat* on 6 December 2002, the applicants submitted supplementary observations to the Administrative Court asking it not to consider itself bound by the Judicial Assembly's opinion and to declare the Law of 4 March 2002 incompatible with the provisions of the Convention. AP-HP, for its part, again submitted that the prenatal diagnosis communicated to the applicants would have been uncertain even if the results had not been transposed.

30. In a judgment of 25 November 2003, the Paris Administrative Court ordered AP-HP to pay the applicants a total of EUR 224,500 (EUR 220,000 on their own behalf and EUR 4,500 on behalf of their eldest daughter) in respect of non-pecuniary damage and the disruption to their lives. It observed in particular:

> "LIABILITY:
>
> [The applicants] seek to establish [AP-HP's] liability for the damage they suffered on account of the fact that their daughter C. was born with a disability not detected during pregnancy.
>
> ...
>
> The provisions of section 1 of the Law of 4 March 2002, in the absence of any provisions in the Law providing for deferred entry into force, are applicable under the conditions of ordinary law following publication of the Law in the Official Gazette of the French Republic. The rules which it lays down, as decided by the legislature on general-interest grounds relating to ethical considerations, the proper organisation of the health service and the equitable treatment of all disabled persons, are not incompatible with the requirements of Article 6 of the Convention ..., with those of Articles 13 and 14 of the Convention or with those of Article 1 of Protocol No. 1 to [the] Convention. ... The general-interest ground which the legislature took into account when laying down the rules contained in the first three sub-paragraphs of paragraph 1 justifies their application to situations which arose prior to the commencement of pending proceedings. Having regard to the wording of the Law of 4 March 2002, neither the fact that the system of compensation has not yet entered into force nor the fact that the mistaken diagnosis is alleged to have resulted from negligence in the organisation and functioning of the service are such as to bar application of the above-mentioned provisions to the present proceedings brought on 16 March 2001.
>
> The administrative courts do not have jurisdiction to determine the constitutionality of statute law. The appellants cannot therefore validly assert that the above-mentioned Law of 4 March 2002 is unconstitutional.
>
> [The applicants], whose eldest daughter suffers from infantile spinal amyotrophy, and who decided in 1992 to terminate another pregnancy after a prenatal diagnosis had revealed that the unborn child was afflicted by the same pathology, had a daughter named C. in 1997 who was discovered during 1999 to be likewise suffering from that disorder despite the fact that, in view of the results of the amniocentesis conducted on [Mrs Maurice], they had been told that the foetus was healthy. That information proved to have been incorrect because the results from two patients had been transposed. The investigation showed that the switch was imputable to [AP-HP], which runs the Necker Children's Hospital on whose premises the sample had been analysed. The switching of the results constituted gross negligence [*faute caractérisée*]

for the purposes of the Law of 4 March 2002. In order to absolve itself of liability, Assistance publique-Hôpitaux de Paris cannot effectively argue that, even in the absence of negligence, the diagnosis would not have been reliable because of the presence of the mother's blood in the foetal sample, since in such circumstances it was incumbent on the practitioner responsible for the analysis to inform [the applicants] accordingly, so that they would then have been able to have a new sample taken. The gross negligence mentioned above deprived the applicants of the possibility of terminating the pregnancy on therapeutic grounds, for which there is no time-limit. Such negligence entitles them to compensation under the conditions laid down in section 1 of the Law of 4 March 2002 ..."

31. As regards assessment of the damage suffered, the court ruled as follows:

"... firstly, the amounts sought in respect of treatment, special education costs and the costs of building a new house and purchasing a vehicle and an electric wheelchair relate to special burdens arising throughout the life of the child from her disability and cannot therefore be sums for which [AP-HP] is liable, regard being had to the above-mentioned provisions of section 1 of the Law of 4 March 2002;

... secondly, [the applicants] are suffering non-pecuniary damage and disruptions to their lives, particularly their work, of exceptional gravity, regard being had to the profound and lasting change in their lives resulting from the birth of a second severely disabled child. In the circumstances of the case, these two heads of damage must be assessed at 220,000 euros. Consequently, [AP-HP] is ordered to pay that sum to [the applicants], after deducting the interim award paid;

... thirdly, the above-mentioned provisions of the Law of 4 March 2002 do not bar payment of compensation, under the rules of ordinary law, for the non-pecuniary damage suffered by A. Maurice on account of the fact that her sister was born with a disability. In the circumstances of the case, a fair assessment of that damage requires [AP-HP] to pay the sum of 4,500 euros to [the applicants] acting on behalf of their child;"

32. On 19 January 2004 the applicants appealed against the above judgment. The appeal is at present pending before the Paris Administrative Court of Appeal.

C. Action against the State for damage inflicted by reason of legislation

33. In a complaint submitted to the Prime Minister on 24 February 2003, the applicants requested payment of compensation in the sum of EUR 1,970,593.33 based on the State's liability for damage inflicted by reason of the Law of 4 March 2002.

34. On expiry of the two-month time-limit following the lodging of their complaint, the applicants referred it to the Paris Administrative Court, requesting it to set aside the Prime Minister's implicit decision to reject it and to order the State to compensate them for the damage they considered they had suffered.

35. In a judgment of 25 November 2003, the Paris Administrative Court dismissed the complaint. It observed in particular:

> "It is clear from the drafting history of the Law of 4 March 2002 that this provision is based, firstly, on the desire of the legislature not to require health-care professionals or establishments to pay compensation for the burdens occasioned by a disability not detected during pregnancy, and, secondly, on a fundamental requirement: the rejection of any discrimination between disabled persons whose disability would be compensated for in accordance with the principles of liability and those whose disability would be covered by national solidarity, their mother having refused an abortion or the disability being undetectable at the time of the prenatal diagnosis.
>
> This desire on the part of the legislature to eliminate any discrimination between disabled persons is a bar to the establishment [by the applicants] of the State's liability by reason of the immediate application to pending proceedings of the Law of 4 March 2002, for the purpose of obtaining compensation for the special burdens arising from the disability, not detected during pregnancy, of their child C. Consequently, the [applicants'] submissions seeking the annulment of the contested decision and an order requiring the State to pay damages must be dismissed.
>
> ..."

36. The applicants appealed against this judgment. The appeal is now pending before the Paris Administrative Court of Appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

37. Before enactment of the Law of 4 March 2002 on patients' rights and the quality of the health service ("the Law of 4 March 2002"), the legal position was established by the relevant case-law.

A. Relevant case-law before the Law of 4 March 2002

38. An action for damages brought by the parents of a child born disabled and by the child itself may come within the jurisdiction of either the administrative courts or the ordinary courts, depending on the identity of the defendant. If the defendant is a private doctor or a private medical laboratory, the dispute is referred to the ordinary courts. Where, on the other hand, as in the instant case, a public hospital service is involved, the dispute falls within the jurisdiction of the administrative courts.

1. *The* Conseil d'Etat

39. The *Conseil d'Etat* gave judgment on 14 February 1997 (CE, Sect., 14 February 1997, *Centre hospitalier de Nice c. Quarez, Recueil Lebon*, p. 44). Mrs Quarez, then aged 42, had undergone an amniocentesis at her own request in order to verify the health of the foetus she was carrying. Although the result of that examination revealed no anomaly, she gave

birth to a child suffering from trisomy 21, a condition detectable through the chromosome test carried out. The *Conseil d'Etat* held in the first place that the hospital which had carried out the examination had been guilty of negligence, since Mrs Quarez had not been informed that the results of the amniocentesis might be subject to a higher margin of error than usual on account of the conditions under which the examination had taken place.

40. Secondly, a distinction was drawn between the disabled child's entitlement to compensation and that of its parents.

With regard to the disabled child's right to compensation, the *Conseil d'Etat* ruled: "In deciding that a direct causal link existed between the negligence of the hospital centre ... and the damage incurred by the child M. from the trisomy from which he suffers, when it is not established by the documents in the file submitted to the court which determined the merits that the infirmity from which the child suffers and which is inherent in his genetic make-up was the consequence of [an] amniocentesis, the Lyon Administrative Court of Appeal made an error of law."

On the other hand, with regard to the parents' right to compensation, the *Conseil d'Etat* noted: "By asking for an amniocentesis, Mrs Quarez had clearly indicated that she wished to avoid the risk of a genetic accident to the child she had conceived, the probability of which, given her age at the time, was relatively high." It went on to say that in those conditions the hospital's negligence had "wrongly led Mr and Mrs Quarez to the certainty that the child conceived was not trisomic and that Mrs Quarez's pregnancy could be carried normally to term" and that "this negligence, as a result of which Mrs Quarez had no reason to ask for a second amniocentesis with a view to abortion on therapeutic grounds under Article L. 162-12 of the Public Health Code, should be regarded as the direct cause of the prejudice caused to Mr and Mrs Quarez by their child's infirmity".

41. With regard to compensation, the *Conseil d'Etat* took into account, under the head of pecuniary damage, the "special burdens, particularly in terms of specialist treatment and education" made necessary by the child's infirmity, and awarded the parents an annuity to be paid throughout the child's life. It also ordered the hospital to pay compensation for their non-pecuniary damage and the disruption to their lives.

42. Thus the *Conseil d'Etat* did not accept that a disabled child was entitled to compensation on the sole ground that the disability had not been detected during the mother's pregnancy. It did accept on the other hand that the parents of a child born with a disability were entitled to compensation and made an award not only in respect of their non-pecuniary damage but also in respect of the prejudice caused by the disruption to their lives and of pecuniary damage, specifying that the

latter included the special burdens which would arise for the parents from their child's infirmity (expenditure linked to specialist treatment and education, assistance from a helper, removal to a suitable home or conversion of their present home, etc.).

43. The judgment did not attract particular comment and led to a line of case-law followed thereafter by the administrative courts.

2. The Court of Cassation

44. The case-law of the ordinary courts was laid down by the Court of Cassation on 17 November 2000 (*Cass., Ass. plén.*, 17 November 2000, *Bull., Ass. plén.*, no. 9) in a judgment which was widely commented on (the *Perruche* judgment). In the *Perruche* case a woman had been taken ill with rubella at the start of her pregnancy. Having decided to terminate the pregnancy if the foetus was affected, she took tests to establish whether she was immunised against the disease. Because of negligence on the part of both her doctor and the laboratory, she was wrongly informed that she was immunised. She therefore decided not to terminate the pregnancy and gave birth to a child who suffered from grave disabilities resulting from infection with rubella in the womb. The Court of Cassation held: "Since the negligence on the part of the doctor and the laboratory in performing the services for which they had been contracted by Mrs X. prevented her from exercising her choice of terminating her pregnancy in order not to give birth to a disabled child, the child may claim compensation for the damage resulting from that disability and caused by the negligence found."

Thus, contrary to the *Conseil d'Etat*, the Court of Cassation accepted that a child born disabled could itself claim compensation for the prejudice resulting from its disability.

In this case, therefore, account was taken of the pecuniary and non-pecuniary damage suffered by both the child and the parents, including the special burdens arising from the disability throughout the child's life.

45. It thus appears that in the same circumstances both the Court of Cassation and the *Conseil d'Etat* base their approach on a system of liability for negligence. However, the Court of Cassation recognises a direct causal link between the medical negligence and the child's disability, and the prejudice resulting from that disability for the child itself. The *Conseil d'Etat* does not recognise that link but considers that the negligence makes the hospital liable *vis-à-vis* the parents on account of the existence of a direct causal link between that negligence and the damage they have sustained.

Both lines of case-law allow compensation to be paid in respect of the special burdens arising from the disability throughout the child's life. However, since the *Conseil d'Etat* considers that damage to have been

sustained by the parents, whereas the Court of Cassation considers that it is sustained by the child, there may be significant differences in the nature and amount of such compensation, depending on whether the case-law of the former or the latter court is being followed.

46. The judgment of 17 November 2000 was upheld several times by the Court of Cassation, which reaffirmed the principle of compensation for a child born disabled, subject to proof where appropriate that the medical conditions for a voluntary termination of pregnancy on therapeutic grounds were satisfied (*Cass., Ass. plén.*, three judgments of 13 July 2001, *BICC*, no. 542, 1 October 2001; see also *Cass., Ass. plén.*, two judgments of 28 November 2001, *BICC*, 1 February 2002).

47. The *Perruche* judgment drew numerous reactions from legal theorists, but also from politicians and from associations of disabled persons and practitioners (doctors, obstetrical gynaecologists and echographers). The last-mentioned group interpreted the judgment as obliging them to provide a guarantee, and the insurance companies raised medical insurance premiums.

3. Liability for negligence

48. Both the *Conseil d'Etat* and the Court of Cassation took as their starting-point a system of liability for negligence. In French law, under the general rules on the question, the right to compensation for damage can be upheld only if the conditions for liability are first satisfied. That means that there must be prejudice (or damage), negligence and a causal link between the damage and the negligence.

More particularly, with regard to the liability of a public authority, for compensation to be payable the prejudice, which is for the victim to prove, must be certain. Loss of opportunity constitutes certain prejudice, provided that the opportunity was a serious one.

In the present case the prejudice resulted from a lack of information, or inadequate or incorrect information, about the results of an examination or analysis. In such a case, before the Law of 4 March 2002 was enacted, negligence falling short of gross negligence was sufficient. As to the relation between cause and effect, a direct causal link was established between the hospital's negligence and the parents' prejudice (see the above-mentioned *Quarez* judgment).

49. Still in the sphere of administrative law, the amount of compensation is governed by the general principle of full compensation for damage (neither impoverishment nor enrichment of the victim). Compensation may take the form of a capital sum or an annuity. According to the principle of the equal validity of claims for all heads of damage, both pecuniary damage and non-pecuniary damage confer entitlement to compensation.

B. Law no. 2002-303 of 4 March 2002 on patients' rights and the quality of the health service, published in the Official Gazette of the French Republic on 5 March 2002

50. The Law of 4 March 2002 put an end to the position established by the case-law mentioned above, of both the *Conseil d'Etat* and the Court of Cassation alike. Its relevant parts provide as follows:

Section 1

"I. No one may claim to have suffered damage by the mere fact of his or her birth.

A person born with a disability on account of medical negligence may obtain compensation for damage where the negligent act directly caused the disability or aggravated it or prevented steps from being taken to attenuate it.

Where the liability of a health-care professional or establishment is established *vis-à-vis* the parents of a child born with a disability not detected during pregnancy by reason of gross negligence [*faute caractérisée*], the parents may claim compensation in respect of their damage only. That damage cannot include the special burdens arising from the disability throughout the life of the child. Compensation for the latter is a matter for national solidarity.

The provisions of the present paragraph I shall be applicable to proceedings in progress, except for those in which an irrevocable decision has been taken on the principle of compensation.

II. Every disabled person shall be entitled, whatever the cause of his or her disability, to the solidarity of the national community as a whole.

III. The National Advisory Council for Disabled Persons shall be charged, in a manner laid down by decree, with assessing the material, financial and non-material situation of disabled persons in France, and of disabled persons of French nationality living outside France and receiving assistance by virtue of national solidarity, and with presenting all proposals deemed necessary to Parliament, with the aim of ensuring, through an ongoing pluriannual programme, that assistance is provided to such persons ..."

51. These provisions came into force "under the conditions of ordinary law following publication of the Law in the Official Gazette of the French Republic" (see paragraph 52 below)[1]. Law no. 2002-303 was published in the Official Gazette on 5 March 2002 and it therefore came into force on 7 March 2002.

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1. That is, in accordance with Article 2 of the Decree of 5 November 1870 on the promulgation of laws and decrees, then in force: "in Paris, one clear day after promulgation; everywhere else, within the territory of each administrative district [*arrondissement*], one clear day after the copy of the Official Gazette containing them reaches the chief-town of the district."

C. The opinion given by the Judicial Assembly of the *Conseil d'Etat* on 6 December 2002 under the Administrative Disputes (Reform) Act (the Law of 31 December 1987) (extracts)

52. The *Conseil d'Etat* observed in particular:

"...

II. The date of the Law's entry into force:

The liability criteria set out in the second sub-paragraph of paragraph I of section 1 were enacted in favour of persons born with disabilities resulting from medical negligence whether that negligence directly caused the disability, aggravated it or made it impossible to take steps to attenuate it. They were laid down with sufficient precision to be applied by the relevant courts without the need for further legislation to clarify their scope.

The different liability criteria defined in the third sub-paragraph of paragraph I of section 1 were enacted in favour of the parents of children born with a disability which, on account of gross negligence on the part of a medical practitioner or health-care establishment, was not detected during pregnancy. They are sufficiently precise to be applied without the need for further legislative provisions or regulations. Admittedly, they bar inclusion of the damage consisting in the special burdens arising from the disability throughout the child's life in the damage for which the parents can obtain compensation, and provide that such damage is to be made good through reliance on national solidarity. But the very terms of the Law, interpreted with the aid of its drafting history, show that Parliament intended to exclude compensation for that head of damage on the ground that, although there was a causal link between negligence and damage, that link was not such as to justify making the person who committed the negligent act liable for the resulting damage. In providing that this type of damage should be made good by reliance on national solidarity, Parliament did not therefore make implementation of the rules on liability for negligence which it had introduced subject to the enactment of subsequent legislation laying down the conditions under which national solidarity would be mobilised to assist disabled persons.

It follows that, since the Law does not contain provisions for the deferred entry into force of section 1, and since in addition Parliament's intention, as revealed by the Law's drafting history, was to make it applicable immediately, the provisions of section 1 came into force under the conditions of ordinary law following the Law's publication in the Official Gazette of the French Republic.

III. Law no. 2002-303's compatibility with international law:

(1) ...

The object of section 1 of the Law of 4 March 2002 is to lay down a new system of compensation for the damage suffered by children born with disabilities and by their parents, differing from the system which had emerged from the case-law of the administrative and ordinary courts. The new system provides for compensation, by means of an award to be assessed by the courts alone, for the damage directly caused to the person born disabled on account of medical negligence and the damage directly caused to the parents of a child born with a disability which, on account of gross medical negligence, was not detected during pregnancy. It prevents children born with a disability which, on account of medical negligence, was not detected during pregnancy from obtaining from the person responsible for the negligent act compensation for the

damage consisting in the special burdens arising from the disability throughout their lives, whereas such compensation had previously been possible under the case-law of the ordinary courts. It also prevents the parents from obtaining from the person responsible for the negligent act compensation for the damage consisting in the special burdens arising from their child's disability throughout its life, whereas such compensation had previously been possible under the case-law of the administrative courts. Lastly, it makes compensation for other heads of damage suffered by the child's parents subject to the existence of gross negligence, whereas the case-law of the administrative and ordinary courts had formerly been based on the existence of negligence falling short of gross negligence.

This new system, which was put in place by Parliament on general-interest grounds relating to ethical considerations, the proper organisation of the health service and the equitable treatment of all disabled persons, is not incompatible with the requirements of Article 6 § 1 of the Convention, with those of Articles 5, 8, 13 and 14 of the Convention, with those of Article 1 of Protocol No. 1 to the Convention or with those of Articles 14 and 26 of the Covenant on Civil and Political Rights.

(2) The last sub-paragraph of paragraph I of section 1 makes the provisions of paragraph I applicable to pending proceedings 'except for those in which an irrevocable decision has been taken on the principle of compensation'.

The general-interest grounds taken into account by Parliament when it laid down the rules in the first three sub-paragraphs of paragraph I show, in relation to the points raised in the request for an opinion, that the intention behind the last sub-paragraph of paragraph I was to apply the new provisions to situations which had arisen previously and to pending proceedings, while rightly reserving final judicial decisions."

D. French national solidarity towards disabled persons

1. Situation before February 2005

53. French legislation (see Law no. 75-534 of 30 June 1975 on orientation in favour of disabled persons, which set up the basic framework, and later legislation) provides compensatory advantages to disabled persons based on national solidarity in a number of fields (such as the right to education for disabled children and adults, technical and human assistance, financial assistance, etc.).

In particular, the families of disabled persons are entitled to a special education allowance (*allocation d'éducation spéciale* – "the AES"). This is a family benefit paid from the family allowance funds, provided both the child and its parents are resident in France. The AES is granted by decision of the Special Education Board of the *département* in which the claimant lives, after the file has been studied by a multidisciplinary technical team. First the Special Education Board takes formal note of the child's disability and assesses it. For entitlement to the AES, the level of disability found must exceed at least 50%. Where the disability exceeds 80%, entitlement to the AES is automatic; if the disability is assessed at between 50% and 80%, payment of the allowance is not automatic. It is

subject to the child's need for pedagogical, psychological, medical, paramedical and other forms of assistance.

The AES is a two-level benefit: the basic allowance plus top-up payments. The first level is automatically payable where the conditions mentioned above are satisfied. The basic rate of AES is EUR 115 per month (the figure supplied by the Government on 16 March 2003). Where the child's state of health requires substantial expenditure or the assistance of a third person, this may then confer entitlement to one of the six levels of AES top-up payments, which are added to the basic rate.

The first five top-up payments depend on the level of expenditure required by the child's state of health, the time for which the assistance of a third person is necessary, or a combination of both. The sixth level of top-up payment is for the most severe cases, where the child's state of health requires the assistance of a third person throughout the day and the families have to provide constant supervision and treatment.

2. Changes made by Law no. 2005-102 of 11 February 2005 on equal rights and opportunities, participation and citizenship for disabled persons, published in the Official Gazette of the French Republic on 12 February 2005

54. This Law emerged from a legislative process launched as far back as July 2002 with the intention of reforming the system of disability compensation in France. It was pointed out in particular that following the enactment of the Law of 4 March 2002 it was necessary to legislate again "to give effective substance to national solidarity" (see the Information Report produced on behalf of the Senate's Social Affairs Committee by Senator P. Blanc, containing seventy-five proposals for amending the Law of 30 June 1975, appended to the record of the Senate's sitting on 24 July 2002, p. 13).

55. The new Law makes a number of substantial changes. In particular, it includes for the first time in French law a definition of disability and introduces a new "compensatory benefit" to be added to existing forms of assistance.

56. To that end, the Law amends the Social Action and Family Code. Its relevant provisions are worded as follows:

Title I: General provisions

Section 2

"I. ... A disability, within the meaning of the present Law, is any limitation of activity or restriction on participation in life in society suffered within his or her environment by any person on account of a substantial, lasting or permanent impairment of one or more physical, sensory, mental, cognitive or psychological functions, a multiple disability, or a disabling health disorder.

...

Every disabled person shall be entitled to solidarity from the whole national community, which, by virtue of that obligation, shall guarantee him or her access to the fundamental rights of all citizens, and the full exercise of citizenship.

The State shall act as the guarantor of equal treatment for disabled persons throughout the national territory and shall lay down objectives for pluriannual action plans.

...

II. – 1. The first three sub-paragraphs of the first paragraph of section 1 of Law no. 2002-303 of 4 March 2002 on patients' rights and the quality of the health service shall become Article L. 114-5 of the Social Action and Family Code.

2. The provisions of Article L. 114-5 of the Social Action and Family Code, as amended by sub-paragraph 1 of the present paragraph II, shall be applicable to proceedings in progress on the date of the entry into force of the above-mentioned Law no. 2002-303 of 4 March 2002, except for those in which an irrevocable decision has been taken on the principle of compensation ..."

Title III: Compensation and resource

Chapter 1: Compensation for the consequences of disability

Section 11

" ... A disabled person shall be entitled to compensation for the consequences of his or her disability whatever the origin or nature of the impairment, or his or her age or lifestyle.

That compensation shall consist in meeting his or her needs, including nursery care in early childhood, schooling, teaching, education, vocational insertion, adaptations of the home or workplace necessary for the full exercise of citizenship and of personal autonomy, developing or improving the supply of services, in particular to enable those around the disabled person to enjoy respite breaks, developing mutual support groups or places in special establishments, assistance of all kinds to the disabled person or institutions to make it possible to live in an ordinary or adapted environment, or regarding access to the specific procedures and institutions dealing with the disability concerned or the resources and benefits accompanying implementation of the legal protection governed by Title XI of Book 1 of the Civil Code. The above responses, adapted as required, shall take into account the care or accompaniment necessary for disabled persons unable to express their needs alone.

The forms of compensation required shall be recorded in a statement of needs drawn up in the light of the needs and aspirations of the disabled person as expressed in his or her life plan, written by himself or herself or, failing that, where he or she is unable to express an opinion, with or for him or her by his or her legal representative.

Section 12
Compensatory benefit

...

I. – Every disabled person stably and regularly resident in metropolitan France ... above the age at which entitlement to the disabled child's education allowance [formerly the AES] begins ..., whose age is below the cut-off point to be laid down by decree and whose disability matches the criteria to be laid down by decree, taking into

account in particular the nature and scale of the forms of compensation required in the light of his or her life plan, shall be entitled to a compensatory benefit which shall take the form of a benefit in kind payable, at the wishes of the beneficiary, either in kind or in money.

...

III. – The element of the benefit mentioned in point 3 of Article L. 245-3 [of the Social Action and Family Code] may also be claimed, under conditions to be laid down by decree, by beneficiaries of the [disabled child's education] allowance [formerly the AES], where on account of their child's disability they are likely to bear burdens of the type covered by that paragraph. ..."

Article L. 245-3 of the Social Action and Family Code (as amended by the Law of 11 February 2005)

"Compensatory benefit may be used, under conditions to be laid down by decree, for:

1. burdens arising from the need for human assistance, including, where necessary, the assistance provided by family helpers;

2. burdens arising from the need for technical assistance, particularly the costs which remain payable by an insured person where such technical assistance forms one of the categories of benefit contemplated in point 1 of Article L. 321-1 of the Social Security Code;

3. burdens arising from adaptation of the home or vehicle of the disabled person, and any extra expenditure needed for his or her transport;

4. specific or exceptional burdens, such as those arising from the purchase or maintenance of products needed on account of the disability;

..."

Article L. 245-4 of the Social Action and Family Code (as amended by the Law of 11 February 2005)

"The element of the benefit mentioned in point 1 of Article L. 245-3 shall be granted to any disabled person either where his or her state of health makes necessary the effective assistance of a third person for the essential acts of his or her existence, or requires regular supervision, or where he or she is obliged to incur additional expenditure through carrying on an occupation or holding elective office."

57. The new compensatory benefit is initially payable in full to persons over the age at which entitlement to the AES (renamed "disabled child's education allowance" by the new legislation – see section 12 above) begins. With regard to children, section 13 of the Law of 11 February 2005 provides:

"Within three years from the entry into force of the present Law compensatory benefit shall be extended to disabled children. Within a maximum of five years those provisions of the present Law which distinguish between disabled persons on the ground of age in respect of compensation for the disability and payment of the costs of residence in social and medico-social establishments shall be repealed."

58. The entry into force of the Law of 11 February 2005 is subject to publication of the implementing decrees. Section 101 provides:

"The regulations implementing the present Law shall be published within six months of its publication, after being referred for opinion to the National Advisory Council for Disabled Persons.

..."

59. According to the information supplied by the Government, the new compensatory benefit should come into force on 1 January 2006. It is expected that it will be payable in full to disabled children by 12 February 2008. In the meantime, children will apparently receive only part of the benefit: only the costs of adapting a disabled child's home or vehicle, or his or her additional transport costs, can already be financed by the new system.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

60. The applicants complained of section 1 of Law no. 2002-303 of 4 March 2002 on patients' rights and the quality of the health service (see paragraph 50 above). They submitted that that provision had infringed their right to peaceful enjoyment of their possessions and breached Article 1 of Protocol No. 1, which provides:

"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."

A. Whether there was a "possession" within the meaning of Article 1 of Protocol No. 1

1. *The parties' submissions*

(a) The applicants

61. Relying on the Court's case-law (in particular *Pressos Compania Naviera S.A. and Others v. Belgium*, judgment of 20 November 1995, Series A no. 332), the applicants submitted that they had a "possession". In that connection, they did not argue that the possession concerned was already their property but rather that they had a "legitimate expectation" of obtaining it, within the meaning of the case-law mentioned. They argued that before the enactment of the Law of

4 March 2002 they had had a legitimate expectation of obtaining full compensation for the prejudice they had sustained on account of the disability of their daughter C. In their submission, the conditions for establishing AP-HP's liability on the basis of the *Conseil d'Etat*'s judgment in *Quarez* (see paragraphs 39-43 above) were satisfied at the time when they brought their action in the administrative courts. Negligence on AP-HP's part had been proved and the causal link between negligence and damage could not be validly challenged, since the switching of the test results, in the applicants' submission, had led to the incorrect diagnosis which had deprived them of the option of terminating the pregnancy on therapeutic grounds. In accordance with the *Quarez* judgment, the applicants' full claim should therefore have been determined in their favour. But on account of the enactment of the Law of 4 March 2002 the right to compensation for the damage they had suffered, with the exception of their non-pecuniary damage and the damage resulting from disruption to their lives, had become illusory, since the effect of the legislation concerned had been to deprive them of their claim retrospectively.

(b) The Government

62. The Government contended that the applicants had never had a "possession", either in the strict meaning of the term or in the sense of a "legitimate expectation" as defined in the Court's case-law (see *Pressos Compania Naviera S.A. and Others*, cited above). That concept implied the certainty of obtaining judgment in one's favour under the relevant domestic liability rules. But before enactment of the legislation in issue compensation was not awarded as of right merely as a consequence of a finding that damage had been sustained. The liability rules applied by the administrative courts made compensation for the damage sustained by the parents subject to the establishment of negligence, damage and a causal link between the negligence and the damage, those elements being a matter for the assessment of the trial courts alone. Thus, as compensation was far from automatic, the applicants could not assert that enactment of the Law of 4 March 2002 had frustrated a "legitimate expectation" that their claim would succeed.

2. The Court's assessment

63. The Court reiterates that, according to its case-law, an applicant can allege a violation of Article 1 of Protocol No. 1 only in so far as the impugned decisions relate to his "possessions" within the meaning of that provision. "Possessions" can be "existing possessions" or assets, including, in certain well-defined situations, claims. For a claim to be capable of being considered an "asset" falling within the scope of Article 1

of Protocol No. 1, the claimant must establish that it has a sufficient basis in national law, for example where there is settled case-law of the domestic courts confirming it. Where that has been done, the concept of "legitimate expectation" can come into play.

64. As regards the concept of "legitimate expectation", one aspect of this was illustrated in *Pressos Compania Naviera S.A. and Others*, cited above, which concerned claims for damages arising from accidents to shipping allegedly caused by the negligence of Belgian pilots. Under the Belgian law of tort, claims came into being as soon as damage had occurred. The Court classified these claims as "assets" attracting the protection of Article 1 of Protocol No. 1. It went on to note that, on the basis of a series of judgments of the Court of Cassation, the applicants could argue that they had a "legitimate expectation" that their claims deriving from the accidents in question would be determined in accordance with the general law of tort.

65. The Court did not expressly state in *Pressos Compania Naviera S.A. and Others* that the "legitimate expectation" was a component of, or was attached to, the property right claimed. However, it was implicit in the judgment that no such expectation could come into play in the absence of an "asset" falling within the ambit of Article 1 of Protocol No. 1, which in that case was a compensation claim. The "legitimate expectation" identified in *Pressos Compania Naviera S.A. and Others* did not in itself constitute a proprietary interest; it related to the way in which the claim qualifying as an "asset" would be treated under domestic law, and in particular to the reliance on the fact that the established case-law of the national courts would continue to be applied in respect of damage which had already occurred.

66. In a whole series of cases, the Court has found that the applicants did not have a "legitimate expectation" where it could not be said that they had a currently enforceable claim that was reasonably established. The Court's case-law does not contemplate the existence of a "genuine dispute" or an "arguable claim" as a criterion for determining whether there is a "legitimate expectation" protected by Article 1 of Protocol No. 1. The Court takes the view that where the proprietary interest is in the nature of a claim it may be regarded as an "asset" only where it has a sufficient basis in national law, for example where there is settled case-law of the domestic courts confirming it (see *Kopecký v. Slovakia* [GC], no. 44912/98, §§ 35 and 48-52, ECHR 2004-IX).

67. In order to determine whether there was a possession in the present case, the Court may have regard to the domestic law in force at the time of the alleged interference. This was a system of liability for negligence requiring the establishment of prejudice (or damage), negligence, and a causal link between damage and negligence. The Court

notes that neither AP-HP nor the Government denied that switching the applicants' test results with those of another family constituted negligence. The only point in dispute is the causal link between the hospital's negligence and the damage suffered by the applicants. In that connection, AP-HP considered that there was no such link because, even if the results had not been switched, the prenatal diagnosis communicated to the applicants would have been uncertain on account of the presence of maternal blood in the sample taken from Mrs Maurice. As AP-HP's liability had not been established, the applicants, in the Government's submission, were not entitled to automatic compensation and could accordingly not plead a "legitimate expectation".

68. The Court cannot accept that argument. It notes that the national courts unambiguously established, both in the proceedings under the urgent procedure and in the main proceedings, and at all stages of those proceedings, the existence of a direct causal link between the negligence and the prejudice sustained. The courts held that in the present case AP-HP's negligence had wrongly led the applicants to the certainty that their unborn child was not affected by infantile spinal amyotrophy and that the pregnancy could be carried normally to term, whereas they had clearly expressed their wish to avoid the risk of a third genetic accident. As a result of the negligence thus committed, there was no reason to request any further examination of Mrs Maurice with a view to termination of the pregnancy on therapeutic grounds, which would certainly have been the case if the reliability of the diagnosis had been in doubt. In reaching that finding the domestic courts based themselves at first on the above-mentioned *Quarez* judgment and later on the provisions of the Law of 4 March 2002, which had come into force in the meantime, and which did not, moreover, alter the conditions for establishing the causal link between the negligence, even gross negligence, and the damage sustained by the parents of a child born with a disability.

69. The conditions for establishing AP-HP's liability on the basis of the *Quarez* judgment were therefore indeed satisfied, and the applicants accordingly had a claim amounting to an "asset". As to the way in which that claim would have been treated in domestic law had it not been for the enactment of the law complained of, the Court considers that, account being taken of the *Quarez* judgment given by the *Conseil d'Etat* on 14 February 1997 and the settled case-law on the question established since then by the administrative courts, the applicants could legitimately expect to be able to obtain compensation for the prejudice they had sustained, including the special burdens arising from their child's disability throughout her life.

70. In the Court's opinion, before the enactment of the law complained of, the applicants had a claim which they could legitimately

expect to be determined in accordance with the ordinary law of liability for negligence, and therefore a "possession" within the meaning of the first sentence of Article 1 of Protocol No. 1, which is accordingly applicable in the case.

B. Compliance with Article 1 of Protocol No. 1

1. *The parties' submissions*

(a) The applicants

71. The applicants submitted that the enactment of the Law of 4 March 2002 constituted "interference" with their right to the peaceful enjoyment of their possessions, since they had been deprived of the possibility of obtaining full compensation for their prejudice, by virtue of the *Quarez* judgment.

72. As regards the legitimacy of the interference, the applicants submitted that it had not struck a fair balance between the demands of the general interest (regard being had in particular to the reasons for the legislation's enactment, which could not justify making it retrospective) and protection of their fundamental rights, since the effect of the law concerned had been to deprive them of their claim without effective compensation.

73. They further stressed the enormous and disproportionate impact of the decision to make the new legislation immediately applicable to pending proceedings, bearing in mind in particular the fact that it referred to arrangements for assisting disabled persons through reliance on national solidarity, which they considered inadequate, vague and imprecise. In that connection, they submitted that, although the recently enacted Law of 11 February 2005 (see paragraphs 54-59 above) had brought in a new benefit to compensate for disability, it could not cancel out the alleged disproportion given the form that this compensatory benefit system was to take, and it still left the applicants to bear an excessive burden.

(b) The Government

74. The Government submitted that, if the Court were to take the view that the applicants had a possession, the partial deprivation of possessions they had suffered could not be declared contrary to Article 1 of Protocol No. 1, given, *inter alia*, the aim of the Law of 4 March 2002, the main object of which had been to clarify a system of liability for medical acts which had been raising legal and ethical problems and which, as the Government stressed at the hearing, had been established by a recent judgment (the *Quarez* judgment not having been delivered until 1997, the

year the applicants' child had been born). The new legislation had not really been retrospective; after modifying the existing legal situation it had merely made the new rules immediately applicable to pending proceedings – a common practice.

75. Referring to the opinion given by the *Conseil d'Etat* on 6 December 2002, still with the aim of establishing the legitimacy of the interference, the Government next referred to the general-interest considerations which, they submitted, had justified the enactment of the legislation complained of and its applicability to pending proceedings.

These included, in the first place, ethical reasons, reflected mainly in paragraph I of section 1. In the light of the reactions to the above-mentioned *Perruche* judgment (see paragraphs 44-47 above), Parliament had intervened to provide a coherent solution to a problem that had been the subject of national debate and had raised crucial ethical issues concerning, *inter alia*, human dignity and the status of the unborn child. The main aim had been to exclude recognition of a child's right to complain of being brought into the world with a congenital disability, a matter on which society had been required to make a fundamental decision. That was why there could be no difference in treatment between pending proceedings depending on whether they had been brought before or after the Law's promulgation.

Secondly, there were questions of natural justice. It was argued that the legislation in issue reflected the need to ensure fair treatment for all disabled persons whatever the severity and cause of their disability. Such intervention had been all the more necessary because, following the *Quarez* and *Perruche* judgments, the system of compensation for disabled persons had become unsatisfactory. That concern for fair treatment, it was submitted, was the reason the legislation had been made immediately applicable, so that no distinction would be drawn between disabled persons in accordance with the date on which their applications had been lodged, whether before or after the Law's promulgation. Natural justice had also prompted the decision to abolish the rule requiring health-care workers and establishments to pay compensation for disabilities not detected during pregnancy, which was perceived as deeply unfair by obstetricians and doctors performing prenatal ultrasound scans.

Lastly and above all, Parliament had intervened for reasons having to do with the proper organisation of the health service, which was under threat as a result of the discontent expressed by health-care practitioners in the wake of the *Perruche* judgment. In the face of strikes, resignations and refusals to carry out ultrasound scans, the legislature had acted to ensure that there would continue to be sufficiently well-staffed medical services in the fields of obstetrics and ultrasound scanning and that pregnant women and unborn children would receive medical attention in satisfactory conditions.

76. The Government further argued that there had been a fair balance between the objective pursued by the legislature and the means it had employed. They submitted in that connection that neither the parents of disabled children nor the children themselves had been deprived of all forms of assistance and that there was still statutory liability for negligence by health-care workers. Parliament had been obliged to give the need to preserve the health service priority over the hopes of a few parents for additional compensation. In view of the large number of doctors on strike, the immediate application of the new legislation had been necessary in order to limit the flight of private practitioners out of the prenatal diagnosis sector. The Government further emphasised that at first instance, after the entry into force of the legislation in issue, the applicants had obtained compensation which, while it might not have been as much as they had hoped to receive, was far from a token payment, since it amounted to EUR 220,000. That amount had equalled the compensation paid in the *Quarez* case and it covered, the Government emphasised, not only the parents' non-pecuniary damage but also all the disruption to their lives for which they had claimed. Consequently, although the applicants had not obtained compensation for all the heads of damage they had claimed, they had received a considerable sum of money.

77. In addition, the Government contended, the level of assistance provided by way of national solidarity should not be disregarded. Measures had already been in place before the Law of 4 March 2002 and these had been supplemented by those provided for in the recently enacted Law of 11 February 2005. Thus disabled persons and their families had not suffered excessive consequences as a result of the application of the Law of 4 March 2002. They had not been deprived of financial support, the difference being that this would no longer be provided by health-care workers only but also by the State.

2. *The Court's assessment*

(a) Whether there was interference with the right to peaceful enjoyment of a "possession"

78. According to the Court's case-law, Article 1 of Protocol No. 1, which guarantees in substance the right of property, comprises three distinct rules. The first, which is expressed in the first sentence of the first paragraph and is of a general nature, lays down the principle of peaceful enjoyment of property. The second rule, in the second sentence of the same paragraph, covers deprivation of possessions and makes it subject to certain conditions. The third, contained 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 second and third rules, which are concerned with particular instances of interference with the right to peaceful enjoyment of property, are to be construed in the light of the general principle laid down in the first rule (see, among other authorities, *Pressos Compania Naviera S.A. and Others*, cited above, pp. 21-22, § 33).

79. The Law of 4 March 2002, which came into force on 7 March 2002, deprived the applicants of the possibility of obtaining compensation for "special burdens" in accordance with the precedent set by the *Quarez* judgment of 14 February 1997, whereas they had already brought an action in the Paris Administrative Court on 16 March 2001 and, in a decision of 19 December 2001, the judge at that court responsible for urgent applications had granted them a substantial interim award, given that AP-HP's liability towards them was not seriously open to challenge. The law complained of therefore entailed interference with the exercise of the right to compensation which could have been asserted under the domestic law applicable until then, and consequently of the applicants' right to peaceful enjoyment of their possessions.

80. The Court notes that in the present case, in so far as the impugned law applied to proceedings brought before 7 March 2002 which were still pending on that date, such as those brought by the applicants, the interference amounts to a deprivation of possessions within the meaning of the second sentence of the first paragraph of Article 1 of Protocol No. 1. It must therefore determine whether the interference complained of was justified under that provision.

(b) Whether the interference was justified

(i) "Provided for by law"

81. It is not disputed that the interference complained of was "provided for by law", as required by Article 1 of Protocol No. 1.

82. On the other hand, the parties disagreed about the legitimacy of that interference. The Court must accordingly determine whether it pursued a legitimate aim, in other words whether there was a "public interest", and whether it complied with the principle of proportionality for the purposes of the second rule laid down in Article 1 of Protocol No. 1.

(ii) "In the public interest"

83. The Court considers that, because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to decide what is "in the public interest". Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment as to the existence of a problem of public concern warranting measures of deprivation of property. Here, as in other fields to which the safeguards

of the Convention extend, the national authorities, accordingly, enjoy a certain margin of appreciation.

84. Furthermore, the notion of "public interest" is necessarily extensive. In particular, the decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues. The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is "in the public interest" unless that judgment is manifestly without reasonable foundation (see *Pressos Compania Naviera S.A. and Others*, cited above, pp. 22-23, § 37, and *Broniowski v. Poland* [GC], no. 31443/96, § 149, ECHR 2004-V).

85. In the present case the Government submitted that section 1 of the Law of 4 March 2002 was prompted by general-interest considerations of three kinds: ethical concerns, and in particular the need to legislate on a fundamental choice of society; fairness; and the proper organisation of the health service (see paragraph 75 above). In that connection, the Court has no reason to doubt that the French parliament's determination to put an end to a line of case-law of which it disapproved and to change the legal position on medical liability, even by making the new rules applicable to existing cases, was "in the public interest". Whether this public-interest aim was of sufficient weight for the Court to be able to find the interference proportionate is another matter.

(iii) Proportionality of the interference

86. An interference with the peaceful enjoyment of possessions must strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (see, among other authorities, *Sporrong and Lönnroth v. Sweden*, judgment of 23 September 1982, Series A no. 52, p. 26, § 69). The concern to achieve this balance is reflected in the structure of Article 1 of Protocol No. 1 as a whole, including therefore the second sentence, which is to be read in the light of the general principle enunciated in the first sentence. In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of his possessions (see *Pressos Compania Naviera S.A. and Others*, cited above, p. 23, § 38).

87. Compensation terms under the relevant domestic legislation are material to the assessment whether the contested measure respects the requisite fair balance and, notably, whether it imposes a disproportionate burden on the applicants. In this connection, the Court has already found that the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference, and a total lack of compensation can be considered

justifiable under Article 1 of Protocol No. 1 only in exceptional circumstances (see *The Holy Monasteries v. Greece*, judgment of 9 December 1994, Series A no. 301-A, p. 35, § 71; *The former King of Greece and Others v. Greece* [GC], no. 25701/94, § 89, ECHR 2000-XII; and *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, § 94, ECHR 2005-VI).

88. The Court observes that the *Conseil d'Etat* acknowledged in its *Quarez* judgment of 14 February 1997 that the State and public-law bodies such as AP-HP, a public health institution providing a public hospital service, were subject to the rules of ordinary law on liability for negligence. It notes that that case-law, although relatively recent, was settled and consistently applied by the administrative courts. As the *Quarez* judgment antedated the discovery of C.'s disability and above all the commencement of the applicants' actions in the French courts, the latter could legitimately expect to rely on it to their advantage.

89. By cancelling the effects of the *Quarez* judgment, and those of the Court of Cassation's *Perruche* judgment, on pending proceedings, the law complained of applied a new liability rule to facts forming the basis for an actionable claim which had occurred before its entry into force and which had given rise to legal proceedings which were still pending at that time, so that it had retrospective scope. Admittedly, the applicability of legislation to pending proceedings does not necessarily in itself upset the requisite fair balance, since the legislature is not in principle precluded in civil matters from intervening to alter the current legal position through a statute which is immediately applicable (see, *mutatis mutandis*, *Zielinski and Pradal and Gonzalez and Others v. France* [GC], nos. 24846/94 and 34165/96 to 34173/96, § 57, ECHR 1999-VII).

90. In the present case, however, section 1 of the Law of 4 March 2002 abolished purely and simply, with retrospective effect, one of the essential heads of damage, relating to very large sums of money, in respect of which the parents of children whose disabilities had not been detected before birth, like the applicants, could have claimed compensation from the hospital held to be liable. The French legislature thereby deprived the applicants of an existing "asset" which they previously possessed, namely an established claim to recovery of damages which they could legitimately expect to be determined in accordance with the decided case-law of the highest courts of the land.

91. The Court cannot accept the Government's argument that the principle of proportionality was respected, provision having been made for an appropriate amount of compensation, which would thus constitute a satisfactory alternative, to be paid to the applicants. It does not consider that what the applicants could receive by virtue of the Law of 4 March 2002 as the sole form of compensation for the special burdens arising from the disability of their child was, or is, capable of providing them with payment of an amount reasonably related to the value of their lost

asset. The applicants are admittedly entitled to benefits under the system now in force, but the amount concerned is considerably less than the sum payable under the previous liability rules and is clearly inadequate, as the Government and the legislature themselves admit, since these benefits were extended recently by new provisions introduced for that purpose by the Law of 11 February 2005. Moreover, neither the sums to be paid to the applicants under that law nor the date of its entry into force for disabled children have been definitively fixed (see paragraphs 57-59 above). That situation leaves the applicants, even now, in considerable uncertainty, and in any event prevents them from obtaining sufficient compensation for the damage they have already sustained since the birth of their child.

Thus, both the very limited nature of the existing compensation payable by way of national solidarity and the uncertainty surrounding the compensation which might result from application of the Law of 11 February 2005 rule out the conclusion that this important head of damage may be regarded as having been reasonably compensated in the period since enactment of the Law of 4 March 2002.

92. As regards the compensation awarded to the applicants by the Paris Administrative Court to date, the Court notes that it covers non-pecuniary damage and disruption to the applicants' lives, but not the special burdens arising from the child's disability throughout her life. On this point, the Court is led to the inescapable conclusion that the amount of compensation awarded by the Paris Administrative Court was very much lower than the applicants could legitimately have expected and that, in any case, it cannot be considered to have been definitively secured, since the award was made in a first-instance judgment against which an appeal is pending. The compensation thus awarded to the applicants cannot therefore compensate for the claims now lost.

93. Lastly, the Court considers that the grounds relating to ethical considerations, equitable treatment and the proper organisation of the health service mentioned by the *Conseil d'Etat* in its opinion of 6 December 2002 and relied on by the Government could not, in the instant case, legitimise retrospective action whose result was to deprive the applicants, without sufficient compensation, of a substantial portion of the damages they had claimed, thus making them bear an individual and excessive burden.

Such a radical interference with the applicants' rights upset the fair balance to be maintained between the demands of the general interest on the one hand and protection of the right to peaceful enjoyment of possessions on the other.

94. In so far as it concerned proceedings pending on 7 March 2002, the date of its entry into force, section 1 of the Law of 4 March 2002 therefore breached Article 1 of Protocol No. 1.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 1 OF PROTOCOL No. 1

95. The applicants complained that the Law of 4 March 2002, by setting up a specific liability system, had created an unjustified inequality of treatment between the parents of children whose disabilities were not detected before birth on account of negligence and the parents of children disabled on account of some other form of negligence, to whom the principles of ordinary law would continue to apply. They relied on Article 14 of the Convention, which 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."

A. The parties' submissions

1. The applicants

96. The applicants referred to the argument they had previously put forward before the Court to the effect that before the Law of 4 March 2002 came into force they had had a compensation claim which amounted to a "possession". The Law of 4 March 2002 had infringed their right to the peaceful enjoyment of that possession by creating an unjustified inequality of treatment between the parents of children whose disabilities had not been detected before birth on account of negligence, like the applicants, for whom compensation for the special burdens arising from the disability throughout the child's life was a matter of national solidarity alone, and the victims of other negligent acts which had caused disability, to whom the principles of the ordinary law of tort would continue to apply. Such a difference in treatment was unjustified in the applicants' submission since the two situations were essentially similar, both being concerned with compensation for prejudice resulting from a disability caused by negligence. In addition, the applicants submitted that no general-interest or public-interest considerations could justify the discriminatory treatment resulting from the new legislation.

2. The Government

97. The Government maintained that, as previously submitted, the applicants did not have a "possession" within the meaning of Article 1 of Protocol No. 1, and therefore that provision was not applicable

in the case. Consequently, since the alleged discrimination did not affect a right protected by the Convention, Article 14 could not be relied on.

98. The Government submitted, in the alternative, that the two categories were not in the same situation. Where the disability had been directly caused by medical negligence, the negligence preceded the disability, was the cause of it and was therefore the original source of the prejudice sustained by the parents through the birth of a disabled child. In the applicants' case, the negligence had not been the direct cause of the disability, which already existed. The only prejudice it had occasioned lay in not having an abortion, or in not having the possibility of aborting. As the causal links between the medical negligence and the disability were different in the two cases, they – rightly, in the Government's opinion – formed the rationale for two different sets of liability rules. It could not therefore be concluded that there had been discrimination since the situations were not the same.

99. Lastly, the Government argued that reliance on national solidarity to provide assistance with the special burdens arising from the disability of children in C.'s situation was not discriminatory since, like the others, they had the benefit of extensive support measures. In addition, the Government considered that the difference in treatment between the two situations was reasonably proportionate to the legitimate objectives of the Law of 4 March 2002.

B. The Court's assessment

100. Regard being had to its finding of a violation concerning the applicants' right to the peaceful enjoyment of their possessions (see paragraph 94 above), the Court does not consider it necessary to examine the applicants' complaint under Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1.

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

101. The applicants alleged that the immediate applicability of the Law of 4 March 2002 to pending proceedings, including their case, infringed their right to a fair trial. 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 fair ... hearing ... by an independent and impartial tribunal established by law. ..."

A. The parties' submissions

1. The applicants

102. Relying on the Court's case-law (particularly *Stran Greek Refineries and Stratis Andreadis v. Greece*, judgment of 9 December 1994, Series A no. 301-B, and *Zielinski and Pradal and Gonzalez and Others*, cited above), the applicants alleged that the provisions of the Law of 4 March 2002 disregarded the rule that the principle of the rule of law and the notion of fair trial (in particular the principle of the equality of arms) precluded any interference by the legislature with the administration of justice designed to influence the judicial determination of a dispute, save on compelling grounds of general interest. They argued that no compelling grounds of general interest justified the retrospective provisions complained of. They submitted that there was no need to define the precise nature of the Law of 4 March 2002 since it did constitute retrospective legislative intervention of the type regularly criticised by the Court in its case-law. The presence of the State as a party to the dispute was not required for that case-law to apply. In any event, in the present case, the State was a party at one remove, since AP-HP was a public administrative establishment, and therefore exercised delegated State power. Lastly, the applicants contested the argument that national solidarity made good the prejudice for which they had not been compensated, since the existing provisions for the assistance of disabled persons were inadequate and future measures uncertain, and in any case belated and ineffective as regards compensating for the special burdens arising from their child's disability.

2. The Government

103. The Government submitted that the present case was to be distinguished from those previously examined by the Court in connection with the question of "legislative validations", and particularly from the cases of *Stran Greek Refineries and Stratis Andreadis* and *Zielinski and Pradal and Gonzalez and Others*, cited above. The law complained of was different in nature and could not be classified as "validating" legislation nor be compared to those previously criticised by the Court. The object of the Law of 4 March 2002 had not been to frustrate actions going through the courts but rather, following the debate on the *Perruche* judgment, to clarify liability rules which were causing difficulties. Intervening independently of any particular dispute, in a field which was appropriate for legislative intervention, and without interfering either in pre-existing contractual relations or with the proper administration of justice, Parliament had enacted a law which was not really retrospective but essentially interpretative. Moreover, the State

was not in any way a party to the dispute which had given rise to the present case, nor was it defending its own interests. It followed that the legislature's intervention did not amount to interference and had not been intended to influence the outcome of the dispute. Furthermore, even if it were accepted that there had been such interference, it was justified since the Law of 4 March 2002 pursued several legitimate objectives, to which the *Conseil d'Etat* had drawn attention in its opinion of 6 December 2002 (set out in paragraph 75 above). Lastly, the Government repeated their argument that there was a "reasonable relationship of proportionality" between the objective pursued by the legislature and the means it had employed. It emphasised the level of assistance provided by way of national solidarity, referring not only to the measures already taken domestically but also to those planned for the future.

B. The Court's assessment

104. Regard being had to the particular circumstances of the present case and to the reasoning which led it to find a violation of Article 1 of Protocol No. 1 (see paragraphs 78-94 above), the Court does not consider it necessary to examine separately the applicants' complaint under Article 6 § 1 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

105. The applicants further alleged that the immediate applicability of the Law of 4 March 2002 to pending proceedings deprived them of an effective remedy, since they could no longer obtain compensation, from the person responsible, for the special burdens arising from their child's disability. They relied on 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."

106. The Court reiterates that Article 13 guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of this Article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of an "arguable" complaint under the Convention and to grant appropriate relief (see, among other authorities, *Aksoy v. Turkey*, judgment of 18 December 1996, *Reports of Judgments and Decisions* 1996-VI, p. 2286, § 95).

107. As the Court concluded above that there has been a violation of Article 1 of Protocol No. 1, there is no doubt that the complaint relating to that provision is arguable for the purposes of Article 13 of the Convention. However, according to the Court's case-law, Article 13 does not go so far as to guarantee a remedy allowing a Contracting State's laws as such to be challenged before a national authority (see, for example, *Gustafsson v. Sweden*, judgment of 25 April 1996, *Reports* 1996-II, p. 660, § 70). Consequently, the applicants' complaint falls foul of that principle in so far as they complained of the lack of a remedy after 7 March 2002, the date of the entry into force of section 1 of the Law of 4 March 2002 on patients' rights and the quality of the health service (see, *mutatis mutandis*, *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 113, ECHR 2002-VI).

108. Accordingly, the Court finds no violation of Article 13 of the Convention in the present case.

V. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION, AND OF ARTICLE 14 TAKEN IN CONJUNCTION WITH ARTICLE 8

109. Lastly, the applicants complained that the legal rules introduced by the Law of 4 March 2002 constituted arbitrary interference by the State in their private and family life, in that it prevented them from meeting their child's needs. They further submitted that the State had failed to discharge its obligation to protect the interests of the family. They relied on Article 8 of the Convention, the relevant parts of which provide as follows:

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

A. The parties' submissions

1. The applicants

110. The applicants asserted that Article 8 of the Convention guaranteed the right to a normal family life and was therefore applicable to the present case, regard being had in particular to the Court's extensive view of the question. They argued that the Law of 4 March 2002 had infringed that right and constituted interference

with its exercise, but that none of the conditions required for such interference to be compatible with the Convention, namely that it should be in accordance with the law, pursue a legitimate aim and be necessary, had been satisfied. In the first place, the legislation was neither clear nor precise, contrary to the requirements established by the Court's case-law, in that the reference to national solidarity remained vague and imprecise. Secondly, and above all, the interference did not pursue a legitimate and compelling objective. In particular, the considerations linked to improving the organisation of the health service, chief among which was the concern to avoid increases in insurance premiums for doctors and health-care establishments, could not justify giving the latter immunity in respect of their negligent acts or omissions. As regards the State's positive obligation, this could not be considered to have been discharged since, by depriving C. and her parents of a remedy whereby they could obtain compensation for the damage consisting of the special burdens arising from her disability, the legislature had prevented the family's interests from being protected practically and effectively.

111. At the hearing the applicants also relied, for the first time, on Article 14 of the Convention taken in conjunction with Article 8, in connection with the right to a normal family life. They asserted that the law complained of introduced unjustified discrimination between the parents of children born disabled as a result of negligence by a doctor who had failed to detect the disability during the mother's pregnancy, who could not obtain full reparation for the consequences of such negligence, like the applicants, and the parents of disabled children who were able to impute the damage to a third party and obtain full reparation.

2. The Government

112. As their main argument, the Government contested the applicability of Article 8 of the Convention in the present case. Relying on the Court's case-law (*Marckx v. Belgium*, judgment of 13 June 1979, Series A no. 31), they distinguished between patrimonial rights which, by their nature, had a connection with family life (such as successions and voluntary dispositions) and those which had only an indirect link with family life, like the right to compensation for medical negligence. Accepting that Article 8 applied to the latter, and in particular to the present case, would bring within the scope of that provision any material claim a family might have, even one having nothing to do with the family structure. Even though, as the Government accepted, the question whether or not the costs arising from C.'s disability would be reimbursed was likely to affect the life of the applicants' family, it did

not have any bearing on the patrimonial relations between parents and children.

113. Even if the Court were to take the view that Article 8 was applicable in the present case, the Government further submitted that no interference had been established. Even if that were so, the interference would be in pursuit of a legitimate aim and necessary in a democratic society, regard being had in particular to the legitimate objectives pursued by the Law of 4 March 2002.

B. The Court's assessment

1. General principles

114. While the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, it does not merely require the State to abstain from such interference: there may in addition be positive obligations inherent in effective "respect" for family life. The boundaries between the State's positive and negative obligations under this provision do not always lend themselves to precise definition; nonetheless, the applicable principles are similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and the community as a whole, and in both contexts the State is recognised as enjoying a certain margin of appreciation (see, for example, *Nuutinen v. Finland*, no. 32842/96, § 127, ECHR 2000-VIII, and *Kutzner v. Germany*, no. 46544/99, §§ 61 and 62, ECHR 2002-I). Furthermore, even in relation to the positive obligations flowing from the first paragraph, "in striking [the required] balance the aims mentioned in the second paragraph ... may be of a certain relevance" (see *Powell and Rayner v. the United Kingdom*, judgment of 21 February 1990, Series A no. 172, p. 18, § 41).

115. "Respect" for family life implies an obligation on the State to act in a manner calculated to allow ties between close relatives to develop normally (see *Marckx*, cited above, p. 21, § 45). The Court has held that a State is under this type of obligation where it has found a direct and immediate link between the measures requested by an applicant, on the one hand, and his private and/or family life on the other (see *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, p. 17, § 32; *X and Y v. the Netherlands*, judgment of 26 March 1985, Series A no. 91, p. 11, § 23; *López Ostra v. Spain*, judgment of 9 December 1994, Series A no. 303-C, p. 55, § 55; *Guerra and Others v. Italy*, judgment of 19 February 1998, *Reports* 1998-I, p. 227, § 58; *Botta v. Italy*, judgment of 24 February 1998, *Reports* 1998-I, p. 423, § 35; and *Zehnalová and Zehnal v. the Czech Republic* (dec.), no. 38621/97, ECHR 2002-V).

116. However, since the concept of respect is not precisely defined, States enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals (see *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, pp. 33-34, § 67, and *Zehnalová and Zehnal*, cited above).

117. At the same time, the Court reiterates the fundamentally subsidiary role of the Convention. The national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions (see, for example, *Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A no. 24, p. 22, § 48, and *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 97, ECHR 2003-VIII). In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight (see *James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A no. 98, p. 32, § 46, where the Court found it natural that the margin of appreciation "available to the legislature in implementing social and economic policies should be a wide one").

2. Application of the above principles

118. In the present case, the applicants complained both of unjustified interference and of inaction on the part of the State, in that it had not set up machinery to provide effective compensation for the special burdens occasioned by their child's disability.

119. The first question to arise is whether Article 8 of the Convention is applicable, that is to say whether the measures taken by the respondent State in relation to disabled persons have anything to do with the applicants' right to lead a normal family life.

120. However, the Court does not consider it necessary in the present case to determine that issue since, even supposing that Article 8 may be considered applicable, it considers that the situation complained of by the applicants did not constitute a breach of that provision.

121. It notes that section 1 of the Law of 4 March 2002 altered the existing legal position on the question of medical liability. In response to the *Perruche* judgment and the stormy nation-wide debate which ensued, reflecting the major differences of opinion on the question within French society, the French parliament, after consulting the various persons and interest groups concerned, decided to intervene to establish a new system of compensation for the prejudice sustained by children born with disabilities and their parents, different from the one

resulting from the case-law of the administrative and civil courts. One of the main effects of the new rules established in consequence, spelled out by the *Conseil d'Etat* in its opinion of 6 December 2002, is that parents may no longer obtain compensation from the negligent party for damage in the form of the special burdens arising from their child's disabilities throughout their lives. These rules were the result of comprehensive debate in Parliament, in the course of which account was taken of legal, ethical and social considerations, and concerns relating to the proper organisation of the health service and the need for fair treatment for all disabled persons. As the *Conseil d'Etat* pointed out in the opinion already mentioned, Parliament based its decision on general-interest grounds, and the validity of those grounds cannot be called into question by the Court (see paragraph 85 above). In doing so it was pursuing at least one of the legitimate aims set out in the second paragraph of Article 8 of the Convention, namely protection of health or morals.

122. Admittedly, being immediately applicable, the provisions in issue retrospectively deprived the applicants of an essential part of the compensation to which they could lay claim, and the Court can only repeat that finding (see paragraphs 86-94 above).

123. However, in deciding that the costs of caring for disabled children should be borne by reliance on national solidarity, the French legislature took the view that it was better to deal with the matter through the legislation laying down the conditions for obtaining compensation for disability than to leave to the courts the task of ruling on actions under the ordinary law of liability. Moreover, the Court notes that the previous legal dispensation, which had obtained since 1975, was thoroughly overhauled by the Law of 11 February 2005 (see paragraphs 54-59 above). It is certainly not for the Court to take the place of the national authorities in assessing the advisability of such a system or in determining what might be the best policy in this difficult social sphere. This is an area where the Contracting States are to be recognised as enjoying a wide margin of appreciation (see, *mutatis mutandis*, *Powell and Rayner*, cited above, p. 19, § 44).

124. Consequently, there is no serious reason for the Court to declare contrary to Article 8, in either its positive or its negative aspect, the way in which the French legislature dealt with the problem or the content of the specific measures taken to that end. It cannot reasonably be claimed that the French parliament, by deciding to reorganise the system of compensation for disability in France, overstepped the wide margin of appreciation left to it on the question or upset the fair balance that must be maintained.

125. There has accordingly been no violation of Article 8 of the Convention.

126. As regards the complaint under Article 14 of the Convention taken together with Article 8, the Court notes that it was raised for the first time before it at the hearing on 23 March 2005 (see paragraph 111 above). It is therefore not covered by the admissibility decision of 6 July 2004 which delimits the scope of the Court's jurisdiction (see, among other authorities, *Göç v. Turkey* [GC], no. 36590/97, § 36, ECHR 2002-V, and *Assanidze v. Georgia* [GC], no. 71503/01, § 162, ECHR 2004-II). It follows that this complaint falls outside the scope of the case as submitted to the Grand Chamber.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

127. 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. Pecuniary and non-pecuniary damage

128. The applicants alleged that they had sustained pecuniary damage corresponding to the sums they would have received if the legal situation prior to the Law of 4 March 2002 had continued to obtain. Supplying the relevant vouchers, they claimed the following sums:

(a) 115,200 euros (EUR) for prejudice sustained by Mr Maurice in his working life;

(b) EUR 11,004 for the installation of an internal lift, EUR 5,647 for a wheelchair (balance of the purchase price after reimbursement by social security), EUR 50,550 for the successive purchase of two vehicles (the first of which had proved unsuitable for transporting the children), and EUR 505,603 for conversion work on their home to provide improved access and special adaptations, amounting to EUR 688,004 (for items (a) and (b)) which, together with the statutory interest which would have been taken into account by the administrative courts, made a total of EUR 790,010.63;

(c) for the prejudice consisting in the special financial burdens arising from their child's disability, either in the form of an annuity payable in monthly instalments of EUR 5,800 for the duration of the child's life, with a fixed coefficient of enhancement in the event of a worsening of her condition, or as a capital sum of EUR 5,421,144 (calculated on the basis of mean life expectancy). These sums had been established by a method which took into account, among other factors, C.'s age and the progressive nature of her illness.

129. As regards in particular the sums corresponding to "special burdens" (listed under (b) and (c) above), the applicants emphasised that the law enacted on 11 February 2005 would not be immediately applicable to children and that it would not ensure compensation for the prejudice they had already sustained since C.'s birth. In addition, the benefit provided for in that law would not allow full compensation for the burdens arising from their child's disability.

130. The applicants' claim for pecuniary damage amounted in total to EUR 6,211,154.63.

131. They did not submit a claim in respect of non-pecuniary damage, a fact which the Government formally noted.

132. On the other hand, the Government contested the applicants' claims for pecuniary damage, which they considered unreasonable. They submitted in particular that the damage for disruption to Mr Maurice's working life had already been made good by the Paris Administrative Court in its judgment of 25 November 2003. As this compensation had not been affected by the enactment of the Law of 4 March 2002, the Government considered that no just satisfaction should be awarded under that head. As to the sums corresponding to the "special burdens" arising from C.'s disability (itemised under (b) and (c) above), these were already partly covered by the allowances paid by way of national solidarity, which were later to be supplemented by the provisions of the Law of 11 February 2005. It followed, in the Government's submission, that if the Court were to find a violation that finding would constitute sufficient just satisfaction.

133. The Court considers that, in the circumstances of the case, and regard being had in particular to the state of the proceedings in the national courts, the question of the application of Article 41 is not yet ready for decision in respect of pecuniary and non-pecuniary damage. It should therefore be reserved, account being taken of the possibility of an agreement between the respondent State and the applicants (Rule 75 §§ 1 and 4 of the Rules of Court).

B. Costs and expenses

134. In respect of costs and expenses incurred before the French courts, the applicants claimed, with the relevant supporting documents, EUR 17,600 (EUR 6,400 for two applications for an interim award, a request for an expert opinion and a compensation claim against AP-HP, EUR 2,800 for a compensation claim against the State for damage inflicted by reason of legislation, EUR 2,800 for the appeal in the interim award proceedings, EUR 2,800 for the appeals on points of law in the interim award proceedings and

EUR 2,800 for the two appeals currently pending in the proceedings against AP-HP and the State). From that amount they deducted EUR 5,762 which they had received in compensation pursuant to the various domestic decisions. The total sum claimed was therefore EUR 11,838. In respect of the costs and expenses incurred before the Court, the applicants claimed EUR 15,000, for which they supplied the relevant bill of costs.

135. The Government submitted that where the Court found a violation it could award only the costs and expenses incurred before the national courts for the prevention or redress of the violation. In the present case, even if the Law of 4 March 2002 had not been enacted, the costs of the proceedings under the urgent procedure and the main proceedings at first instance would still have been incurred. The Government therefore contended that only the costs incurred on appeal in the main proceedings and against the State for damage inflicted by reason of legislation should be awarded to the applicants, a sum of EUR 5,600.

136. As to the costs incurred before the Court, the Government acknowledged that the applicants had used the services of a lawyer and that the case was of a certain complexity. They left assessment of the amount to be awarded under this head to the Court's discretion, while submitting that it should not exceed EUR 7,500.

137. With regard to the proceedings in the domestic courts, the Court reiterates that, where it finds that there has been a violation of the Convention, it may award the applicant the costs and expenses incurred before the national courts "for the prevention or redress of the violation" (see, for example, *Hertel v. Switzerland*, judgment of 25 August 1998, *Reports* 1998-VI, p. 2334, § 63, and *Carabasse v. France*, no. 59765/00, § 68, 18 January 2005).

In the present case, since the violation found concerned the enactment of the Law of 4 March 2002, the Court considers that the applicants are entitled to claim reimbursement of the costs of the proceedings in which they had to contest the effects of that legislation. That applies to the proceedings brought in the Paris Administrative Court against AP-HP and the State, the appeals lodged and currently pending in the Paris Administrative Court of Appeal and the appeals on points of law in the interim award proceedings. As regards the ordinary appeal in the interim award proceedings, the Court notes that, although this was lodged by AP-HP before 4 March 2002, the law complained of was enacted during the course of the proceedings, and the applicants, moreover, contested its applicability in one of their memorials. Part of the applicants' costs in those proceedings was therefore incurred to prevent the violation of the Convention found by the Court.

138. Ruling on an equitable basis, as required by Article 41 of the Convention, the Court, having regard to the foregoing, awards the applicants the sum of EUR 11,400 which, less EUR 5,000 already received in compensation pursuant to the various relevant domestic decisions, makes EUR 6,400, all taxes included.

139. As regards the costs incurred in the proceedings before it, the Court notes that the applicants supported their claims by supplying a bill of costs. Considering that the amounts claimed are not excessive in the light of the nature of the dispute, which was incontestably of a certain complexity, the Court allows the applicants' claims in full and awards them the sum of EUR 15,000, including all taxes.

C. Default interest

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

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been a violation of Article 1 of Protocol No. 1;

2. *Holds* unanimously that it is not necessary to examine the complaint relating to Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1;

3. *Holds* by twelve votes to five that it is not necessary to examine separately the complaint under Article 6 § 1 of the Convention;

4. *Holds* unanimously that there has been no violation of Article 13 of the Convention;

5. *Holds* unanimously that, even supposing that Article 8 of the Convention were applicable, there has been no violation of that provision;

6. *Holds* unanimously that the complaint under Article 14 of the Convention taken in conjunction with Article 8 falls outside the scope of its examination;

7. *Holds* unanimously that, as regards the sum to be awarded to the applicants in respect of any pecuniary and non-pecuniary damage resulting from the violation found, the question of the application of Article 41 is not ready for decision and accordingly

   (a) *reserves* the said question in whole;

(b) *invites* the Government and the applicants to submit, within six months from the date of notification of this judgment, their written observations on the matter and, in particular, to notify the Court of any agreement that they may reach;
(c) *reserves* the further procedure and *delegates* to the President of the Court the power to fix the same if need be;

8. *Holds* unanimously
(a) that the respondent State is to pay the applicants, within three months, EUR 21,400 (twenty-one thousand four hundred euros) in respect of the costs and expenses incurred up to the present stage of the proceedings before the domestic courts and the Court, 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;

9. *Dismisses* unanimously the remainder of the claim for costs and expenses.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 6 October 2005.

Luzius WILDHABER
President

Lawrence EARLY
Deputy Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following opinions are annexed to this judgment:
(a) joint partly dissenting opinion of Mr Rozakis, Sir Nicolas Bratza, Mr Bonello, Mr Loucaides and Mrs Jočienė;
(b) separate opinion of Mr Bonello.

JOINT PARTLY DISSENTING OPINION OF JUDGES ROZAKIS, Sir Nicolas BRATZA, BONELLO, LOUCAIDES AND JOČIENĖ

1. We are in agreement with the conclusion and reasoning of the majority on all aspects of the case, save as to their conclusion that it is unnecessary to examine separately the applicants' complaint under Article 6 § 1 of the Convention. In our view such an examination is called for in the present case, consistent with the approach of the Court in *Stran Greek Refineries and Stratis Andreadis v. Greece* (judgment of 9 December 1994, Series A no. 301-B) and *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom* (judgment of 23 October 1997, *Reports of Judgments and Decisions* 1997-VII). Article 6 of the Convention and Article 1 of Protocol No. 1 reflect two separate and distinct Convention values, both of fundamental importance – the rule of law and the fair administration of justice on the one hand and the peaceful enjoyment of possessions on the other. While the facts at the basis of the complaints under the two Articles are the same, the issues raised and the relevant governing principles are not, and unlike the majority we do not consider that the Court's conclusion that Article 1 of Protocol No. 1 has been violated is such as to relieve the Court of the duty of examining the applicants' complaint under Article 6 of the Convention.

2. The Court has previously held that the legislature is not in principle precluded in civil matters from regulating rights arising from legislation in force through new retrospective provisions. However, the principle of the rule of law and the notion of fair trial enshrined in Article 6 preclude any interference by the legislature – other than on compelling grounds of general interest – with the administration of justice designed to influence the judicial determination of a dispute (see *Zielinski and Pradal and Gonzales and Others v. France* [GC], nos. 24846/94 and 34165/96 to 34173/96, ECHR 1999-VII, and, among other authorities, *Anagnostopoulos and Others v. Greece*, no. 39374/98, §§ 20 and 21, ECHR 2000-XI).

3. In the present case, the Law of 4 March 2002, which introduced a new system of compensation for the prejudice sustained by a person born with a disability, provided, in paragraph I *in fine* of section 1, that its provisions were to be applicable to pending proceedings, with the exception of those in which there had been an irrevocable decision on the principle of compensation. As a result of the application of that provision, the parents of children whose disability had not been detected before birth on account of negligence, like the applicants, were deprived of a considerable part of the compensation they could previously have

claimed by virtue of the precedent set in the *Quarez* case. Thus the law complained of, being applicable to the judicial proceedings which the applicants had brought and which were still in progress, had the effect of changing their outcome once and for all by retrospectively limiting the damages potentially recoverable in the proceedings to the applicants' disadvantage (see paragraph 79 of the judgment).

4. The Government submitted that the Law of 4 March 2002 was not directed specifically at the dispute which gave rise to the present case, or any particular dispute. While it is true that, unlike the situation in *Stran Greek Refineries and Stratis Andreadis*, the impugned legislation in the present case did not target particular litigation, this is not in our view decisive. Of greater significance is the fact that the contested provisions manifestly had the aim, and the effect, of radically altering the applicable compensation rules and were, by their express terms, designed to apply to all pending judicial proceedings, including those of the applicants, in which no irrevocable decision had been taken on the principle of compensation.

5. The Government further relied on the fact that, in further contrast to the case in *Stran Greek Refineries and Stratis Andreadis*, the State was not itself directly party to the dispute which gave rise to the present case. This fact, again, is not in our view of central importance, the principle which precludes intervention by the legislature in pending legal proceedings being founded not only the requirement of equality of arms between the parties to the proceedings but also on more general requirements of Article 6 of the Convention relating to the rule of law and the separation of powers. In any event, while the State was not as such a party to the proceedings in question in the present case, we note that the participation of AP-HP, a public administrative establishment under the supervision of four ministers, necessarily had major implications for the public finances and that the State was, accordingly, directly affected by the outcome of the proceedings to which the legislation expressly related.

6. While, as in the case of the complaint under Article 1 of Protocol No. 1, we do not seek to question the validity of the general-interest considerations which motivated the introduction of the Law of 4 March 2002, the question remains whether those reasons were, individually or collectively, sufficiently cogent to justify the legislature in extending the measures to legal proceedings which were already in progress. In our view, neither the parliamentary proceedings which preceded the enactment of the provisions in question – in which the main concern raised was the need to end the effects of the *Perruche* judgment – nor the considerations set out by the *Conseil d'Etat* in its opinion of 6 December 2002 and relied on by the Government (see paragraphs 51 and 62 of the judgment), can be regarded as affording sufficiently compelling general-interest grounds to justify

making the provisions of the first paragraph of section 1 applicable to pending proceedings.

7. Consequently, we consider that the application of section 1 of the Law of 4 March 2002 to the proceedings brought by the applicants and pending at the time the law came into force, violated the applicants' rights under Article 6 § 1 of the Convention.

SEPARATE OPINION OF JUDGE BONELLO

1. I voted for the minority's finding that in the present case there has been a violation of both Article 6 § 1 and of Article 1 of Protocol No. 1, for the reasons set out in the joint dissenting opinion which I fully endorse.

2. While agreeing with the reasons of the Court for finding a violation of Article 1 of Protocol No. 1, and with the minority in finding a violation of Article 6 § 1, I would add another set of considerations which influenced my resolution to vote for a double breach.

3. Law no. 303 of 4 March 2002 ("the 2002 Act") bred two consequences which, in my view, were both equally unacceptable. Firstly, it interfered in a manipulative manner with the outcome of an already pending court case, with highly adverse results for the applicants' Convention rights. Secondly, it did this by spawning a new, privileged, immune class of culpable doctors.

4. The 2002 Act peremptorily introduced the novelty of exempting some health professionals or establishments retroactively from the consequences of proved medical error. *All* other medical practitioners and establishments were previously answerable, and still are fully answerable, for the moral and material damage arising from their deficiencies. Professionals and establishments which fail in their function to detect disabilities in the foetus before birth have now been rewarded with a blanket exemption from liability for any material damage arising from their negligence.

5. Before 2002 all doctors in France were equal before the law. Like all other professionals (lawyers, architects, etc.), they were fully liable in negligence. By virtue of the 2002 Act, those who practise prenatal detection are now less equal than others. Their negligence carries a considerably lighter price tag than that of all other professionals. In my book, unequal disposal of equal guilt is no less pernicious than equal disposal of unequal guilt.

6. The internationally accepted norm remains the principle of liability. Every person who has, through malice or negligence, caused harm to others is bound to make good all damage occasioned. The 2002 Act has derogated from this principle. All medical practitioners remain subject to the principle and consequences of liability, except those working in one particular branch of medicine. The 2002 Act has protected the latter in an eminently privileged fortress, totally immune from suits in material damages. I see this discriminatory immunity not so much in the light of Article 14, but rather as another element to factor in when assessing the proportionality of the interference.

7. The 2002 Act not only improperly thwarted the applicants' Convention rights, but did this through the medium of an improper

agency: the creation of a total immunity from the risk of material damages. Immunity, detestable by nature, appears doubly so when wielded to maim fundamental rights.

8. Some immunities, like diplomatic immunity, judicial immunity and partial parliamentary immunity, are the result of historical imperatives and functional necessities. They enjoy the legitimation of long-standing acceptance and tradition, and a proven advantageousness that somehow neutralises the odium of a protection that is unequal between the immune and the non-immune.

9. But to ring in, *pace* the twenty-first century, a new immunity tailored to the comfort of one handpicked class of one handpicked profession is, to my way of thinking, the most efficient way of achieving a disagreeable disturbance of Convention rights.

10. The creation of brand-new immunities from suit, as in the present case, automatically brings into play a new suspect classification, which should have had the double effect of shifting the onus of justification onto the Government and of burdening the Court with a duty of more stringent scrutiny.

11. The impunity engineered by the 2002 Act was intended to salvage some medical practitioners from the consequences of their own deficit of diligence, while abandoning all others to full responsibility in negligence and tort. This has nothing to do with other so-called acceptable "immunities", like the capping of the liability of air carriers. That limitation comes into being by prior international agreement and is contractually accepted beforehand by the eventual victim of damage through the mere purchase of an air ticket publicising that limitation.

12. The Government, which lost no opportunity of re-crafting the law to their own financial advantage, have lost the opportunity of justifying, by compelling reasons, the creation of a suspect unequal protection; and the Court has not scrutinised all the more stringently the emergence of this "parvenu" immunity.

B. PRONUNCE RESE NEI CONFRONTI DI ALTRI PAESI

<u>**Retroattività della legge “civile”**</u>

Art. 1 del Protocollo n. 1 (diritto al rispetto dei beni)

<u>In materia di obbligazioni e contratti</u>

Estratto (par. 37-71) della sentenza del 20 luglio 2004, sez. IV, causa BÄCK c. Finlandia

THE LAW

ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

37. The applicant claimed to be the victim of a breach of Article 1 of Protocol No. 1, which provides:

> "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."

A. The parties' submissions

1. The applicant

38. The applicant complained under Article 1 of Protocol No. 1 that N.'s debt adjustment had deprived him of his property without compensation and without serving a legitimate aim in the general interest. The adjustment had effectively transferred to N. an amount equal to the applicant's net income per year, thereby placing an unreasonable burden on the latter.

39. Whilst accepting that the interference was lawful, the applicant contended that it was disproportionate to the aim sought to be achieved. As a creditor he had been unable to avail himself effectively of his right to question the fairness of N.'s proposed payment schedule, being unable to obtain information on N.'s financial situation or to hear evidence from him under oath in respect of his debts. Equality of arms had not been ensured and the time available for opposing a request for debt adjustment had been short. Moreover, the duty under section 53 of the 1993 Act to investigate the debtor's financial situation had not been properly fulfilled by the enforcement authorities. Due to the substantial number of debt adjustments at the relevant time, the courts' examination of each request had been extremely summary in nature.

40. As a result of the adjustment, the applicant's claim had been reduced from FIM 118,500 (approximately EUR 20,000) to FIM 2,168.41 (EUR 365). The adoption of N.'s debt-adjustment scheme had therefore practically extinguished a claim on his part, the existence of which had already been confirmed by a court. As a rough guess concerning the market value of his possession before the debt adjustment, the applicant estimated that a transfer of his claim to a debt-collection agency would have yielded 50% of its nominal value.

41. In the applicant's view, it had been contrary to the 1993 Act to grant N. a debt adjustment. N.'s responsibility for his heavy debt burden was his alone and his debts had been only temporary in nature, given his age. Had the applicant's claim not been extinguished, he could have sought payment of N.'s debt in a few years.

42. While accepting, in general, that Article 1 of Protocol No. 1 and the public-interest considerations justified a wide margin of appreciation being

granted to the Contracting States, the applicant was opposed to direct property transfers from one citizen to another as in the case of a debt adjustment. Finland's serious recession at the beginning of the 1990s did not justify such direct property transfers. Nor had the debt-adjustment legislation been repealed, even though the country was no longer facing a crisis of that kind. A more appropriate policy for supporting debtors and avoiding serious social consequences would be in the form of a State allowance. If, as the Government argued, debt adjustment sought to alleviate and prevent social problems, the State should at least abandon its fiscal claims against debtors. In the payment schedule adopted for N., the county tax authority was to receive over FIM 3,000 (EUR 505) on a claim with a book-value of FIM 155,000 (EUR 26,069). Thus, through the almost total extinction of his own claim, the applicant had indirectly had to contribute to securing N.'s payment of a fiscal claim.

43. The applicant argued, moreover, that while the adjustment of N.'s debts may have saved him from "social misery", at the same time similar misery was created for creditors. The interference with the applicant's property rights had placed too heavy a burden on him in comparison with N. The applicant contested the Government's assertion that through the debt adjustment he had been ensured the reimbursement of an amount higher than that which he could have hoped to receive without such an adjustment. The amount which the applicant had been required to reimburse as co-guarantor of N.'s loan had amounted to roughly the applicant's annual salary. Whereas the applicant had been obliged to pay off for fifteen years the loan he had been forced to take out in order to reimburse half N.'s loan, N.'s responsibility for paying his court-reduced debts had been limited to a period of only five years. At the time, however, it had been estimated that N. would have thirty-one years left in which to work before retiring.

2. The Government

44. The Government recognised that the impugned measures constituted an interference with the applicant's right to the peaceful enjoyment of his possessions or, in the alternative, amounted to a deprivation of his property and thus fell to be considered under the second sentence of the first paragraph of Article 1 of Protocol No. 1. It was their view, however, that this provision had not been violated.

45. The Government noted that the adjustment of N.'s debt to the applicant had been granted pursuant to the 1993 Act, which constituted a law within the meaning of Article 1 of Protocol No. 1 that was adequately accessible and sufficiently precise. The aim of the 1993 Act was to ensure that an individual with financial difficulties would be able to improve his or her financial situation, thereby preventing the negative effects of insolvency on society as a whole, such as social exclusion, health and social problems and an expanding grey sector of the economy.

46. They explained that the large number of debt-adjustment cases at the relevant time had largely resulted from the unfavourable economic climate of the 1990s and the increase in borrowing by households and companies in previous years. The extensive marketing of credits, favourable economic developments and the general expectations of economic growth had encouraged some households to take out loans without sufficient guarantees of being able to repay them, and the credit institutions had not been sufficiently interested in verifying the solvency of debtors. A sudden and strong increase in unemployment, a reduction in the net income of households, a significant rise in interest levels and a strong decrease in house prices had created strong social

and political pressure to establish a system under which unreasonable debt burdens on private individuals could be resolved. As the debt problems of private individuals were prevented or resolved through debt adjustment, there was less need for the unfruitful use of the court system and enforcement authorities. The need for social assistance was also reduced.

47. The Government pointed out further that debt adjustments were implemented in accordance with a payment schedule fixed for several years, taking into account the *de facto* solvency of the debtor. That way, the debtor was afforded a way out of a hopeless debt situation and was able to plan his or her future in a sensible and realistic manner. The improvement of the debtor's financial situation also ensured that the creditors' claims were reimbursed to the fullest extent possible, albeit with a longer payment schedule. An arrangement which ensured a debtor's present and future capacity for earning an income also served the interests of creditors. Where a debtor failed to pursue actively the reimbursement of debts, due to financial difficulties which he or she found insurmountable, the creditors usually did not receive any payments. When account was taken of the debtor's *de facto* ability to repay his or her debts, the creditors could expect to have at least part of their claims satisfied. As a result of the assessment of the debtor's solvency, the creditors also avoided the useless and costly measures of recovering debts.

48. The Government concluded that the 1993 Act, which sought to ensure a balance between the interests of the parties concerned, undoubtedly served a legitimate "public interest" for the purposes of Article 1 of Protocol No. 1, even to the extent that it might imply the transfer of property from one individual to another. Debt-adjustment legislation was also common in other member States of the Council of Europe.

49. The Government submitted further that the interference with the applicant's property rights was in proportion to the legitimate aim sought to be realised. The issue of the proportionality of the 1993 Act had been discussed at length in the Standing Constitutional Law Committee of Parliament as well as in its Standing Legal Affairs Committee. They had emphasised the need to give due consideration to the protection of property provided for in the 1919 Constitution, meaning above all that the weakening of the creditors' position, although inevitable, should not lead to unreasonable results. It was noted that a private individual was not released from his or her liability to reimburse a debt even when declared bankrupt. The effects of debt adjustment on the position of creditors therefore had to be assessed in the light of their ability to obtain payment from the debtor's future income and assets. As the debt would be reduced and the debtor freed from his or her liability to reimburse a debt only where debt adjustment by other means was not possible, such an adjustment would not in reality weaken the position of creditors.

50. The Government emphasised that, in the present case, N.'s total debt had amounted to FIM 1,391,375 (EUR 234,012) of which the applicant's share had been approximately FIM 113,000 (approximately EUR 19,000). In drawing up the payment schedule, it had been calculated that N. could afford to reimburse a total of approximately FIM 420 (EUR 71) per month. On the expiry of the five-year payment schedule, the applicant would have received a total of FIM 2,160 (EUR 363) from N. It was highly unlikely that N. would ever have reimbursed his whole debt to the applicant in the absence of a debt adjustment; on the contrary, the latter would not even have received the amount fixed by that adjustment. Furthermore, as there

was in practice no market for individual claims against insolvent persons, there was no reasonable basis for believing that the applicant would, in the absence of the debt adjustment, have been able to sell his claim for a sum exceeding the sum he had received through the debt adjustment.

51. The Government pointed out that a distinction had to be made between the nominal value of a claim, on the one hand, and the real value of such a claim, on the other. The latter depended crucially on the prospect of recovering the amount, that is, on the actual credit risk. In the present case, the applicant's claim had been unsecured. Moreover, as a guarantor, the applicant had taken on a special role in that he had specifically assumed the risk of the debtor's insolvency.

B. The Court's assessment

1. General principles

52. The Court reiterates that Article 1 of Protocol No. 1 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 peaceful enjoyment of property. The second rule, contained in the second sentence of the same paragraph, covers deprivation of possessions and makes it subject to certain conditions. The third rule, stated in the second paragraph, recognises that Contracting States are entitled, among 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. Both forms of interference defined must comply with the principle of lawfulness and pursue a legitimate aim by means reasonably proportionate to the aim sought to be realised (see *Jokela v. Finland*, no. 28856/95, §§ 44 and 48, ECHR 2002-IV).

53. The notion of "public interest" is necessarily extensive. In particular, the decision to enact property laws will commonly involve consideration of political, economic and social issues. The taking of property in pursuance of legitimate social, economic or other policies may be in the public interest even if the community at large has no direct use or enjoyment of the property. The national authorities are in principle better placed than the international judge to appreciate what is "in the public interest". The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is "in the public interest" unless that judgment is manifestly without reasonable foundation (see *The former King of Greece and Others v. Greece* [GC], no. 25701/94, § 87, ECHR 2000-XII, and *James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A no. 98, pp. 31-32, §§ 45-46).

54. The possible existence of alternative solutions does not in itself render the contested legislation unjustified. Provided that the legislature remains within the bounds of its margin of appreciation, it is not for the Court to say whether the legislation represented the best solution for dealing with the problem or whether the legislative discretion should have been exercised in another way (see *James and Others*, cited above, p. 35, § 51).

55. An interference with peaceful enjoyment of possessions must nevertheless strike a "fair balance" between the demands of the public or general interest of the community and the requirements of the protection of the

individual's fundamental rights. The concern to achieve this balance is reflected in the structure of Article 1 as a whole, which is to be read in the light of the general principle enunciated in the first sentence. In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of his possessions or controlling their use. Compensation terms under the relevant legislation are material to the assessment of whether the contested measure respects the requisite fair balance and, notably, whether it imposes a disproportionate burden on the applicant (see *The former King of Greece and Others*, cited above, § 89).

56. Although Article 1 of Protocol No. 1 contains no explicit procedural requirements, the proceedings in issue must also afford the individual a reasonable opportunity of putting his or her case to the responsible authorities for the purpose of effectively challenging the measures interfering with the rights guaranteed by this provision. In ascertaining whether this condition has been satisfied, a comprehensive view must be taken of the applicable procedures (see *Jokela*, cited above, § 45).

2. Application in the present case

57. It is common ground that the applicant's claim constituted a "possession" within the meaning of Article 1 of Protocol No. 1. It is likewise undisputed that the 1993 Act interfered with the applicant's property rights. The Court notes that under Finnish law the applicant's claim against N. was based on the right of recourse he had against N. by virtue of having reimbursed part of his debts. The Court is satisfied that the applicant's claim therefore constituted a "possession" within the meaning of Article 1 of Protocol No. 1 (see, for example, *Pressos Compania Naviera S.A. and Others v. Belgium*, judgment of 20 November 1995, Series A no. 332, p. 21, §§ 30-31). Likewise, the Court sees no reason to differ in so far as the parties consider that the application of the 1993 Act constituted an interference with the applicant's property rights.

58. The Court observes that the adjustment of N.'s debts under the 1993 Act almost extinguished the applicant's claim. The facts of this case bear resemblance both to deprivation and to control of property, but they cannot easily be classified as a matter to be examined solely under the second or the third rule contained in Article 1 of Protocol No. 1. Moreover, the situations envisaged in the second sentence of the first paragraph of Article 1 and in its second paragraph are only particular instances of interference with the right to peaceful enjoyment of property as guaranteed by the general rule set forth in the first sentence of the first paragraph. The Court will therefore examine whether the alleged interference with the applicant's property rights was compatible with the general rule in the first sentence of the first paragraph of Article 1.

59. Turning to the question whether the interference with the applicant's property rights could be considered justified by a public or general interest, the Court notes that a legislative framework for permitting the adjustment of private individuals' debts on certain conditions has been put in place in a number of Contracting States. It has no reason to doubt the Finnish legislature's judgment that there was, at the relevant time, an urgent and compelling public interest in affording debtors the possibility of seeking a debt adjustment in certain circumscribed situations. The Court can likewise accept that there was, in principle, a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

60. The Court agrees with the applicant that a transfer of property effected for no reason other than to confer a benefit on a private party cannot be "in the public interest". Nonetheless, it is settled case-law that the compulsory transfer of property from one individual to another may, depending upon the circumstances, constitute a legitimate means of promoting the public interest. Thus, a transfer of property effected in pursuance of legitimate social, economic or other policies may be "in the public interest", even if the community at large has no direct use or enjoyment of the property transferred (see *James and Others*, cited above, pp. 30-32, § 40-45). The debt-adjustment legislation clearly serves legitimate social and economic policies and is not *ipso facto* an infringement of Article 1 of Protocol No. 1.

61. The Court must, however, also satisfy itself that the application of the 1993 Act in the case before it did not impose an excessive burden on the applicant.

62. It is true that at the time when the applicant agreed to guarantee N.'s loan he could not foresee the economic recession and the subsequent legislation allowing for the adjustment of N.'s debts. The detriment which this adjustment caused to the applicant was no doubt significant in financial terms. It is equally true, however, that when guaranteeing N.'s loan the applicant had to assess the risk that N. would fail to comply with his payment obligation. He also had to consider the possibility that N. might be declared bankrupt, in which case his claim against N. would most likely become worthless. The fact that in the case of a bankruptcy the applicant's claims would have remained legally valid and enforceable at a later stage does not alter the fact that by entering into the guarantee agreement the applicant accepted a risk of financial loss.

63. The Court would not exclude the possibility that the court-ordered irrevocable extinction of a debt, as opposed to the scheduling of payments of a debt over a longer period of time or the bankruptcy of a private individual, could in some circumstances result in the placing of an excessive burden on a creditor. The question whether such a burden was placed on the applicant also depends on whether the procedure applied provided him with a fair possibility of defending his interests as one of some seventy creditors.

64. In this connection, the Court notes that submissions from the applicant were heard by the District Court and he was thus able to put forward his views on N.'s request for a debt adjustment and the proposed payment scheme. The Court is satisfied that the District Court carried out a thorough and careful assessment of the case and finds no indication of any arbitrariness in the conclusions reached. The applicant was further entitled to a full review by an appellate court as regards both the decision to grant the debt adjustment and the details of the adopted payment scheme. Finally, the applicant was able to seek leave to appeal to the Supreme Court.

65. The Court further notes that N.'s payment schedule and the resultant virtual extinction of the applicant's claim did not acquire legal force when the court proceedings ended in February 1997. Until the payment schedule ceased to be in force on 1 June 2001, the applicant could have sought to have it extended or to have the payments to himself increased if he considered, for instance, that N.'s ability to pay had improved significantly.

66. Admittedly, the applicant had no way of verifying that the information provided by N. in his application for a debt adjustment, or later on, was correct. This can nevertheless be considered to have been offset by

the fact that N. was under an obligation to give accurate information, that obligation being subject to criminal sanctions.

67. The Court finds no indication that the domestic courts arbitrarily failed to consider the arguments put forward by the applicant or that the adjustment of N.'s debts and the fixing of his payment schedule were based on arbitrary or unreasonable considerations. Thus, the proceedings viewed as a whole afforded him a reasonable opportunity of putting his case to the competent authorities with a view to establishing a fair balance between the conflicting interests at stake.

68. Turning to the retroactive effect of the 1993 Act, the Court notes that neither the Convention nor its Protocols preclude the legislature from interfering with existing contracts (see *Mellacher and Others v. Austria*, judgment of 19 December 1989, Series A no. 169, p. 27, § 50). The Court considers that a special justification is required for such interference, but accepts that in the context of the 1993 Act there were special grounds of sufficient importance to warrant it. The Court observes that in remedial social legislation and in particular in the field of debt adjustment, which is the subject of the present case, it must be open to the legislature to take measures affecting the further execution of previously concluded contracts in order to attain the aim of the policy adopted. Furthermore, other Council of Europe member States such as Norway and Sweden have introduced legislation allowing for the adjustment of debts contracted prior to its entry into force.

69. It is undoubtedly true that the reduction in the applicant's nominal claim is striking in its amount. However, the burden imposed by N.'s debt adjustment was shared by several creditors, the applicant's nominal claim representing merely 8.4% of the total amount of the claims. Moreover, it is obvious that, even before the 1993 Act was passed, the "market value", if any, of the applicant's claim, that is, the amount which anyone willing to buy the claim would have been ready to pay for it, was much less than its nominal value.

70. Bearing in mind also that by 1995, when N.'s state of insolvency led him to seek a debt adjustment, he had effectively not repaid his debt during those four years, apart from the sum of FIM 2,964 (EUR 499) which he had paid by September 1992, the Court concludes that the applicant's claim had already been rendered highly precarious before the debt adjustment for reasons not attributable to the State under the Convention. In these circumstances, the burden imposed on the applicant by the 1993 Act cannot be regarded as excessive.

71. Accordingly, there has been no violation of Article 1 of Protocol No. 1.

B. PRONUNCE RESE NEI CONFRONTI DI ALTRI PAESI

Retroattività della legge "civile"

Art. 6 § 1 della Convenzione (equo processo)

In materia di contratti

Sentenza dell'11 aprile 2006, sez. II, causa CABOURDIN c. Francia (in particolare, par. 21-39)

En l'affaire Cabourdin c. France,

La Cour européenne des Droits de l'Homme (deuxième section), siégeant en une chambre composée de :

MM. A.B. BAKA, *président*,
J.-P. COSTA,
R. TÜRMEN,
K. JUNGWIERT,
M. UGREKHELIDZE,
Mme D. JOCIENE,
M. D. POPOVIC, *juges*,
et de Mme S. DOLLE, *greffière de section*,

Après en avoir délibéré en chambre du conseil les 7 juin 2005 et 21 mars 2006,

Rend l'arrêt que voici, adopté à cette dernière date :

PROCÉDURE

1. A l'origine de l'affaire se trouve une requête (n° 60796/00) dirigée contre la République française et dont un ressortissant de cet Etat, M. Thierry Cabourdin (« le requérant »), a saisi la Cour le 30 août 2000 en vertu de l'article 34 de la Convention de sauvegarde des Droits de l'Homme et des Libertés fondamentales (« la Convention »).

2. Le requérant est représenté par Me J. Gresy, avocat au barreau de Versailles. Le gouvernement défendeur est représenté par son agent, Madame Edwige Belliard, directrice des Affaires juridiques au ministère des Affaires étrangères.

3. Le requérant alléguait en particulier la violation de l'article 6 § 1 de la Convention.

4. La requête a été attribuée à la deuxième section de la Cour (article 52 § 1 du règlement). Au sein de celle-ci, la chambre chargée d'examiner l'affaire (article 27 § 1 de la Convention) a été constituée conformément à l'article 26 § 1 du règlement.

5. Le 1er novembre 2004, la Cour a modifié la composition de ses sections (article 25 § 1 du règlement). La présente requête a été attribuée à la deuxième section ainsi remaniée (article 52 § 1).

6. Par une décision du 7 juin 2005, la Cour a déclaré la requête recevable.

7. Tant le requérant que le Gouvernement ont déposé des observations écrites sur le fond de l'affaire (article 59 § 1 du règlement).

EN FAIT

I. LES CIRCONSTANCES DE L'ESPÈCE

8. Le requérant est né en 1951 et réside à Voisins-le-Bretonneux.

9. Suivant acceptation d'une offre préalable du 15 septembre 1987, la Banque nationale de Paris (la « BNP ») consentit au requérant et à son épouse un prêt de 675 000 FRF (102 740 euros environ), remboursable sous la forme de cent quatre-vingts mensualités constantes, destiné à financer l'acquisition d'un bien immobilier. Ce faisant, la BNP fit application des dispositions de la loi n° 79-596 du 13 juillet 1979, dispositions ultérieurement intégrées dans le code de la consommation sous les articles L. 312-1 et suivants.

10. Le 3 avril 1996, à la suite de poursuites engagées à leur encontre par la BNP pour défaut de paiement, le requérant et son épouse assignèrent la banque en nullité du prêt consenti, et demandèrent à ce que celle-ci soit déchue de ses droits à intérêts. A l'appui de leur demande, ils faisaient valoir que l'établissement financier, contrairement à ce qui était prévu à l'article 312-8 du code de la consommation tel qu'issu de l'article 5 de la loi du 13 juillet 1979, n'avait pas joint à l'offre préalable de prêt un échéancier des amortissements ; ils précisaient également que cette omission était contraire à la jurisprudence de la Cour de cassation en la matière (arrêts des 16 mars et 20 juillet 1994).

11. Le 12 avril 1996, le Parlement vota une loi n° 96-314 « portant diverses dispositions d'ordre économique et financier » dont l'article 87-I modifia les dispositions du code de la consommation relatives aux offres de prêt et ce, avec effet rétroactif, sous réserve des décisions de justice passées en force de chose jugée.

12. Par un jugement du 28 novembre 1996, le tribunal de grande instance de Paris débouta le requérant et son épouse de leur demande. Le tribunal constata en effet l'acquisition de la prescription quinquennale de l'action civile prévue à l'article 1034 du code civil, et estima « *qu'il n'était pas nécessaire de faire application des dispositions de l'article 87-I de la loi du 12 avril 1996, dont le Conseil constitutionnel* [avait] *dit qu'elles n'étaient contraires ni à la Constitution, ni aux principes généraux du droit* ».

13. Le 26 mai 1998, la cour d'appel de Paris confirma le jugement entrepris, par un arrêt ainsi motivé :

> « (...) considérant que l'article 87 de la loi du 12 avril 1996 dispose que, *sous réserve des décisions de justice passées en force de chose jugée, les offres de prêt mentionnées à l'article L.321-7 du code de la consommation et émises avant le 31 décembre 1994 sont réputées régulières au regard des dispositions relatives à l'échéancier des amortissements prévues par le deuxièmement de l'article L. 312-8 du*

même code, dès lors qu'elles ont indiqué le montant des échéances du remboursement du prêt, leur périodicité, leur nombre ou la durée du prêt ainsi que, le cas échéant, les modalités de leur variation ;

Que l'offre de prêt du 15 septembre 1987 contenant ces informations est dès lors réputée régulière ;

Que les appelants sont donc mal fondés à soutenir que la banque est déchue des intérêts par application des articles L. 312-33 et L. 313-16 du code de la consommation (...) ».

14. Le 31 août 1998, le requérant et son épouse formèrent alors un pourvoi en cassation, dans lequel ils invoquaient notamment une violation de l'article 6 de la Convention en raison de l'ingérence du pouvoir législatif dans l'administration de la justice. Ils estimaient en effet que l'article 87 précité avait pour seul objet de modifier, pendant le cours du procès, les règles de droit applicables que le législateur avait lui-même fixées depuis la loi du 13 juillet 1979, et de contraindre ainsi les magistrats à adopter une solution favorable aux établissements bancaires qui n'avaient pas respecté la loi en vigueur à l'époque.

15. Par un arrêt du 20 juin 2000, la 1ère chambre civile de la Cour de cassation rejeta le pourvoi. La Haute juridiction statua en ces termes :

« Attendu, d'abord, que l'intervention du législateur, dans l'exercice de sa fonction normative, n'a eu pour objet que de limiter, pour l'avenir, la portée d'une interprétation jurisprudentielle et non de trancher un litige dans lequel l'Etat aurait été partie ; qu'ensuite, la cour d'appel a constaté que si l'offre de prêt litigieuse ne comportait pas d'échéancier des amortissements, ce dont il résultait qu'elle ne satisfaisait pas aux exigences de l'article 5 de la loi du 13 juillet 1979, devenu l'article L. 312-8 du code de la consommation, elle contenait les informations exigées par l'article 87-I de la loi du 12 avril 1996 ; qu'elle a exactement considéré, sans avoir à répondre à des conclusions de ce fait inopérantes, que cette offre était réputée régulière ; que le premier moyen est mal fondé en toutes ses branches, le second étant inopérant, en ses deux branches, pour critiquer des motifs surabondants ;

(...) ».

II. LE DROIT ET LA PRATIQUE INTERNES PERTINENTS

A. Code de la consommation

16. Les dispositions pertinentes du code de la consommation, section 3 intitulée « le contrat de crédit », se lisaient comme suit dans leur rédaction applicable avant la loi n° 96-314 du 12 avril 1996 :

Article L. 312-7

« Pour les prêts mentionnés à l'article L. 312-2, le prêteur est tenu de formuler par écrit une offre adressée gratuitement par voie postale à l'emprunteur éventuel ainsi qu'aux cautions déclarées par l'emprunteur lorsqu'il s'agit de personnes physiques. »

Article L. 312-8

« L'offre définie à l'article précédent :

1° Mentionne l'identité des parties, et éventuellement des cautions déclarées ;

2° Précise la nature, l'objet, les modalités du prêt, notamment celles qui sont relatives aux dates et conditions de mise à disposition des fonds ainsi qu'à l'échéancier des amortissements ;

3° Indique, outre le montant du crédit susceptible d'être consenti, et, le cas échéant, celui de ses fractions périodiquement disponibles, son coût total, son taux défini conformément à l'article L. 313-1 ainsi que, s'il y a lieu, les modalités de l'indexation ;

4° Enonce, en donnant une évaluation de leur coût, les stipulations, les assurances et les sûretés réelles ou personnelles exigées, qui conditionnent la conclusion du prêt ;

5° Fait état des conditions requises pour un transfert éventuel du prêt à une tierce personne ;

6° Rappelle les dispositions de l'article L. 312-10.

Toute modification des conditions d'obtention du prêt, notamment le montant ou le taux du crédit, donne lieu à la remise à l'emprunteur d'une nouvelle offre préalable.

Toutefois, cette obligation n'est pas applicable aux prêts dont le taux d'intérêt est variable, dès lors qu'a été remise à l'emprunteur avec l'offre préalable une notice présentant les conditions et modalités de variation du taux. »

B. Jurisprudence de la Cour de cassation

17. Par deux arrêts des 16 mars et 20 juillet 1994, la première chambre civile de la Cour de cassation a jugé que l'échéancier des amortissements, joint à l'offre préalable, devait préciser, pour chaque échéance, la part de l'amortissement du capital par rapport à celle couvrant les intérêts et que le non-respect de ces dispositions d'ordre public était sanctionné non seulement par la déchéance du droit aux intérêts pour le prêteur, mais encore par la nullité du contrat de prêt (Bull. civ. I, respectivement n°s 100 et 262 ; dans le même sens, Civ. 1ère, arrêt du 18 mars 1997, Bull. civ. I, n° 97).

18. Après l'adoption de la loi du 12 avril 1996, des juges du fond avaient considéré que l'article 87-I de la loi était contraire à l'article 6 § 1 de la Convention, en ce que son application aux instances en cours portait atteinte au principe d'égalité des droits et à l'exigence du procès équitable puisqu'elle modifiait une donnée fondamentale du litige au détriment de l'une des parties : la Cour de cassation a censuré cette position en cassant les arrêts concernés les 29 avril et 9 juillet 2003 (Civ. 1ère, pourvois nos 00-20062, 99-12031 et 99-15369).

C. Loi n° 96-314 du 12 avril 1996

19. L'article 87 de la loi n° 96-314 du 12 avril 1996 portant diverses dispositions d'ordre économique et financier prévoyait ce qui suit :

Article 87

« I. – Sous réserve des décisions de justice passées en force de chose jugée, les offres de prêts mentionnées à l'article L. 312-7 du code de la consommation et émises avant le 31 décembre 1994 sont réputées régulières au regard des dispositions relatives à l'échéancier des amortissements prévues par le 2° de l'article L. 312-8 du même code, dès lors qu'elles ont indiqué le montant des échéances de remboursement du prêt, leur périodicité, leur nombre ou la durée du prêt, ainsi que, le cas échéant, les modalités de leurs variations.

II. – L'article L. 312-8 du code de la consommation est ainsi modifié :

a) Dans le troisième alinéa (2°) les mots : « ainsi qu'à l'échéancier des amortissements » sont supprimés ;

b) Il est inséré, après le troisième alinéa, un 2° *bis* ainsi rédigé :

2° *bis* Comprend un échéancier des amortissements détaillant pour chaque échéance la répartition du remboursement entre le capital et les intérêts. Toutefois, cette disposition ne concerne pas les offres de prêts à taux variable. »

D. Travaux parlementaires – extraits

20. Extraits des débats tenus au Sénat lors de l'examen de la loi litigieuse :

- « Force est d'abord de constater que le premier arrêt de la Cour de cassation posant problème date du 16 mars 1994. Or, nous sommes le 21 mars 1996. Personne ici, parmi ceux qui s'intéressent au sujet, n'a reçu la moindre information, le moindre état de situation de la part des organismes concernés, pour nous indiquer qu'il y avait un risque et pour nous permettre d'en évaluer l'importance (...).

Dans les contacts qu'il m'a été possible d'avoir avec eux tout récemment, ils n'invoquent encore que des données très vagues, M. le Rapporteur s'en est d'ailleurs très franchement fait l'écho. Mais nous ne disposons, aujourd'hui, d'aucune donnée

permettant de vérifier le caractère crédible du risque financier invoqué. J'observe que lors de ces derniers contacts, aujourd'hui même, les représentants officiels de cette profession ont omis de nous rappeler les limites procédurales qui, de toute façon, empêchent un grand nombre d'emprunteurs de faire jouer leurs droits » (intervention de M. le sénateur Alain Richard, *J.O. Débats Sénat*, 21 mars 1996, p. 1683)

- « Contrairement à ce que laissent supposer certains professionnels du crédit, sont concernées, non pas toutes les banques mais une infime minorité d'entre elles : celles qui n'ont pas respecté la loi » (intervention de Mme le sénateur Marie-Claude Beaudeau, *J.O. Débats Sénat*, 21 mars 1996, p. 1684).

EN DROIT

I. SUR LA VIOLATION ALLÉGUÉE DE L'ARTICLE 6 § 1 DE LA CONVENTION

21. Le requérant se plaint de l'adoption de la loi du 12 avril 1996 et de son application rétroactive par les juridictions internes. Ces mesures porteraient atteinte à son droit à un procès équitable, constitueraient une ingérence du pouvoir législatif dans la mission de l'autorité judiciaire, seraient contraires au principe de séparation des pouvoirs, et rompraient l'égalité des armes entre les parties. Le requérant invoque l'article 6 § 1 de la Convention qui dispose :

> « Toute personne a droit à ce que sa cause soit entendue équitablement (...) par un tribunal indépendant et impartial (...) qui décidera (...) des contestations sur ses droits et obligations de caractère civil (...) »

A. Arguments des parties

1. Le Gouvernement

22. Le Gouvernement rappelle, en tout premier lieu, les grandes lignes de la jurisprudence de la Cour en matière de validations législatives et cite, à cet égard, toute une série d'affaires portant sur ce sujet (arrêts *Raffineries grecques Stran et Stratis Andreadis c. Grèce* du 9 décembre 1994, série A n° 301-B ; *Papageorgiou c. Grèce* du 22 octobre 1997, *Recueil des arrêts et décisions* 1997-VI ; *National & Provincial Building Society, Leeds Permanent Building Society et Yorkshire Building Society c. Royaume-Uni* du 23 octobre 1997, *Recueil* 1997-VII ; *Zielinski et Pradal et Gonzalez et autres c. France* [GC] n°s 24846/94 et 34165/96 à 34173/96, CEDH 1999-VII, et *Forrer-Niedenthal c. Allemagne*, n° 47316/99, 20 février 2003). Il considère qu'il existe une différence majeure entre ces précédentes affaires

et la présente espèce : l'Etat n'est pas partie au litige et ne défend en aucune manière ses intérêts propres. Les pouvoirs publics sont restés extérieurs aux procédures et neutres à l'égard des parties. Le nouveau régime juridique issu de la loi du 12 avril 1996 s'applique aux relations entre emprunteurs et établissements bancaires, à des rapports de droit privé. Par ailleurs, cette loi n'est pas « une loi de circonstance » destinée à s'immiscer dans des relations contractuelles préexistantes ou dans la bonne administration de la justice, puisqu'elle ne visait qu'à limiter, de façon générale, la portée de l'interprétation jurisprudentielle de la notion « d'échéancier des amortissements », intervention purement normative qui relève de la compétence naturelle du législateur.

23. En l'absence d'implication de l'Etat dans le litige, le Gouvernement rappelle que la Cour a jugé que des motifs d'intérêt général peuvent rendre légitime l'intervention du pouvoir législatif dans le déroulement d'une instance judiciaire en cours (*Forrer-Niedenthal*, précité). Or, en l'espèce, un tel motif d'intérêt général, très clairement rappelé par le Conseil constitutionnel dans sa décision du 9 avril 1996, existait bien. La nouvelle loi avait pour objectif de sauvegarder l'équilibre financier du système bancaire, afin de ne pas mettre en péril l'activité économique en général, ce que jugea également la Cour de cassation dans son arrêt du 29 avril 2003.

24. La loi du 12 avril 1996 poursuivait donc un but légitime et sa disposition litigieuse n'emportait en outre aucune conséquence excessive puisque, d'une part, elle ne remettait pas en cause les décisions passées en force de chose jugée et que, d'autre part, elle ne réputait régulières que certaines offres de prêts émises préalablement (c'est-à-dire celles qui, au regard du contenu de l'échéancier des amortissements, n'étaient pas totalement conformes à l'interprétation que la jurisprudence avait donnée de cette notion avant la loi nouvelle). Le législateur est donc intervenu de façon raisonnable et proportionnée.

2. Le requérant

25. Le requérant rappelle tout d'abord l'évolution législative en matière d'offre de prêt dans le domaine immobilier (les loi du 13 juillet 1979 et du 12 avril 1996 précitées) ainsi que celle relative à la jurisprudence de la Cour de cassation y afférente.

26. En ce qui concerne le grief tiré de la violation de l'article 6 § 1 de la Convention, le requérant considère, contrairement au Gouvernement, qu'aucun motif impérieux d'intérêt général ne justifiait l'ingérence du législateur en l'espèce dans l'administration de la justice. En effet, il observe que s'il a été évoqué lors des travaux parlementaires sur la loi du 12 avril 1996 les chiffres de neuf millions de prêts représentant un montant en capital prêté de plus de deux mille milliards de francs français (soit un peu plus de trois cents milliards d'euros), il convient de distinguer parmi cet ensemble ceux conclus sur la base d'une offre non conforme aux exigences

jurisprudentielles posées par la Cour de cassation et, parmi eux, ceux donnant effectivement lieu à un litige. A cet égard, le requérant se réfère à la doctrine qui a pu observer que la position prise par la Cour de cassation dans ses arrêts des 16 mars et 20 juillet 1994 n'avait pas entraîné une multiplication des actions en nullité des contrats de prêts. Il en conclut, d'une part, que le prétendu souhait du législateur d'éviter un développement des contentieux qui aurait entraîné des risques considérables pour l'activité économique générale (comme rappelé par le Conseil constitutionnel dans sa décision du 9 avril 1996) était entaché d'inexactitude matérielle et d'erreur manifeste d'appréciation et, d'autre part, que l'objectif de la loi litigieuse était en réalité de favoriser certains établissements de crédit qui n'avaient pas respecté la loi antérieure au détriment du droit à l'information de l'emprunteur. Par conséquent, il convient d'appliquer la jurisprudence *Zielinski et Pradal et Gonzalez et autres c. France* précitée, sans que puisse être soutenue la nécessité que l'Etat soit partie au litige. Sur ce dernier point, le requérant souligne l'intérêt particulier qu'avait l'Etat français dans le litige opposant la BNP aux époux Cabourdin, dans la mesure où l'Etat avait des participations directes ou indirectes dans le capital de la banque. Il produit à cet égard des extraits du rapport annuel 2004 de la BNP et des extraits des rapports annuels de la société AXA pour 1997 et 2004. Privatisée en 1993, le requérant fait observer que la composition du capital de la BNP depuis lors fait apparaître la société AXA comme principal actionnaire à hauteur de 6 % du capital ou des droits de votes de 2002 à 2004 ; or, cette société, en 1997 comme en 2004, était contrôlée par des fonds publics à hauteur de 73 % environ (dont 20 % par l'Etat français). Enfin, le requérant estime que l'ingérence du législateur emporte des conséquences excessives et ne saurait passer comme étant raisonnable et proportionnée au but visé.

27. S'agissant du grief tiré de la violation de l'article 14 de la Convention, le requérant, renvoyant à ses observations développées au regard de l'article 6 § 1, est d'avis que la discrimination opérée entre, d'une part, les citoyens ayant accepté une offre de prêt avant le 31 décembre 1994 et ne pouvant se prévaloir d'une décision de justice passée en force de chose jugée et, d'autre part, ceux ayant accepté une telle offre après cette date, n'apparaît pas proportionnée à l'objectif visé.

B. Appréciation de la Cour

28. La Cour réaffirme que si, en principe, le pouvoir législatif n'est pas empêché de réglementer en matière civile, par de nouvelles dispositions à portée rétroactive, des droits découlant de lois en vigueur, le principe de la prééminence du droit et la notion de procès équitable consacrés par l'article 6 s'opposent, sauf pour d'impérieux motifs d'intérêt général, à l'ingérence du pouvoir législatif dans l'administration de la justice dans le

but d'influer sur le dénouement judiciaire du litige (*Raffineries grecques Stran et Stratis Andreadis* précité ; *Zielinski et Pradal et Gonzalez et autres* précité).

29. En l'espèce, la Cour constate que l'Etat n'était pas partie à la procédure judiciaire lors de l'intervention législative en cause. Cependant, la Cour estime que sa jurisprudence (voir, notamment, les arrêts précités *Raffineries grecques Stran et Stratis Andreadis c. Grèce*; *Papageorgiou c. Grèce* ; *National & Provincial Building Society, Leeds Permanent Building Society et Yorkshire Building Society c. Royaume-Uni* ; *Zielinski et Pradal et Gonzalez et autres c. France* ; voir également *Anagnostopoulos et autres c. Grèce*, n° 39374/98, CEDH 2000-XI et *Crişan c. Roumanie*, n° 42930/98, 27 mai 2003) va au-delà des litiges dans lesquels l'Etat est partie. Ainsi, dans son arrêt *OGIS-Institut Stanislas et autres c. France* (n°s 42219/98 et 54563/00, 27 mai 2004), elle est parvenue à un constat de non-violation de l'article 6 § 1 de la Convention après avoir jugé que « l'intervention du législateur, parfaitement prévisible, répondait à une évidente et impérieuse justification d'intérêt général » (§ 72), et non en raison du fait que l'Etat n'était pas directement partie au litige.

30. Le problème posé en l'espèce relève fondamentalement du procès équitable et, de l'avis de la Cour, la responsabilité de l'Etat est encourue tant en sa qualité de législateur, s'il fausse le procès ou influe sur le dénouement judiciaire du litige, qu'en sa qualité d'autorité judiciaire, du fait des atteintes au procès équitable et ce, y compris dans le cadre des litiges de droit privé entre particuliers.

31. La Cour rappelle d'ailleurs que dans des litiges opposant des intérêts de caractère privé, l'exigence de l'égalité des armes implique l'obligation d'offrir à chaque partie une possibilité raisonnable de présenter sa cause dans des conditions qui ne la placent pas dans une situation de net désavantage par rapport à son adversaire (voir notamment les arrêts *Dombo Beheer B.V. c. Pays-Bas* du 27 octobre 1993, série A n° 274, p. 19, § 33 ; *Raffineries grecques Stran et Stratis Andreadis*, précité, p. 81, § 46 ; *Forrer-Niedenthal*, précité, § 65).

32. Dans les circonstances de l'espèce, si l'article 87 de la loi n° 96-314 du 12 avril 1996 excluait expressément de son champ d'application les décisions de justice passées en force de chose jugée, il fixait définitivement les termes du débat soumis aux juridictions de l'ordre judiciaire et ce, de manière rétroactive, s'agissant d'offres de prêts émises avant le 31 décembre 1994.

33. En conséquence, l'adoption de la loi du 12 avril 1996 réglait en réalité le fond du litige et rendait vaine toute continuation des procédures.

34. Dans ces conditions, la Cour estime que l'on ne saurait parler d'égalité des armes entre les deux parties privées, l'Etat ayant donné raison à l'une d'elles en faisant adopter la loi litigieuse.

35. En tout état de cause, et à titre surabondant, la Cour relève que si l'Etat n'était pas partie au litige *stricto sensu*, force est de constater, avec le requérant, qu'il était partie prenante en qualité d'actionnaire indirect dans l'établissement bancaire auquel était opposé le requérant, ce que démontrent les documents fournis par ce dernier. Par ailleurs, il n'est pas contesté que l'Etat était présent dans le secteur bancaire à l'époque des faits, qu'il s'agisse de banques nationalisées ou de participations, directes ou non, comme en l'espèce, dans le capital d'établissements bancaires. Ainsi, à supposer que l'Etat n'ait pas eu d'intérêt dans la procédure en cours proprement dite, il ne pouvait à tout le moins être qualifié de « neutre » quant à l'issue du litige. Enfin, la Cour rappelle que même si une intervention législative n'a pas comme finalité d'influer sur le dénouement judiciaire du litige, les effets de la nouvelle loi peuvent l'amener à un constat de violation de l'article 6 § 1 (*Crişan*, précité, § 27).

36. Quant à l'« impérieux motif d'intérêt général », évoqué par le Gouvernement et rappelé par le Conseil constitutionnel dans sa décision du 9 avril 1996, il résulterait de la nécessité de sauvegarder l'équilibre financier du système bancaire et de l'activité économique en général. S'agissant de la décision du Conseil constitutionnel, la Cour rappelle qu'elle ne saurait suffire à établir la conformité de l'article 87 de la loi du 12 avril 1996 avec les dispositions de la Convention (*Zielinski et Pradal et Gonzalez et autres,* précité, § 59*)*. Elle note toutefois que le Conseil constitutionnel, s'inspirant de la jurisprudence de la Cour, exige désormais un intérêt général « suffisant » (voir, notamment, sa décision n° 2004-509 DC du 13 janvier 2005).

37. La Cour rappelle également qu'en principe un motif financier ne permet pas à lui seul de justifier une telle intervention législative (voir, notamment, *Zielinski et Pradal et Gonzalez et autres,* précité, même §). En tout état de cause, dans les faits de l'espèce, aucun élément ne vient étayer l'argument selon lequel l'impact aurait été d'une telle importance que l'équilibre du secteur bancaire et l'activité économique en général auraient été mis en péril. Les sénateurs eux-mêmes, semble-t-il, n'ont pas reçu d'informations précises à ce sujet (paragraphe 20 ci-dessus). Outre l'absence d'évaluation crédible du coût virtuel des procédures en cours et futures, lesquelles n'ont pas davantage été recensées, force est de constater que la question ne concernait que certaines banques, à savoir celles qui n'avaient pas respecté l'obligation prévue par l'article L. 312-8 du code de la consommation. Par ailleurs, lesdites banques n'étaient pas directement exposées à un paiement de dommages-intérêts ou de pénalités, mais principalement à un remboursement de sommes préalablement perçues de leurs clients. De fait, si les bénéfices des établissements concernés auraient pu souffrir de l'absence de la loi, il n'est pas établi que leur survie et, *a fortiori*, l'équilibre général de l'économie nationale, auraient été menacés.

38. Compte tenu de ce qui précède, l'intervention législative litigieuse, qui réglait définitivement, de manière rétroactive, le fond du litige opposant des particuliers devant les juridictions internes, n'était pas justifiée par d'impérieux motifs d'intérêt général.

39. Partant, il y a eu violation de l'article 6 § 1 de la Convention.

II. SUR LA VIOLATION ALLÉGUÉE DES ARTICLES 6 § 1 et 14 COMBINES DE LA CONVENTION

40. Le requérant se plaint également de ce que l'article 87-I de la loi du 12 avril 1996 a introduit une inégalité de traitement, au regard des règles du droit à un procès équitable, entre les citoyens ayant accepté une offre de prêt avant et après le 31 décembre 1994. Il explique que cette disposition opérerait une discrimination fondée sur une notion arbitraire du temps, dans la mesure où seuls les justiciables concernés qui peuvent se prévaloir d'une décision de justice passée en force de chose jugée échappent à la validation législative. Il invoque les articles 6 § 1 et 14 combinés de la Convention, dont ce dernier se lit comme suit :

> « La jouissance des droits et libertés reconnus dans la présente Convention doit être assurée, sans distinction aucune, fondée notamment sur le sexe, la race, la couleur, la langue, la religion, les opinions politiques ou toutes autres opinions, l'origine nationale ou sociale, l'appartenance à une minorité nationale, la fortune, la naissance ou toute autre situation »

41. La Cour constate que ce grief se confond largement avec le précédent. Eu égard aux circonstances particulières de la présente affaire, ainsi qu'au raisonnement qui l'a conduite à constater une violation de l'article 6, la Cour n'estime pas nécessaire d'examiner séparément le grief du requérant sous l'angle des articles 6 et 14 combinés de la Convention.

III. SUR L'APPLICATION DE L'ARTICLE 41 DE LA CONVENTION

42. 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. »

A. Dommage

43. Le requérant réclame 60 000 euros (EUR) au titre du préjudice matériel, correspondant au remboursement des intérêts du prêt litigieux. Il demande également 100 000 EUR au titre du préjudice personnel et familial subi pendant plus de dix années, en raison des déménagements successifs

qui lui ont été imposés du fait des poursuites judiciaires diligentées à son encontre et de la détérioration de son état de santé psychique qui en est résulté ; il fournit à cet égard diverses factures d'un montant de 13 502 EUR pour des travaux d'aménagement et de réaménagement qu'il a entrepris, ainsi qu'un certificat médical du 26 juillet 2005 indiquant que les difficultés judiciaires du requérant ont « majoré » l'instabilité de l'humeur dont il souffre depuis 1988. Dans un second jeu d'observations relatives à la demande de satisfaction équitable, parvenu au Greffe de la Cour le 19 octobre 2005, le requérant compléta sa demande initiale en fournissant d'autres éléments de preuves pour justifier le préjudice moral allégué, et sollicita « la fixation d'intérêts moratoires au taux de 10 % l'an en cas de condamnation de l'adversaire, ainsi que la fixation d'une astreinte de 1 000 EUR par mois de retard à compter du prononcé de l'arrêt ».

44. Le Gouvernement soutient que ces prétentions sont excessives et dépourvues de tout lien de causalité avec le grief tiré d'une violation de l'article 6 § 1 de la Convention. Il considère que si la Cour constatait une violation de l'article 6 § 1, le constat de cette violation constituerait une satisfaction équitable pour le requérant.

45. La Cour rappelle d'abord qu'aux termes de l'article 60 § 1 de son règlement, « toute demande de satisfaction équitable au titre de l'article 41 de la Convention doit, sauf instruction contraire du président de la chambre, être exposée par la Partie contractante requérante ou le requérant dans les observations écrites sur le fond ou, à défaut de pareilles observations, dans un document spécial déposé au plus tard deux mois après la décision déclarant la requête recevable » (voir *Katsaros c. Grèce* (satisfaction équitable), n° 51473/99, 13 novembre 2003). En l'espèce, la Cour note que le délai imparti au requérant pour soumettre sa demande de satisfaction équitable était fixé au 5 septembre 2005, et que sa nouvelle demande lui est parvenue le 19 octobre 2005. Aucune demande de prorogation dudit délai n'ayant été formulé, la Cour en déduit que la nouvelle requête présentée au titre de la satisfaction équitable est irrecevable car tardive.

La Cour relève ensuite que la seule base à retenir pour l'octroi d'une satisfaction équitable réside en l'espèce dans le fait que le requérant n'ont pu jouir des garanties de l'article 6 en qui concerne l'équité de la procédure. A cet égard, la Cour ne saurait certes spéculer sur ce qu'eût été l'issue du procès dans le cas contraire, mais n'estime pas déraisonnable de penser que les intéressés ont subi une perte de chances réelles (arrêt *Zielinski et Pradal et Gonzalez et autres* précité, § 79). A cela s'ajoute un préjudice moral auquel le constat de violation figurant dans le présent arrêt ne suffit pas à remédier. Statuant en équité, comme le veut l'article 41, elle alloue 10 000 EUR au requérant, toutes causes de préjudice confondues.

B. Frais et dépens

46. Le requérant réclame 20 000 EUR au titre des frais et dépens engagés depuis l'origine de l'affaire. Il fournit différentes factures : 2 784 EUR pour les frais encourus en première instance, 3 163,22 EUR pour les frais et dépens d'appel et 2 573 EUR au titre de la présente requête devant la Cour.

47. Le Gouvernement, au vu des factures produites, propose d'allouer au requérant la somme de 4 043,90 EUR.

48. Selon la jurisprudence de la Cour, un requérant ne peut obtenir le remboursement de ses frais et dépens que dans la mesure où se trouvent établis leur réalité, leur nécessité et le caractère raisonnable de leur taux. En outre, lorsque la Cour constate une violation de la Convention, elle n'accorde au requérant le paiement des frais et dépens qu'il a exposés devant les juridictions nationales que dans la mesure où ils ont été engagés pour prévenir ou faire corriger par celles-ci ladite violation.

La Cour note que tel a bien été le cas en l'espèce, mais seulement à compter de l'instance d'appel ; il convient donc d'écarter les prétentions du requérant quant au montant des sommes engagées en première instance. Pour ce qui est des frais relatif à la procédure devant la Cour de cassation, le requérant ne fournit aucune note d'honoraire. En conséquence, la Cour alloue au requérant 5 736,22 EUR au titre des frais et dépens encourus tant devant la cour d'appel de Paris que devant elle.

C. Intérêts moratoires

49. 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. *Dit* qu'il y a eu violation de l'article 6 § 1 de la Convention ;

2. *Dit* qu'il n'est pas nécessaire d'examiner aussi l'affaire sous l'angle des articles 6 § 1 et 14 combinés de la Convention ;

3. *Dit*

   a) que l'Etat défendeur doit verser au requérant, dans les trois mois à compter du jour où l'arrêt sera devenu définitif conformément à l'article 44 § 2 de la Convention, 10 000 EUR (dix mille euros) au titre des préjudices matériel et moral, ainsi que 5 736,22 EUR (cinq mille sept cent trente six euros et vingt deux centimes) au titre des frais et dépens, plus tout montant pouvant être dû à titre d'impôt ;

b) qu'à compter de l'expiration dudit délai et jusqu'au versement, ces montants seront à majorer d'un intérêt simple à un taux égal à celui de la facilité de prêt marginal de la Banque centrale européenne applicable pendant cette période, augmenté de trois points de pourcentage ;

4. *Rejette* la demande de satisfaction équitable pour le surplus.

Fait en français, puis communiqué par écrit le 11 avril 2006 en application de l'article 77 §§ 2 et 3 du règlement.

S. DOLLE	A.B. BAKA
Greffière	Président

Sentenza del 18 aprile 2006, sez. II, causa VEZON c. Francia (in particolare, par. 22-38)

En l'affaire Vezon c. France,
La Cour européenne des Droits de l'Homme (deuxième section), siégeant en une chambre composée de :
MM. A.B. BAKA, président, J.-P. COSTA, R. TÜRMEN, K. JUNGWIERT, M. UGREKHELIDZE, Mme D. JOCIENE, MM. D. POPOVIC, juges, et de Mme S. DOLLE, greffière de section,
Après en avoir délibéré en chambre du conseil les 14 juin 2005 et 28 mars 2006,
Rend l'arrêt que voici, adopté à cette dernière date :

PROCÉDURE

1. A l'origine de l'affaire se trouve une requête (no 66018/01) dirigée contre la République française et dont deux ressortissants de cet Etat, M. et Mme Vezon (« les requérants »), ont saisi la Cour le 19 mai 2000 en vertu de l'article 34 de la Convention de sauvegarde des Droits de l'Homme et des Libertés fondamentales (« la Convention »).

2. Les requérants sont représentés par Me Bel, avocat à Lyon. Le gouvernement français (« le Gouvernement ») est représenté par son agent, Mme Edwige Belliard, Directrice des Affaires juridiques au ministère des Affaires étrangères.

3. Les requérants alléguaient en particulier une violation de l'article 6 § 1 de la Convention en raison de l'intervention d'une loi rétroactive en cours de procédure judiciaire.

4. La requête a été attribuée à la deuxième section de la Cour (article 52 § 1 du règlement).

5. Par une décision du 14 juin 2005, la chambre a déclaré la requête recevable.

EN FAIT

I. LES CIRCONSTANCES DE L'ESPÈCE

6. Les requérants sont nés respectivement en 1948 et 1950 et résident à Caluire.

7. Afin d'acquérir une parcelle de terrain pour construire une maison d'habitation, les requérants acceptèrent le 21 février 1986 du Crédit Agricole (CA) une offre de prêt de 185 000 francs français (FRF) par application des dispositions de la loi no 79-596 du 13 juillet 1979, dispositions ultérieurement intégrées dans le code de la consommation sous les articles L. 312-1 et suivants.

8. Par acte notarié du 25 mars 1986, le prêt immobilier, remboursable au taux effectif global de 14,8895 % en 240 échéances mensuelles progressives de 1492,59FRF à 2904,28 FRF, fut contracté.

9. Le 25 mars 1986, la banque envoya aux requérant les décomptes et modalités de réalisation du prêt ainsi qu'un tableau d'amortissement précisant les conditions de remboursement, la décomposition de l'échéance, et le montant total qui sera prélevé par le débit de leur compte à la date indiquée.

10. Confrontés à des difficultés financières, les requérant ne purent régler en totalité les échéances du prêt. Le 23 janvier 1992, l'établissement financier fit délivrer un commandement de saisie immobilière auquel les requérant firent opposition en saisissant le tribunal de grande instance de Saint-Etienne.

11. Par un jugement du 31 octobre 1995, le tribunal déclara irrecevable l'opposition à commandement et condamna les requérants à verser au CA la somme de 214 030,66 FRF après

avoir rejeté leurs conclusions tendant à l'irrégularité de l'offre de prêt pour non-respect de l'article 5 de la loi du 13 juillet 1979 :

« (...) L'argument tiré de l'irrégularité de l'offre de prêt soulevé par les requérants près de deux ans après le début de la procédure ne saurait prospérer.

En effet, l'article 5 de la loi du 13 juillet 1979 énumère les éléments devant figurer sur ce document à savoir outre l'identité des parties, la nature de l'objet et les modalités du prêt, le montant du crédit, son coût total, son taux, enfin les stipulations, assurances et sûretés exigés qui conditionnent la conclusion du prêt – en donnant une évaluation de leur coût.

Or, en l'espèce, l'offre de prêt reproduite dans l'acte notarié communiqué par la banque (...) porte en sa page 3 le montant du prêt, sa durée, le taux d'intérêt annuel, le taux effectif global, le coût total du crédit, et précise en sa page 4 relative aux échéances mensuelles que le montant de la période d'amortissement est établi à partir d'une progressivité de l'annuité de 6 % pendant les cinq premières années, de 4 %

pendant les 5 années suivantes et de 2 % pour les années restant à courir, ce paragraphe étant suivi du détail des échéances mensuelles année par année.

Ainsi donc, l'offre de prêt faite au requérants répond aux exigences de l'article précité (...) ».

12. Les requérants firent appel du jugement en demandant à la cour de condamner le CA à leur rembourser la somme de 89 735,17 FRF correspondant aux intérêts indûment perçus car l'offre de prêt n'étant pas régulière, la banque devait être déchue du droit aux intérêts. Les requérants prétendirent que le CA leur avait soumis un barème de remboursement différent de celui agréé par l'organisme de tutelle puisqu'il ne comportait pas pour chaque mensualité le capital amorti et les intérêts acquittés et ne répondait pas ainsi aux exigences d'information prévues par l'article 5 de la loi du 13 juillet 1979. Ils réclamèrent l'application des sanctions de l'article 31 de cette même loi, à savoir la déchéance du droit aux intérêts du prêt de l'établissement financier.

13. Le 12 avril 1996, le Parlement vota une loi no 96-314 « portant diverses dispositions d'ordre économique et financier » dont l'article 87-1 modifia des dispositions du code de la consommation relatives aux offres de prêt et ce, avec effet rétroactif, sous réserves des décisions de justice passées en force de chose jugée.

14. Par un arrêt du 6 novembre 1997, la cour d'appel de Lyon confirma le jugement en toutes ses dispositions. Sur la question de la validité de l'offre de prêt, elle s'exprima comme suit :

« Attendu que l'article 5 de la loi du 13 juillet 1979 dispose que l'offre écrite de prêt doit préciser la nature, l'objet, les modalités du prêt notamment celles qui sont relatives aux dates et conditions de mise à disposition des fonds ainsi qu'à l'échéancier des amortissements et doit énoncer en donnant une évaluation de leur coût, les stipulations qui conditionnent la conclusion du prêt ;

Attendu qu'en l'espèce le tableau d'amortissement remis aux emprunteurs comporte le montant de chaque échéance de remboursement, la périodicité, le montant des intérêts, l'amortissement, le capital restant dû et le coût de l'assurance ;

Que cette offre est ainsi régulière au regard des dispositions relatives à l'échéancier des amortissements ; (...)

Attendu que l'offre précise en page 4 que le montant de la période d'amortissement du prêt est établi à partir d'une progressivité d'annuité à 6 % pendant les cinq premières années, de 4 % pendant les cinq années suivantes et de 2 % pour les années restant à courir ;

Que les conditions de remboursement anticipé du prêt et de versement de l'indemnité de deux mois d'intérêts calculés au taux moyen du prêt sur le capital remboursé par anticipation sont aussi énoncées ;

Qu'enfin, il est noté qu'en cas de prêt à mensualités progressives il sera perçu par le prêteur une indemnité : celle-ci représente un complément d'intérêts destiné à rendre égal le taux de rendement du prêt tel que prévu initialement dans le présent contrat ;

Que les emprunteurs avaient donc une complète information lors de la remise préalable de l'offre pour évaluer le coût entraîné par un remboursement anticipé du prêt ;

Attendu que l'offre répondant aux exigences de l'article 5 de la loi du 13 juillet 1979 et du décret du 28 juin 1980 applicables à cette date, il n'y a pas lieu de prononcer la sanction de déchéance des intérêts prévue à l'article 31 de cette même loi ;

Que la demande de remboursement de la somme de 89 735,17 francs formée par les requérants n'est en conséquence pas fondée (...) ».

15. Les requérants formèrent un pourvoi en cassation fondé sur la violation de l'article 5 de la loi du 31 juillet 1979 et firent valoir que l'irrégularité d'une offre de prêt s'apprécie à la date à laquelle elle est faite et que précisément, le 21 février 1986, l'offre ne comportait pas les mentions requises par cette disposition.

16. Par un arrêt du 7 décembre 1999, la Cour de cassation rejeta le pourvoi :

« Attendu, d'abord, que, statuant par motifs propres et adoptés, la cour d'appel, a constaté que l'offre de prêt remise en 1986 aux emprunteurs comportait les mentions exigées par l'article L 312-8 du code de la consommation ; que l'absence d'indication pour chaque échéance de la répartition du remboursement entre le capital et les intérêts n'est pas de nature à affecter la validité de l'offre eu égard aux dispositions de l'article 87-1 de la loi no 96-314 du 12 avril 1996 ; (...) »

II. LE DROIT ET LA PRATIQUE INTERNES PERTINENTS

A. Code de la consommation

17. Les dispositions pertinentes du code de la consommation, section 3 intitulée « le contrat de crédit », se lisaient comme suit dans leur rédaction applicable avant la loi no 96-314 du 12 avril 1996 :

Article L. 312-7

« Pour les prêts mentionnés à l'article L. 312-2, le prêteur est tenu de formuler par écrit une offre adressée gratuitement par voie postale à l'emprunteur éventuel ainsi qu'aux cautions déclarées par l'emprunteur lorsqu'il s'agit de personnes physiques. »

Article L. 312-8

« L'offre définie à l'article précédent :

1º Mentionne l'identité des parties, et éventuellement des cautions déclarées ;

2º Précise la nature, l'objet, les modalités du prêt, notamment celles qui sont relatives aux dates et conditions de mise à disposition des fonds ainsi qu'à l'échéancier des amortissements ;

3º Indique, outre le montant du crédit susceptible d'être consenti, et, le cas échéant, celui de ses fractions périodiquement disponibles, son coût total, son taux défini conformément à l'article L. 313-1 ainsi que, s'il y a lieu, les modalités de l'indexation ;

4º Enonce, en donnant une évaluation de leur coût, les stipulations, les assurances et les sûretés réelles ou personnelles exigées, qui conditionnent la conclusion du prêt ;

5º Fait état des conditions requises pour un transfert éventuel du prêt à une tierce personne ;

6º Rappelle les dispositions de l'article L. 312-10.

Toute modification des conditions d'obtention du prêt, notamment le montant ou le taux du crédit, donne lieu à la remise à l'emprunteur d'une nouvelle offre préalable.

Toutefois, cette obligation n'est pas applicable aux prêts dont le taux d'intérêt est variable, dès lors qu'a été remise à l'emprunteur avec l'offre préalable une notice présentant les conditions et modalités de variation du taux. »

B. Jurisprudence de la Cour de cassation

18. Par deux arrêts des 16 mars et 20 juillet 1994, la première chambre civile de la Cour de cassation a jugé que l'échéancier des amortissements, joint à l'offre préalable, devait préciser, pour chaque échéance, la part de l'amortissement du capital par rapport à celle couvrant les intérêts et que le non-respect de ces dispositions d'ordre public était sanctionné non seulement par la déchéance du droit aux intérêts pour le prêteur, mais encore pour la nullité du contrat de prêt (Bull. civ. I, respectivement nos 100 et 262 ; dans le même sens, Civ. 1ère, arrêt du 18 mars 1997, Bull. civ. I, no 97).

19. Après l'adoption de la loi du 12 avril 1996, des juges du fond avaient considéré que l'article 87-I de la loi était contraire à l'article 6 § 1 de la Convention, en ce que son application aux instances en cours portait atteinte au principe d'égalité des droits et à l'exigence du procès équitable puisqu'elle modifiait une donnée fondamentale du litige au détriment de l'une des parties : la Cour de cassation a censuré cette position en cassant les arrêts concernés les 29 avril et 9 juillet 2003 (Civ. 1ère, pourvois nos 00-20062, 99-12031 et 99-15369).

C. Loi no 96-314 du 12 avril 1996

20. L'article 87 de la loi no 96-314 du 12 avril 1996 portant diverses dispositions d'ordre économique et financier prévoyait ce qui suit :

Article 87

« I. – Sous réserve des décisions de justice passées en force de chose jugée, les offres de prêts mentionnées à l'article L. 312-7 du code de la consommation et émises avant le 31 décembre 1994 sont réputées régulières au regard des dispositions relatives à l'échéancier des amortissements prévues par le 2o de l'article L. 312-8 du même code, dès lors qu'elles ont indiqué le montant des échéances de remboursement du prêt, leur périodicité, leur nombre ou la durée du prêt, ainsi que, le cas échéant, les modalités de leurs variations.

II. – L'article L. 312-8 du code de la consommation est ainsi modifié :

a) Dans le troisième alinéa (2o) les mots : « ainsi qu'à l'échéancier des amortissements » sont supprimés ;

b) Il est inséré, après le troisième alinéa, un 2o bis ainsi rédigé :

2o bis Comprend un échéancier des amortissements détaillant pour chaque échéance la répartition du remboursement entre le capital et les intérêts. Toutefois, cette disposition ne concerne pas les offres de prêts à taux variable. »

D. Travaux parlementaires – extraits

21. Extraits des débats tenus au Sénat lors de l'examen de la loi litigieuse :

- « Force est d'abord de constater que le premier arrêt de la Cour de cassation posant problème date du 16 mars 1994. Or, nous sommes le 21 mars 1996. Personne ici, parmi ceux qui s'intéressent au sujet, n'a reçu la moindre information, le moindre état de situation de la part des organismes concernés, pour nous indiquer qu'il y avait un risque et pour nous permettre d'en évaluer l'importance (...).

Dans les contacts qu'il m'a été possible d'avoir avec eux tout récemment, ils n'invoquent encore que des données très vagues, M. le Rapporteur s'en est d'ailleurs très franchement fait l'écho. Mais nous ne disposons, aujourd'hui, d'aucune donnée permettant de vérifier le caractère crédible du risque financier invoqué. J'observe que lors de ces derniers contacts, aujourd'hui même, les représentants officiels de cette profession ont omis de nous rappeler les limites procédurales qui, de

toute façon, empêchent un grand nombre d'emprunteurs de faire jouer leurs droits » (intervention de M. le sénateur Alain Richard, J.O. Débats Sénat, 21 mars 1996, p. 1683)

- « Contrairement à ce que laissent supposer certains professionnels du crédit, sont concernées, non pas toutes les banques mais une infime minorité d'entre elles : celles qui n'ont pas respecté la loi » (intervention de Mme le sénateur Marie-Claude Beaudeau, J.O. Débats Sénat, 21 mars 1996, p. 1684).

EN DROIT

I. SUR LA VIOLATION ALLÉGUÉE DE L'ARTICLE 6 § 1 DE LA CONVENTION

22. Les requérants se plaignent de l'application rétroactive de la loi du 12 avril 1996 et dénoncent une violation de leur droit à un procès équitable au sens de l'article 6 § 1 de la Convention qui dispose :

« Toute personne a droit à ce que sa cause soit entendue équitablement (...) par un tribunal (...), qui décidera (...) des contestations sur ses droits et obligations de caractère civil (...) »

A. Thèse des parties

1. Les requérants

23. Les requérants considèrent que dans le cas où l'Etat ne serait pas concerné par ce litige entre particuliers, il serait encore plus choquant qu'une des parties puisse obtenir du législateur le vote d'un texte qui d'une part la favoriserait par rapport à l'autre, et d'autre part le ferait rétroactivement. La situation serait alors encore plus choquante compte tenu du fait que la loi du 13 juillet 1979 sur les prêts vise à la protection des emprunteurs. Or cette protection a été retirée à leurs bénéficiaires par la loi du 12 avril 1996.

24. Si le litige implique l'Etat français, ils soutiennent qu'aucun motif impérieux d'intérêt général ne justifiait l'ingérence du législateur en l'espèce. Les requérants font valoir qu'ils ont recherché, pour apprécier le risque judiciaire allégué, quel était le nombre de recours intentés avant le vote de la loi du 12 avril 1996 par des emprunteurs qui auraient contesté la régularité de leur emprunt immobilier, recours qui ont été rejetés par les juridictions sur la base de cette loi rétroactive. Sauf erreur et omission, les arrêts rendus par la Cour de cassation pour valider les offres irrégulières sur la base de la loi précitée sont au nombre de dix sept sur les années 1999 à 2003. Sur ces affaires, six concernaient le Crédit agricole. Or, les résultats du Crédit agricole font apparaître 124,2 milliards de francs de fonds propres en 1995 (Article du journal Le Monde du 27 avril 1996), comparés aux six réclamations présentées contre cette banque devant la haute juridiction, ramènent à de plus justes proportions les motifs avancés pour tenter de justifier le vote de la loi du 12 avril 1996.

2. Le Gouvernement

25. Le Gouvernement considère qu'il existe une différence majeure entre les précédentes affaires jugées par la Cour en matière de validations législatives et la présente espèce : l'Etat n'est pas partie au litige et ne défend en aucune manière ses intérêts propres. Les pouvoirs publics sont restés étrangers aux procédures et neutres à l'égard des parties. Le nouveau régime juridique issu de la loi du 12 avril 1996 s'applique aux relations entre emprunteurs et établissements bancaires, donc à des rapports de droit privé. Par ailleurs, cette loi n'est pas « une loi de circonstance » destinée à s'immiscer dans des relations contractuelles préexistantes ou dans la bonne administration de la justice, puisqu'elle ne visait qu'à limiter, de façon générale, la portée de l'interprétation jurisprudentielle de la notion « d'échéancier des amortissements », intervention purement normative qui relève de la compétence naturelle du législateur.

26. En l'absence d'implication de l'Etat dans le litige, des motifs d'intérêt général peuvent rendre légitime l'intervention du pouvoir législatif dans le déroulement d'une instance judiciaire en cours. Or, en l'espèce, un tel motif d'intérêt général, très clairement rappelé par le Conseil constitutionnel dans sa décision du 9 avril 1996, existait bien. La nouvelle loi avait pour objectif de sauvegarder

l'équilibre financier du système bancaire, afin de ne pas mettre en péril l'activité économique en général, ce que jugea également la Cour de cassation dans son arrêt du 29 avril 2003.

27. La loi du 12 avril 1996 poursuivait donc un but légitime et sa disposition litigieuse n'emportait en outre aucune conséquence excessive puisque, d'une part, elle ne remettait pas en cause les décisions passées en force de chose jugée et que, d'autre part, elle ne réputait régulières que certaines offres de prêts émises préalablement (c'est-à-dire celles qui, au regard du contenu de l'échéancier des amortissements, n'étaient pas totalement conformes à l'interprétation que la jurisprudence avait donnée de cette notion avant la loi nouvelle). Le législateur est donc intervenu de façon raisonnable et proportionnée.

B. Appréciation de la Cour

28. La Cour réaffirme que si, en principe, le pouvoir législatif n'est pas empêché de réglementer en matière civile, par de nouvelles dispositions à portée rétroactive, des droits découlant de lois en vigueur, le principe de la prééminence du droit et la notion de procès équitable consacrés par l'article 6 s'opposent, sauf pour d'impérieux motifs d'intérêt général, à l'ingérence du pouvoir législatif dans l'administration de la justice dans le but d'influer sur le dénouement judiciaire du litige (Raffineries grecques Stran et Stratis Andreadis c. Grèce, arrêt du 9 décembre 1994, série A no 301-B, p. 82, § 49 ; Zielinski et Pradal et Gonzalez et autres c. France [GC], nos 24846/94 et 34165/96 à 34173/96,CEDH 1999-VII, § 57).

29. En l'espèce, la Cour constate que l'Etat n'était pas partie à la procédure judiciaire lors de l'intervention législative litigieuse. Cependant, la Cour estime que sa jurisprudence (voir, notamment, les arrêts Raffineries grecques Stran et Stratis Andreadis, précité ; Papageorgiou c. Grèce du 22 octobre 1997, Recueil des arrêts et décisions 1997-VI ; National & Provincial Building Society, Leeds Permanent Building Society et Yorkshire Building Society c. Royaume-Uni du 23 octobre 1997, Recueil 1997-VII ; Zielinski et Pradal et Gonzalez et autres, précité ; Anagnostopoulos et autres c. Grèce, no 39374/98, CEDH 2000-XI ; Crişan c. Roumanie, no 42930/98, 27 mai 2003) va au-delà des litiges dans lesquels l'Etat est partie. Ainsi, dans son arrêt OGIS-Institut Stanislas et autres c. France (nos 42219/98 et 54563/00, 27 mai 2004), elle est parvenue à un constat de non-violation de l'article 6 § 1 de la Convention après avoir jugé que « l'intervention du législateur, parfaitement prévisible, répondait à une évidente et impérieuse jusitification d'intérêt général » (§ 72), et non en raison du fait que l'Etat n'était pas directement partie au litige.

30. Le problème posé en l'espèce relève fondamentalement du procès équitable et, de l'avis de la Cour, la responsabilité de l'Etat est encourue tant en sa qualité de législateur, s'il fausse le procès ou influe sur le dénouement judiciaire du litige, qu'en sa qualité d'autorité judiciaire, du fait des atteintes au procès équitable et ce, y compris dans le cadre des litiges de droit privé entre particuliers.

31. La Cour rappelle d'ailleurs que dans des litiges opposant des intérêts de caractère privé, l'exigence de l'égalité des armes implique l'obligation d'offrir à chaque partie une possibilité raisonnable de présenter sa cause dans des conditions qui ne la placent pas dans une situation de net désavantage par rapport à son adversaire (voir notamment les arrêts Dombo Beheer B.V. c. Pays-Bas du 27 octobre 1993, série A no 274, p. 19, § 33 ; Raffineries grecques Stran et Stratis Andreadis, précité, p. 81, § 46 ; Forrer-Niedenthal c. Allemagne, no 47316/99, 20 février 2003, § 65).

32. Dans les circonstances de l'espèce, si l'article 87 de la loi no 96-314 du 12 avril 1996 excluait expressément de son champ d'application les décisions de justice passées en force de chose jugée, il fixait définitivement les termes du débat soumis aux juridictions de l'ordre judiciaire et ce, de manière rétroactive s'agissant d'offres de prêts émises avant le 31 décembre 1994.

33. En conséquence, l'adoption de la loi du 12 avril 1996 réglait en réalité le fond du litige et rendait vaine toute continuation des procédures.

34. Dans ces conditions, la Cour estime que l'on ne saurait parler d'égalité des armes entre les deux parties privées, l'Etat ayant donné raison à l'une d'elles en faisant adopter la loi litigieuse.

35. Quant à l'« impérieux motif d'intérêt général », évoqué par le Gouvernement et rappelé par le Conseil constitutionnel dans sa décision du 9 avril 1996, il résulterait de la nécessité de sauvegarder l'équilibre financier du système bancaire et de l'activité économique en général.

S'agissant de la décision du Conseil constitutionnel, la Cour rappelle qu'elle ne saurait suffire à établir la conformité de l'article 87 de la loi du Comment [A1]:

12 avril 1996 avec les dispositions de la Convention (Zielinski et Pradal et Gonzalez et autres, précité, § 59). Elle note toutefois que le Conseil constitutionnel, s'inspirant de la jurisprudence de la Cour, exige désormais un intérêt général « suffisant » (cf. notamment sa décision no 2004-509 DC du 13 janvier 2005).

36. La Cour rappelle également qu'en principe un motif financier ne permet pas à lui seul de justifier une telle intervention législative (voir, notamment, Zielinski et Pradal et Gonzalez et autres, précité, § 59). En tout état de cause, dans les faits de l'espèce, aucun élément ne vient étayer l'argument selon lequel l'impact aurait été d'une telle importance que l'équilibre du secteur bancaire et l'activité économique en général auraient été mis en péril. Les sénateurs eux-mêmes, semble-t-il, n'ont pas reçu d'informations précises à ce sujet (paragraphe 21 ci-dessus). Outre l'absence d'évaluation crédible du coût virtuel des procédures en cours et futures, lesquelles n'ont pas davantage été recensées, force est de constater que la question ne concernait que certaines banques, à savoir celles qui n'avaient pas respecté l'obligation prévue par l'article L. 312-8 du code de la consommation. Par ailleurs, lesdites banques n'étaient pas directement exposées à un paiement de dommages-intérêts ou de pénalités, mais principalement à un remboursement de sommes préalablement perçues de leurs clients. De fait, si les bénéfices des établissements concernés auraient pu souffrir de l'absence de la loi, il n'est pas établi que leur survie et, a fortiori, l'équilibre général de l'économie nationale, auraient été menacés.

37. Compte tenu de ce qui précède, l'intervention législative litigieuse, qui réglait définitivement, de manière rétroactive, le fond du litige opposant des particuliers devant les juridictions internes, n'était pas justifiée par d'impérieux motifs d'intérêt général.

38. Partant, il y a eu violation de l'article 6 § 1 de la Convention.

II. SUR L'APPLICATION DE L'ARTICLE 41 DE LA CONVENTION

39. 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. »

A. Dommage

40. Au titre du préjudice matériel, les requérants réclament 106 617,47 euros (EUR) à titre principal correspondant à la déchéance totale des intérêts du prêt. Si la Cour estimait que malgré les irrégularités commises le prêt irrégulier ne devait pas être déchu de la totalité de ses intérêts, comme l'avait ordonné l'arrêt Kalbacher du 20 juillet 1994, les requérants proposent que le taux légal soit affecté au remplacement du taux contractuel pratiqué et demandent 28 233,51 euros à titre subsidiaire (correspondant à la déchéance partielle de ces intérêts). Ils demandent également 5 000 EUR au titre du préjudice moral.

41. Le Gouvernement considère que les prétentions sont excessives et dépourvues de tout lien de causalité avec le grief tiré d'une violation alléguée de l'article 6 § 1 de la Convention. Elles sont relatives au litige qui opposait les requérants au Crédit agricole en droit interne, par lequel ils cherchaient à faire reconnaître leurs intérêts particuliers. Les sommes et dommages exposés sont sans lien avec la violation alléguée. Si la Cour constatait une violation de l'article 6 § 1, le constat de cette violation constituerait une satisfaction équitable pour les requérants.

42. La Cour relève que la seule base à retenir pour l'octroi d'une satisfaction équitable réside en l'espèce dans le fait que les requérants n'ont pu jouir des garanties de l'article 6 en qui concerne

l'équité de la procédure. A cet égard, la Cour ne saurait certes spéculer sur ce qu'eût été l'issue du procès dans le cas contraire, mais n'estime pas déraisonnable de penser que les intéressés ont subi une perte de chances réelles (arrêt Zielinski et Pradal et Gonzalez et autres précité, § 79). A quoi s'ajoute un préjudice moral auquel le constat de violation figurant dans le présent arrêt ne suffit pas à remédier. Statuant en équité, comme le veut l'article 41, elle alloue 8 000 EUR aux requérants toutes causes de préjudice confondues.

B. Frais et dépens

43. Les requérants réclament la somme de 18 500 euros dont 4000 euros au titre des frais de défense devant la Cour.

44. Le Gouvernement rappelle que seuls les frais engagés pour prévenir ou faire corriger la violation alléguée de la Convention peuvent donner lieu à indemnisation. Or les factures produites ne permettent pas de connaître précisément le montant des frais engagés devant la Cour. Le Gouvernement propose d'allouer 3 000 EUR.

45. Selon la jurisprudence de la Cour, un requérant ne peut obtenir le remboursement de ses frais et dépens que dans la mesure où se trouvent établis leur réalité, leur nécessité et le caractère raisonnable de leur taux. En outre, lorsque la Cour constate une violation de la Convention, elle n'accorde au requérant le paiement des frais et dépens qu'il a exposés devant les juridictions nationales que dans la mesure où ils ont été engagés pour prévenir ou faire corriger par celles-ci ladite violation. Tel n'a pas été le cas en l'espèce. La Cour rappelle que dans sa décision sur la recevabilité du 14 juin 2005, elle a jugé que les requérants ont été victimes de la loi du 12 avril 1996 du fait de son application au litige par la Cour de cassation et uniquement à ce stade. En conséquence, elle décide de ne rien allouer aux requérants à ce titre.

Par ailleurs, en ce qui concerne le montant des frais et honoraires relatifs à la procédure devant elle, la Cour l'estime raisonnable et l'accorde en entier. En conséquence, elle décide d'allouer 4 000 EUR aux requérants à ce titre.

C. Intérêts moratoires

46. 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. Dit, qu'il y a eu violation de l'article 6 § 1 de la Convention ;

2. Dit,

a) que l'Etat défendeur doit verser aux requérants, dans les trois mois à compter du jour où l'arrêt sera devenu définitif conformément à l'article 44 § 2 de la Convention, 8 000 EUR (huit mille euros) au titre des préjudices matériel et moral et 4 000 EUR (quatre mille euros) pour frais et dépens, plus tout montant pouvant être dû à titre d'impôt ;

b) qu'à compter de l'expiration dudit délai et jusqu'au versement, ces montants seront à majorer d'un intérêt simple à un taux égal à celui de la facilité de prêt marginal de la Banque centrale européenne applicable pendant cette période, augmenté de trois points de pourcentage ;

3. Rejette, la demande de satisfaction équitable pour le surplus.

Fait en français, puis communiqué par écrit le 18 avril 2006 en application de l'article 77 §§ 2 et 3 du règlement.

S. DOLLE	A.B. BAKA
Greffière	Président

Sentenza del 12 giugno 2007, sez. II, causa DUCRET c. Francia (in particolare, par. 27-42)

En l'affaire Ducret c. France,

La Cour européenne des Droits de l'Homme (deuxième section), siégeant en une chambre composée de :

Mme F. TULKENS, présidente, MM. J.-P. COSTA, I. CABRAL BARRETO, R. TÜRMEN, M. UGREKHELIDZE, V. ZAGREBELSKY, Mme A.MULARONI, juges, et de Mme S. DOLLE, greffière de section,

Après en avoir délibéré en chambre du conseil les 29 août 2006 et 22 mai 2007,

Rend l'arrêt que voici, adopté à cette dernière date :

PROCÉDURE

1. A l'origine de l'affaire se trouve une requête (no 40191/02) dirigée contre la République française et dont un ressortissant de cet Etat, M. Patrick Ducret (« le requérant »), a saisi la Cour le 2 novembre 2002 en vertu de l'article 34 de la Convention de sauvegarde des Droits de l'Homme et des Libertés fondamentales (« la Convention »).

2. Le gouvernement français (« le Gouvernement ») est représenté par son agent, Mme E. Belliard, directrice des Affaires juridiques au ministère des Affaires étrangères.

3. Le requérant alléguait en particulier la violation de l'article 6 § 1 de la Convention.

4. Par une décision du 29 août 2006, la chambre a déclaré la requête partiellement recevable.

EN FAIT

I. LES CIRCONSTANCES DE L'ESPÈCE

5. Le requérant est né en 1961 et réside à Rozay-en-Brie.

6. En février 1984, le requérant, artisan, se rapprocha de la société C., en vue de l'obtention d'un prêt immobilier pour l'acquisition d'un pavillon destiné à constituer son habitation principale.

7. Le 16 mars 1984, cet établissement financier lui adressa une offre préalable de prêt, par application des dispositions de la loi no 79-596 du

13 juillet 1979 (relative aux contrats de prêt consentis pour financer un bien immobilier à usage d'habitation), dispositions ultérieurement intégrées dans le code de la consommation sous les articles L. 312-1 et suivants.

8. Le requérant accepta l'offre de prêt et, par un acte notarié du 28 avril 1984, le prêt immobilier, d'un montant de 230 000 francs français (FRF), soit 35 063 euros (EUR), remboursable en cent quatre-vingts mensualités, fut contracté.

9. Le requérant connut des difficultés pour faire face aux remboursements et, en septembre 1991, la société C. engagea à son encontre une procédure de saisie immobilière. Le requérant versa 50 000 FRF (soit 7 622 EUR) à la société C., qui abandonna la procédure et, en janvier 1992, proposa une renégociation du prêt. Ce réaménagement, aux termes duquel le requérant accepta de rembourser la somme de 306 160,83 FRF (soit 46 673,92 EUR) en quatre-vingt-six mensualités et au taux d'intérêt de 12,50 %, entra en vigueur en janvier 1993.

10. Le 30 juillet 1993, le requérant assigna la société C. à comparaître devant le tribunal de grande instance de Paris. Se fondant sur l'article 5 de la loi du 13 juillet 1979, il fit valoir que la société C. n'avait pas joint de tableau d'amortissement à l'offre préalable de prêt du 16 mars 1984 et demanda en conséquence que l'établissement financier soit déchu, en application de l'article 33 de la même loi, de ses droits à intérêts du prêt et, partant, condamné à rembourser les montants indûment versés, soit 380 999,93 FRF (58 083 EUR) en principal.

11. Par un jugement du 18 février 1994, le tribunal de grande instance débouta le requérant de ses demandes, considérant que l'offre de prêt du 16 mars 1984, qui mentionnait « le montant du prêt, les conditions de mise à disposition, l'échéancier d'amortissement, le coût total du prêt de 447 684,88 francs au titre des intérêts et 1 650 francs au titre des frais d'ouverture de crédit et le taux effectif global de 17,50 % », était conforme aux exigences de l'article 5 de la loi du 13 juillet 1979, et que le requérant, qui avait accepté la première offre de prêt, signé l'acte notarié du 28 mai 1984, et consenti au réaménagement du prêt, ne pouvait valablement soutenir qu'il n'était pas informé des conditions de ce prêt.

12. Le requérant interjeta appel de ce jugement.

13. Par un arrêt rendu le 19 décembre 1995, la cour d'appel de Paris confirma le jugement déféré, aux motifs suivants :

« Considérant que le 16 mars 1994, le C. a fait à Monsieur DUCRET une offre de prêt, soumis à la loi du 13 juillet 1979 et d'un montant de 230 000 frs remboursable en 15 ans ; que l'offre précisait que les 24 premiers mois, seule une partie serait remboursable à raison de 3 124,21 frs par mois et que sur les 156 mois restant, les remboursements comprendraient le capital et les intérêts et s'élèveraient à 3 353,63 frs durant 12 mois, 3 554,65 durant 12 mois, 3 732,44 frs durant 12 mois et 3 881,71 frs durant les 132 mois restant ; qu'elle précisait encore que le montant total des intérêts était évalué à 447 684,88 frs et que le taux du prêt était de 17,50 %, le taux effectif global étant de 18,75 % ; qu'il n'est pas contesté qu'aucun tableau d'amortissement précisant pour chaque échéance le montant affecté au paiement des intérêts n'a été annexé à l'offre ni au contrat de vente qui a suivi et a reproduit les termes de l'offre, sauf en ce qui concerne les douze premières échéances affectées au seul régime des intérêts ;

Mais considérant qu'en annonçant à son client le montant total des intérêts à verser, la durée du prêt, son taux et le montant global des échéances, la société C. a répondu suffisamment aux exigences de l'article L. 312-8 du code de la consommation qui impose seulement la mise à disposition de l'emprunteur d'un échéancier des remboursements, non obligatoirement présenté sous la forme d'un tableau d'amortissements ; que les indications, qui ont été portées à la connaissance de Monsieur DUCRET, lui permettaient d'apprécier immédiatement l'exacte réalité des modalités et du coût du prêt consenti ; que la société C. n'encourt pas la déchéance du droit aux intérêts ; (...) »

14. La cour d'appel condamna le requérant au paiement des dépens et de 4 000 FRF (soit 609,80 EUR) à la société C. au titre des frais irrépétibles.

15. Le requérant se pourvut en cassation, se fondant sur la violation de l'article L. 312-8 du code de la consommation, qui avait repris l'article 5 de la loi du 13 juillet 1979.

16. Alors que l'affaire était pendante devant la Cour de cassation, le Parlement adopta une loi no 96-314 « portant diverses dispositions d'ordre économique et financier » qui fut promulguée le 12 avril 1996 et dont l'article 87-I modifia des dispositions du code de la consommation relatives aux offres de prêt et ce, avec effet rétroactif, sous réserve des décisions de justice passées en force de chose jugée.

17. Le pourvoi du requérant fut retiré du rôle de la Cour de cassation à la demande de la société C., devenue « E. », le requérant n'ayant pas exécuté l'arrêt frappé de pourvoi. Par des versements effectués de mai 1997 à juin 1999, le requérant régla les sommes mises à sa charge en appel, soit au

total 17 913,80 FRF (2 730,94 EUR), et l'affaire fut réinscrite au rôle de la Cour de cassation par une ordonnance du 6 août 1999.

18. Le requérant déposa des observations complémentaires et invoqua l'article 6 de la Convention et l'article du 1 Protocole no 1 pour contester le moyen de l'établissement financier tiré de la rétroactivité de la loi du 12 avril 1996.

19. Par un arrêt rendu le 7 mai 2002, la Cour de cassation rejeta le pourvoi formé par le requérant aux motifs que, selon les constatations de l'arrêt attaqué, « l'offre litigieuse indiquait le montant variable des échéances de remboursement, leur périodicité, leur nombre et la durée du prêt » et que, dès lors, « cette offre, émise avant le 31 décembre 1994, était réputée régulière au regard des dispositions relatives à l'échéancier des amortissements par application de l'article 87-I de la loi du 12 avril 1996 ».

20. Parallèlement, une seconde procédure de saisie immobilière fut diligentée par la société E., au terme de laquelle, suivant jugement d'adjudication du 6 juillet 1998, le pavillon acquis par le requérant en 1984 fut vendu pour le prix principal de 230 000 FRF (soit 35 063 EUR).

21. Enfin, le 10 juin 2003, l'établissement financier assigna le requérant devant le tribunal de grande instance de Meaux aux fins d'obtenir le paiement du solde de sa créance, soit 363 000 FRF (55 339 EUR), demandant que soient ordonnées les opérations de compte, liquidation et partage de l'indivision existant entre le requérant et son épouse. Par un jugement rendu le 29 juin 2004, le tribunal fit droit à cette demande et ordonna préalablement la vente aux enchères du logement des époux. Le 25 novembre 2004, la société E. accepta la proposition du requérant de régler 20 000 EUR pour solde de tout compte, à condition que cette somme soit versée avant le 30 décembre suivant, faute de quoi la procédure se poursuivrait. Par une lettre datée du 17 décembre 2004, le requérant a informé la Cour qu'il avait exécuté cet accord.

II. LE DROIT ET LA PRATIQUE INTERNES PERTINENTS

A. Code de la consommation

22. Les dispositions pertinentes du code de la consommation, section 3 intitulée « le contrat de crédit », se lisaient comme suit dans leur rédaction applicable avant la loi no 96-314 du 12 avril 1996 :

Article L. 312-7

« Pour les prêts mentionnés à l'article L. 312-2, le prêteur est tenu de formuler par écrit une offre adressée gratuitement par voie postale à l'emprunteur éventuel ainsi qu'aux cautions déclarées par l'emprunteur lorsqu'il s'agit de personnes physiques. »

Article L. 312-8

« L'offre définie à l'article précédent :

1º Mentionne l'identité des parties, et éventuellement des cautions déclarées ;

2º Précise la nature, l'objet, les modalités du prêt, notamment celles qui sont relatives aux dates et conditions de mise à disposition des fonds ainsi qu'à l'échéancier des amortissements ;

3º Indique, outre le montant du crédit susceptible d'être consenti, et, le cas échéant, celui de ses fractions périodiquement disponibles, son coût total, son taux défini conformément à l'article L. 313-1 ainsi que, s'il y a lieu, les modalités de l'indexation ;

4º Enonce, en donnant une évaluation de leur coût, les stipulations, les assurances et les sûretés réelles ou personnelles exigées, qui conditionnent la conclusion du prêt ;

5º Fait état des conditions requises pour un transfert éventuel du prêt à une tierce personne ;

6º Rappelle les dispositions de l'article L. 312-10.

Toute modification des conditions d'obtention du prêt, notamment le montant ou le taux du crédit, donne lieu à la remise à l'emprunteur d'une nouvelle offre préalable.

Toutefois, cette obligation n'est pas applicable aux prêts dont le taux d'intérêt est variable, dès lors qu'a été remise à l'emprunteur avec l'offre préalable une notice présentant les conditions et modalités de variation du taux. »

B. Jurisprudence de la Cour de cassation

23. Par deux arrêts des 16 mars et 20 juillet 1994, la première chambre civile de la Cour de cassation a jugé que l'échéancier des amortissements, joint à l'offre préalable, devait préciser, pour chaque échéance, la part de l'amortissement du capital par rapport à celle couvrant les intérêts et que le non-respect de ces dispositions d'ordre public était sanctionné non seulement par la déchéance du droit aux intérêts pour le prêteur, mais encore par la nullité du contrat de prêt (Bull. civ. I, respectivement nos 100 et 262 ; dans le même sens, Civ. 1ère, arrêt du 18 mars 1997, Bull. civ. I, no 97).

24. Après l'adoption de la loi du 12 avril 1996, des juges du fond avaient considéré que l'article 87-I de la loi était contraire à l'article 6 § 1 de la Convention, en ce que son application aux instances en cours portait atteinte au principe d'égalité des droits et à l'exigence du procès équitable puisqu'elle modifiait une donnée fondamentale du litige au détriment de l'une des parties : la Cour de cassation a censuré cette position en cassant les arrêts concernés les 29 avril et 9 juillet 2003 (Civ. 1ère, pourvois nos 00-20062, 99-12031 et 99-15369).

C. Loi no 96-314 du 12 avril 1996

25. L'article 87 de la loi no 96-314 du 12 avril 1996 portant diverses dispositions d'ordre économique et financier prévoyait ce qui suit :

« I. – Sous réserve des décisions de justice passées en force de chose jugée, les offres de prêts mentionnées à l'article L. 312-7 du code de la consommation et émises avant le 31 décembre 1994 sont réputées régulières au regard des dispositions relatives à l'échéancier des amortissements prévues par le 2o de l'article L. 312-8 du même code, dès lors qu'elles ont indiqué le montant des échéances de remboursement du prêt, leur périodicité, leur nombre ou la durée du prêt, ainsi que, le cas échéant, les modalités de leurs variations.

II. – L'article L. 312-8 du code de la consommation est ainsi modifié :

a) Dans le troisième alinéa (2o) les mots : « ainsi qu'à l'échéancier des amortissements » sont supprimés ;

b) Il est inséré, après le troisième alinéa, un 2o bis ainsi rédigé :

2o bis Comprend un échéancier des amortissements détaillant pour chaque échéance la répartition du remboursement entre le capital et les intérêts. Toutefois, cette disposition ne concerne pas les offres de prêts à taux variable. »

D. Travaux parlementaires – extraits

26. Extraits des débats tenus au Sénat lors de l'examen de la loi litigieuse :

- « Force est d'abord de constater que le premier arrêt de la Cour de cassation posant problème date du 16 mars 1994. Or, nous sommes le 21 mars 1996. Personne ici, parmi ceux qui s'intéressent au sujet, n'a reçu la moindre information, le moindre état de situation de la part des organismes concernés, pour nous indiquer qu'il y avait un risque et pour nous permettre d'en évaluer l'importance (...)

Dans les contacts qu'il m'a été possible d'avoir avec eux tout récemment, ils n'invoquent encore que des données très vagues, M. le Rapporteur s'en est d'ailleurs très franchement fait l'écho. Mais nous ne disposons, aujourd'hui, d'aucune donnée permettant de vérifier le caractère crédible du risque financier invoqué. J'observe que lors de ces derniers contacts, aujourd'hui même, les représentants officiels de cette profession ont omis de nous rappeler les limites procédurales qui, de toute façon,

empêchent un grand nombre d'emprunteurs de faire jouer leurs droits » (intervention de M. le sénateur Alain Richard, J.O. Débats Sénat, 21 mars 1996, p. 1683).

- « Contrairement à ce que laissent supposer certains professionnels du crédit, sont concernées, non pas toutes les banques mais une infime minorité d'entre elles : celles qui n'ont pas respecté la loi » (intervention de Mme le sénateur Marie-Claude Beaudeau, J.O. Débats Sénat, 21 mars 1996, p. 1684).

EN DROIT

I. SUR LA VIOLATION ALLÉGUÉE DE L'ARTICLE 6 § 1 DE LA CONVENTION

27. Le requérant, qui se plaint de l'adoption de la loi du 12 avril 1996 et de son application rétroactive par les juridictions internes, invoque en substance l'article 6 § 1 de la Convention, dont les dispositions pertinentes sont rédigés comme suit :

« Toute personne a droit à ce que sa cause soit entendue équitablement (...) par un tribunal indépendant et impartial (...) qui décidera (...) des contestations sur ses droits et obligations de caractère civil (...) »

A. Thèses des parties

28. Le Gouvernement rappelle, en premier lieu, les grandes lignes de la jurisprudence de la Cour en matière de validations législatives et cite, à cet égard, les arrêts Raffineries grecques Stran et Stratis Andreadis c. Grèce du 9 décembre 1994, série A no 301-B ; Papageorgiou c. Grèce du 22 octobre

1997, Recueil des arrêts et décisions 1997-VI ; National & Provincial Building Society, Leeds Permanent Building Society et Yorkshire Building Society c. Royaume-Uni du 23 octobre 1997, Recueil 1997-VII ; Zielinski et Pradal et Gonzalez et autres c. France [GC], nos 24846/94 et 34165/96 à 34173/96, CEDH 1999-VII, et Forrer-Niedenthal c. Allemagne, no 47316/99, 20 février 2003. Il considère qu'il existe une différence majeure entre ces précédentes affaires et la présente espèce : l'Etat n'est pas partie au litige et ne défend en aucune manière ses intérêts propres. Les pouvoirs publics sont restés extérieurs aux procédures et neutres à l'égard des parties. Le nouveau régime juridique issu de la loi du 12 avril 1996 s'applique aux relations entre emprunteurs et établissements bancaires, à des rapports de droit privé. Par ailleurs, cette loi n'est pas « une loi de circonstance » destinée à s'immiscer dans des relations contractuelles préexistantes ou dans la bonne administration de la justice, puisqu'elle ne visait qu'à limiter, de façon générale, la portée de l'interprétation jurisprudentielle de la notion « d'échéancier des amortissements », intervention purement normative qui relève de la compétence naturelle du législateur.

29. En l'absence d'implication de l'Etat dans le litige, le Gouvernement rappelle que la Cour a jugé que des motifs d'intérêt général peuvent rendre légitime l'intervention du pouvoir législatif dans le déroulement d'une instance judiciaire en cours (Forrer-Niedenthal, précité). Or, en l'espèce, un tel motif d'intérêt général, très clairement rappelé par le Conseil constitutionnel dans une décision du 9 avril 1996, existait bien. La nouvelle loi avait pour objectif de sauvegarder l'équilibre financier du système bancaire, afin de ne pas mettre en péril l'activité économique en général, ce que jugea également la Cour de cassation dans son arrêt du 29 avril 2003.

30. La loi du 12 avril 1996 poursuivait donc un but légitime et sa disposition litigieuse n'emportait en outre aucune conséquence excessive puisque, d'une part, elle ne remettait pas en cause les décisions passées en force de chose jugée et que, d'autre part, elle ne réputait régulières que certaines offres de prêts émises préalablement (c'est-à-dire celles qui, au regard du contenu de l'échéancier des amortissements, n'étaient pas totalement conformes à l'interprétation que la jurisprudence avait donnée de cette notion avant la loi nouvelle). Le législateur est donc intervenu de façon raisonnable et proportionnée.

31. Le requérant conteste cette thèse et fait valoir que la rétroactivité de la loi n'était pas justifiée par l'intérêt général et constitue un abus de pouvoir et une atteinte à l'équité de la justice.

B. Appréciation de la Cour

32. La Cour réaffirme que si, en principe, le pouvoir législatif n'est pas empêché de réglementer en matière civile, par de nouvelles dispositions à

portée rétroactive, des droits découlant de lois en vigueur, le principe de la prééminence du droit et la notion de procès équitable consacrés par l'article 6 s'opposent, sauf pour d'impérieux motifs d'intérêt général, à l'ingérence du pouvoir législatif dans l'administration de la justice dans le but d'influer sur le dénouement judiciaire du litige (Raffineries grecques Stran et Stratis Andreadis, précité, p. 82, § 49 ; Zielinski et Pradal et Gonzalez et autres, précité, § 57).

33. En l'espèce, la Cour constate que l'Etat n'était pas partie à la procédure judiciaire lors de l'intervention législative litigieuse. Cependant, la Cour estime que sa jurisprudence (voir, notamment, les arrêts Raffineries grecques Stran et Stratis Andreadis, précité ; Papageorgiou, précité ; National & Provincial Building Society, Leeds Permanent Building Society et Yorkshire Building Society, précité ; Zielinski et Pradal et Gonzalez et autres, précité ; Anagnostopoulos et autres c. Grèce, no 39374/98, CEDH 2000-XI ; Crişan c. Roumanie, no 42930/98, 27 mai 2003) va au-delà des litiges dans lesquels l'Etat est partie. Ainsi, dans son arrêt OGIS-Institut Stanislas et autres c. France (nos 42219/98 et 54563/00, 27 mai 2004), elle est parvenue à un constat de non-violation de l'article 6 § 1 de la Convention après avoir jugé que « l'intervention du législateur, parfaitement prévisible, répondait à une évidente et impérieuse justification d'intérêt général » (§ 72), et non en raison du fait que l'Etat n'était pas directement partie au litige.

34. Le problème posé en l'espèce relève fondamentalement du procès équitable et, de l'avis de la Cour, la responsabilité de l'Etat est encourue tant en sa qualité de législateur, s'il fausse le procès ou influe sur le dénouement judiciaire du litige, qu'en sa qualité d'autorité judiciaire, du fait des atteintes au procès équitable et ce, y compris dans le cadre des litiges de droit privé entre particuliers.

35. La Cour rappelle d'ailleurs que dans des litiges opposant des intérêts de caractère privé, l'exigence de l'égalité des armes implique l'obligation d'offrir à chaque partie une possibilité raisonnable de présenter sa cause dans des conditions qui ne la placent pas dans une situation de net désavantage par rapport à son adversaire (voir notamment les arrêts Dombo Beheer B.V. c. Pays-Bas du 27 octobre 1993, série A no 274, p. 19, § 33 ; Raffineries grecques Stran et Stratis Andreadis, précité, p. 81, § 46 ; Forrer-Niedenthal, précité, § 65).

36. Dans les circonstances de l'espèce, si l'article 87 de la loi no 96-314 du 12 avril 1996 excluait expressément de son champ d'application les décisions de justice passées en force de chose jugée, il fixait définitivement les termes du débat soumis aux juridictions de l'ordre judiciaire et ce, de manière rétroactive s'agissant d'offres de prêts émises avant le 31 décembre 1994.

37. En conséquence, l'adoption de la loi du 12 avril 1996 réglait en réalité le fond du litige et rendait vaine toute continuation des procédures.

38. Dans ces conditions, la Cour estime que l'on ne saurait parler d'égalité des armes entre les deux parties privées, l'Etat ayant donné raison à l'une d'elles en faisant adopter la loi litigieuse.

39. Quant à l'« impérieux motif d'intérêt général », évoqué par le Gouvernement et rappelé par le Conseil constitutionnel dans sa décision du 9 avril 1996, il résulterait de la nécessité de sauvegarder l'équilibre financier du système bancaire et de l'activité économique en général. S'agissant de la décision du Conseil constitutionnel, la Cour rappelle qu'elle ne saurait suffire à établir la conformité de l'article 87 de la loi du 12 avril 1996 avec les dispositions de la Convention (Zielinski et Pradal et Gonzalez et autres, précité, § 59).

40. La Cour rappelle également qu'en principe un motif financier ne permet pas à lui seul de justifier une telle intervention législative (voir, notamment, Zielinski et Pradal et Gonzalez et autres, précité, § 59). En tout état de cause, en l'espèce, aucun élément ne vient étayer l'argument selon lequel l'impact aurait été d'une telle importance que l'équilibre du secteur bancaire et l'activité économique en général

auraient été mis en péril. Les sénateurs eux-mêmes, semble-t-il, n'ont pas reçu d'informations précises à ce sujet (paragraphe 26 ci-dessus). Outre l'absence d'évaluation crédible du coût virtuel des procédures en cours et futures, lesquelles n'ont pas davantage été recensées, force est de constater que la question ne concernait que certaines banques, à savoir celles qui n'avaient pas respecté l'obligation prévue par l'article L. 312-8 du code de la consommation. Par ailleurs, ces banques n'étaient pas directement exposées à un paiement de dommages-intérêts ou de pénalités, mais principalement à un remboursement de sommes préalablement perçues de leurs clients. De fait, si les bénéfices des établissements concernés auraient pu souffrir de l'absence de loi, il n'est pas établi que leur survie et, a fortiori, l'équilibre général de l'économie nationale, auraient été menacés.

41. Compte tenu de ce qui précède, l'intervention législative litigieuse, qui réglait définitivement, de manière rétroactive, le fond du litige opposant des particuliers devant les juridictions internes, n'était pas justifiée par d'impérieux motifs d'intérêt général.

42. Partant, il y a eu violation de l'article 6 § 1 de la Convention.

II. SUR L'APPLICATION DE L'ARTICLE 41 DE LA CONVENTION

43. 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. »

A. Dommage

44. Le requérant réclame 226 400 EUR au titre de son préjudice matériel correspondant aux loyers-crédits versés à l'organisme prêteur, aux frais de dossier exposés afin d'obtenir la clôture du dossier auprès de cet organisme, ainsi qu'aux pertes financières occasionnées par la vente de sa maison. Il demande également 150 000 EUR au titre du préjudice moral subi pendant plus de quatorze ans.

45. Le Gouvernement soutient que ces prétentions sont excessives et dépourvues de tout lien de causalité avec le grief tiré d'une violation de l'article 6 § 1 de la Convention. Il considère que si la Cour constatait une violation de l'article 6 § 1 de la Convention, le constat de cette violation constituerait une satisfaction équitable pour le requérant.

46. La Cour relève que la seule base à retenir pour l'octroi d'une satisfaction équitable réside en l'espèce dans le fait que le requérant n'a pu jouir des garanties de l'article 6 § 1 de la Convention. La Cour ne saurait certes spéculer sur ce qu'eût été l'issue du procès dans le cas contraire, mais n'estime pas déraisonnable de penser que l'intéressé a subi une perte de chances réelles (voir, notamment, Zielinski et Pradal et Gonzalez et autres, précité, § 79 ; Lecarpentier c. France, no 67847/01, 14 février 2006, § 61 ; Arnolin et 24 autres c. France, nos 20127/03, 31795/03, 35937/03, 2185/04, 4208/04, 12654/04, 15466/04, 15612/04, 27549/04, 27552/04, 27554/04, 27560/04, 27566/04, 27572/04, 27586/04, 27588/04, 27593/04, 27599/04, 27602/04, 27605/04, 27611/04, 27615/04, 27632/04, 34409/04 et 12176/05, 9 janvier 2007, § 87). La Cour tient à souligner qu'en l'espèce la jurisprudence de la Cour de cassation était, avant l'adoption de la loi litigieuse, favorable à la position du requérant. Il en résulte que si aucune violation de la Convention ne s'était produite, la situation du requérant aurait vraisemblablement été différente, dès lors que la déchéance du droit aux intérêts du prêteur lui aurait été accordée. Partant, la Cour en déduit que la violation de la Convention constatée en l'espèce est susceptible d'avoir causé au requérant un dommage matériel (voir, mutatis mutandis, Arnolin et 24 autres, précité, § 87). Afin d'évaluer ce dernier à la lumière du constat auquel elle est parvenue, la Cour estime qu'il convient de se fonder sur le débat soumis devant les juridictions internes relatif à la déchéance du droit aux intérêts, et notamment sur les montants sollicités devant elles par le requérant. A quoi s'ajoute un préjudice moral, auquel le constat de violation figurant dans le présent arrêt ne suffit pas à remédier (ibidem). Statuant en équité, la Cour estime qu'il convient d'accorder au requérant la somme de 50 000 EUR.

B. Frais et dépens

47. Le requérant réclame 9 776 EUR au titre des frais et dépens exposés devant les juridictions nationales.

48. Le Gouvernement estime que le montant réclamé par le requérant est excessif et propose de lui allouer une somme maximale de 2 000 EUR.

49. Selon la jurisprudence de la Cour, un requérant ne peut obtenir le remboursement de ses frais et dépens que dans la mesure où se trouvent établis leur réalité, leur nécessité et le caractère raisonnable de leur taux. En outre, lorsque la Cour constate une violation de la Convention, elle n'accorde au requérant le paiement des frais et dépens qu'il a exposés devant les juridictions nationales que dans la mesure où ils ont été engagés pour prévenir ou faire corriger par celles-ci ladite violation.

50. La Cour note qu'en l'espèce seuls les frais engagés afin de former un pourvoi en cassation sont susceptibles de correspondre à cette définition. Cependant le requérant n'a fourni aucun justificatif pour les frais relatifs à cette procédure. En conséquence, aucune somme ne saurait lui être allouée à ce titre.

C. Intérêts moratoires

51. 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. Dit qu'il y a eu violation de l'article 6 § 1 de la Convention ;

2. Dit

a) que l'Etat défendeur doit verser au requérant, dans les trois mois à compter du jour où l'arrêt sera devenu définitif conformément à l'article 44 § 2 de la Convention, 50 000 EUR (cinquante mille euros) au titre des préjudices matériel et moral, plus tout montant pouvant être dû à titre d'impôt ;

b) qu'à compter de l'expiration dudit délai et jusqu'au versement, ces montants seront à majorer d'un intérêt simple à un taux égal à celui de la facilité de prêt marginal de la Banque centrale européenne applicable pendant cette période, augmenté de trois points de pourcentage ;

3. Rejette la demande de satisfaction équitable pour le surplus.

Fait en français, puis communiqué par écrit le 12 juin 2007 en application de l'article 77 §§ 2 et 3 du règlement.

S. DOLLE F. TULKENS Greffière Présidente

B. PRONUNCE RESE NEI CONFRONTI DI ALTRI PAESI

<u>Retroattività della legge "civile"</u>

Art. 6 § 1 della Convenzione (equo processo)

<u>In materia di lavoro</u>

Estratto (par. 33-40) della sentenza del 22 ottobre 1997, Camera, causa PAPAGEORGIOU c. Grecia

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

33. The applicant alleged two violations of Article 6 § 1 of the Convention, which provides:

"In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing within a reasonable time by [a] ... tribunal ..."

Firstly, the enactment of section 26 of Law no. 2020/1992 and the fact that the Court of Cassation had applied it in his case had deprived him of a fair hearing. Secondly, the proceedings he had brought for recovery of the sum that his employer, the DEI, had deducted from his salary had taken more than a "reasonable time".

A. Fair hearing

34. The applicant complained of interference by the legislature in the judicial process with regard to both the determination of the competent judicial order and the actual merits of the dispute. By providing in section 26 that the contributions paid to the OAED were "welfare deductions", the Government had sought to remove pending and future disputes from the civil courts and to make them subject to the jurisdiction of the administrative courts. They had thus attributed to those disputes a public-law character, to which they had added retrospective effect, as it was indicated in the explanatory report that the section was intended to clarify the meaning of certain "misunderstood" provisions of Law no. 1483/1984 (see paragraph 25 above). Furthermore, in judgment no. 1120/1993 the Court of Cassation had, on the basis of that section, merely declared that the proceedings had been struck out; it had not given any reasons for its decision or considered the constitutionality of the provisions of that section.

35. The Commission too was of the view that the State had infringed Article 6 of the Convention with regard to the fairness of the proceedings as it had "used legislation to dispose of a case to which it was a party".

36. In the Government's submission, section 26 of Law no. 2020/1992 had not been enacted for the purposes of resolving the litigation between the applicant and the DEI. The section had been drafted in objective and impersonal terms; it governed any case falling within its scope and had applied in the applicant's case by accident and chance. The fact that the courts had applied a provision that was unfavourable to Mr Papageorgiou could not amount to an infringement of Article 6 of the Convention as otherwise it would be necessary to find a violation every time legislation was passed altering an existing legal position to the advantage of one of the parties to proceedings. Lastly, the Government said that legislation, such as section 26, interpreting section 20 of Law no. 1483/1984 (see paragraph 24 above) had been necessary to consolidate the development of the welfare State in Greece; its purpose was to provide support for the unemployed and family benefit for employees who were not in receipt of such benefit from another source.

37. The Court agrees with the Government that in principle the legislature is not precluded from regulating by new provisions rights arising under laws previously in force.

However, in the Stran Greek Refineries and Stratis Andreadis v. Greece case (judgment of 9 December 1994, Series A no. 301-B) the Court held that the principle of the rule of law and the notion of fair trial enshrined in Article 6 precluded the interference by the Greek legislature with the administration of justice designed to influence the judicial determination of the dispute. It concluded that the State had infringed the applicants' rights under Article 6 by intervening in a manner which was decisive to ensure that the imminent outcome of proceedings in which it was a party was favourable to it (ibid., p. 82, §§ 49–50).

38. In the instant case, as in the aforementioned case, the Court cannot ignore the effect of section 26 of Law no. 2020/1992 in conjunction with the method and timing of its enactment.Firstly, although subsection (1) of section 26 clarified the meaning of Law no. 1483/1984, subsection (2) provided that any claims for repayment of contributions previously paid to the OAED were extinguished and any proceedings concerning such claims pending in any court were to be struck out (see paragraph 25 above).Secondly, section 26 was contained in a statute whose title ("rules on the special tax on the consumption of petroleum products and other provisions") bore no relation to that provision; as the applicant pointed out, the absence of such a connection is prohibited by Article 74 § 5 of the Greek Constitution (see paragraph 21 above).Lastly and above all, section 26 was enacted after the appeal against the judgment of the Athens Court of First Instance, sitting as an appellate court, had been lodged with the Court of Cassation by the DEI, joined by the OAED, and before the latter court had held its hearing, which had initially been set down for 29 September 1992 (see paragraph 17 above). At that time it was certainly foreseeable that the Court of Cassation would follow its recent case-law (see paragraph 26 above), in which it had already clarified the meaning of section 20 of Law no. 1483/1984 and which was favourable to the applicant.In the circumstances of the present case the enactment of section 26 at such a crucial point in the proceedings resolved the substantive issues for practical purposes and made carrying on with the litigation pointless.

39. As for the Government's contention that the dispute was not between Mr Papageorgiou and the State (as the DEI was a private-law, not a public-law, entity), the Court notes that the sums deducted by the DEI from its employees' salaries were paid to the OAED, a public social-security body. Had the Court of Cassation found in favour of the applicant, it was the Greek State which would have had to reimburse him.

40. Consequently, there has been a violation of Article 6 § 1 with respect to the right to a fair hearing.

Sentenza del 28 ottobre 1999, Grande Camera, causa ZIELINSKI, PRADAL e GONZALEZ c. Francia (in particolare, par. 50-61)

In the case of Zielinski and Pradal and Gonzalez and Others v. France,

The European Court of Human Rights, sitting, in accordance with Article 27 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), as amended by Protocol No. 11[1], and the relevant provisions of the Rules of Court[2], as a Grand Chamber composed of the following judges:

Mr L. Wildhaber, *President*,
Mr L. Ferrari Bravo,
Mr L. Caflisch,
Mr J. Makarczyk,
Mr W. Fuhrmann,
Mr K. Jungwiert,
Mr M. Fischbach,
Mr B. Zupančič,
Mrs N. Vajić,
Mr J. Hedigan,
Mrs W. Thomassen,
Mrs M. Tsatsa-Nikolovska,
Mr T. Panţîru,
Mr E. Levits,
Mr K. Traja,
Mrs S. Botoucharova,
Mr A. Bacquet, ad hoc *judge*,
and also of Mrs M. de Boer-Buquicchio, *Deputy Registrar*,

Having deliberated in private on 26 May and 29 September 1999,
Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The Zielinski and Pradal v. France case was referred to the Court, as established under former Article 19 of the Convention[3], by the European Commission of Human Rights ("the Commission") on 25 October 1997 and by the French Government ("the Government") on 11 December 1997. The Gonzalez and Others v. France case was referred to the Court, as established under Article 19 as amended, by the Commission on 9 December 1998. Both cases were so referred within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention. The two cases originated in ten applications (no. 24846/94 and nos. 34165/96 to 34173/96, the latter having been joined by the Commission on 9 April 1997) against the French Republic lodged with the Commission under former Article 25 by eleven French nationals. The first application was lodged by Mr Benoît Zielinski and Mr Patrick Pradal on 5 July 1994, the second by Ms Jeanine Gonzalez on 19 August 1996 and the other eight by Ms Martine Mary, Ms Anita Delaquerrière, Mr Guy Schreiber, Ms Monique Kern, Mr Pascal Gontier, Ms Nicole Schreiber, Ms Josiane Memeteau and Mr Claude Cossuta on 9 September 1996.

The Commission's requests referred to former Articles 44 and 48 and to the declaration whereby France recognised the compulsory jurisdiction of the Court (former Article 46). The Government's application referred to former Article 48. The object of the requests and of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 § 1 and Article 13 of the Convention.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of former Rules of Court A[4], Mr Zielinski and Mr Pradal stated that they wished to take part in the proceedings and designated the lawyer who would represent them (former Rule 30).

3. As President of the Chamber which had originally been constituted for the first case (former Article 43 of the Convention and former Rule 21) in order to deal, in particular, with procedural matters that might arise before the entry into force of Protocol No. 11, Mr R. Bernhardt, acting through the Registrar, consulted the Agent of the Government, Mr Zielinski's and Mr Pradal's lawyer and the Delegate of the Commission on the organisation of the written procedure. Pursuant to the order made in consequence, the Registrar received the applicants' memorial and the Government's memorial on 27 April 1998.

4. After the entry into force of Protocol No. 11 on 1 November 1998 and in accordance with the provisions of Article 5 § 5 thereof, the case was referred to the Grand Chamber of the Court. The Grand Chamber included *ex officio* Mr J.-P. Costa, the judge elected in respect of France (Article 27 § 2 of the Convention and Rule 24 § 4 of the Rules of Court), Mr L. Wildhaber, the President of the Court, Mrs E. Palm, Vice-President of the Court, and Mr M. Fischbach, Vice-President of Section (Article 27 § 3 of the Convention and Rule 24 §§ 3 and 5 (a)). The other members appointed to complete the Grand Chamber were Mr L. Ferrari Bravo, Mr Gaukur Jörundsson, Mr L. Caflisch, Mr W. Fuhrmann, Mr K. Jungwiert, Mr B. Zupančič, Mrs N. Vajić, Mr J. Hedigan, Mrs W. Thomassen, Mrs M. Tsatsa-Nikolovska, Mr T. Panţîru, Mr E. Levits and Mr K. Traja (Rule 24 § 3 and Rule 100 § 4).

Subsequently, Mr Costa withdrew from sitting in the Grand Chamber (Rule 28). The Government accordingly appointed Mr A. Bacquet to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1). Later, Mr J. Makarczyk and Mrs S. Botoucharova, substitute judges, replaced Mrs Palm and Mr Gaukur Jörundsson, who were unable to take part in the further consideration of the case (Rule 24 § 5 (b)).

5. In accordance with the provisions of Article 5 § 4 of Protocol No. 11 read in conjunction with Rules 100 § 1 and 24 § 6, a panel of the Grand Chamber decided on 14 January 1999 that the Gonzalez and Others case should be considered by the same Grand Chamber as the one already constituted to hear the Zielinski and Pradal case. Subsequently the Grand Chamber decided, on an application by the Government, to join the two cases (Rule 43 § 1).

6. Through the Registrar, Mr Wildhaber consulted the Agent of the Government, the applicants' lawyer and the Delegate of the Commission on the organisation of the written procedure. Pursuant to the order made in consequence, the Registrar received the applicants' memorial on 23 March 1999 and the Government's memorial on 25 March 1999.

7. At the Court's invitation (Rule 99), the Commission delegated one of its members, Mr M. Nowicki, to take part in the proceedings before the Grand Chamber.

8. In accordance with the President's decision, a hearing took place in public in the Human Rights Building, Strasbourg, on 26 May 1999.

There appeared before the Court:

(a) *for the Government*
Mr R. Abraham, Director of Legal Affairs,
Ministry of Foreign Affairs, *Agent*,
Mr P. Boussaroque, Human Rights Section,
Legal Affairs Department,
Ministry of Foreign Affairs,
Ms E. Ducos, Human Rights Office,
European and International Affairs Department,
Ministry of Justice, *Advisers*;

(b) *for the applicants*
Ms H. Masse-Dessen, of the *Conseil d'Etat* and
Court of Cassation Bar, *Counsel*;

(c) *for the Commission*
Mr M. Nowicki, *Delegate*,
Ms M.-T. Schoepfer, *Secretary to the Commission*.

The Court heard addresses by Mr Nowicki, Ms Masse-Dessen and Mr Abraham.

THE FACTS

9. Mr Zielinski, Mr Pradal, Ms Gonzalez, Ms Mary, Ms Delaquerrière, Mr Schreiber, Ms Kern, Mr Gontier, Ms Schreiber, Ms Memeteau and Mr Cossuta are French nationals who were born in 1954, 1955, 1956, 1953, 1955, 1948, 1949, 1957, 1950, 1954 and 1957 respectively. They live in the *départements* of Meurthe-et-Moselle (Mr Zielinski), Moselle (Mr Pradal), Bas-Rhin (Ms Mary) and Haut-Rhin (all the other applicants) and work for social-security bodies in Alsace-Moselle.

I. THE CIRCUMSTANCES OF THE CASE

A. Background to the case

1. The preliminaries

10. On 28 March 1953 the representatives of the social-security offices of the Strasbourg region signed an agreement with the regional representatives of the trade unions. Under the agreement, a "special difficulties allowance" (*indemnité de difficultés particulières* – "*IDP*") was introduced for the staff of social-security bodies on the ground that applying the local law of the *départements* of Haut-Rhin, Bas-Rhin and Moselle was a particularly complicated task. The agreement specified that the allowance was equal to twelve times the value of one salary "point" as laid down in the national agreement covering social-security staff.

The Minister of Employment and Social Security approved the agreement in a letter of 2 June 1953. The agreement was accordingly implemented as expected.

11. Following two amendments of 10 June 1963 and 17 April 1974 concerning the method of calculating salaries and the classification of jobs, changes which affected the value of the point, the boards of the social-security bodies reduced the *IDP*, which was set at the equivalent of six points in 1963 and 3.95 points in 1974, instead of twelve points as provided in the 1953 agreement. Further, the *IDP* was not taken into account for the purpose of calculating the annual Christmas bonus (*treizième mois*) payable under the national collective agreement.

12. In 1988, however, several social-security bodies decided to incorporate the *IDP* into their basis for calculating annual allowances, with five years' retrospective effect. The Regional Health and Social Affairs Department, the supervising authority for these public bodies, quashed the decisions authorising the transfer of the funds needed to make these payments to staff.

2. Actions brought by certain staff members – other than the applicants – of the social-security bodies concerned

(a) The judgments of the Forbach, Sarrebourg and Sarreguemines industrial tribunals

13. Applications were made to five industrial tribunals by 136 staff members of the social-security offices concerned, seeking to have the 1953 agreement implemented strictly and to be paid the corresponding salaries backdated to 1 December 1983 (claims in respect of pay being statute-barred after five years).

14. In judgments of 22 December 1989 and 26 April 1990 (Sarrebourg industrial tribunal, miscellaneous activities division), 20 December 1989 (Sarrebourg industrial tribunal, executive staff division) and 10 April and 12 June 1990 (Forbach industrial tribunal, executive staff division) the officials' claim for back payment of the *IDP* on the basis of twelve times the value of the point was dismissed.

15. In judgments of 23 April and 14 May 1990 (Forbach industrial tribunal, miscellaneous activities division) and 19 March 1990 (Sarreguemines industrial tribunal, executive staff division) the Sarreguemines Health Insurance Office (*Caisse primaire d'assurance maladie* – "*CPAM*") was ordered to pay the officials the amounts sought in back payment of the *IDP* as calculated on the basis of twelve points.

(b) The Metz Court of Appeal's judgments of 26 February 1991

16. In twenty-five judgments of 26 February 1991 concerning 136 officials, the Metz Court of Appeal gave judgment in their favour. The representatives of the State – the prefect of the region and, on the latter's authority, the Regional Director of Health and Social Affairs – appealed on points of law.

(c) The ministerial decisions of 30 July 1991 and 8 July 1992 concerning the ministerial approval

17. On 30 July 1991 the Minister of Social Affairs withdrew the ministerial approval given on 2 June 1953. On 8 July 1992 the Minister of Social Affairs revoked that withdrawal of approval.

(d) The Court of Cassation's judgments of 22 April 1992

18. In three judgments of 22 April 1992 the Court of Cassation quashed in part the twenty-five judgments given by the Metz Court of Appeal on 26 February 1991 in the actions brought by the 136 officials. The court considered that the change of classification in 1963 had resulted in the disappearance of the reference index in the 1953 agreement. It consequently remitted the cases to the court below to determine whether a practice had been established or, if none had been, to determine the value that the reference index would have reached had it been retained.

19. The Court of Cassation directed that the case should be reheard by the Besançon Court of Appeal.

(e) The judgments of the Colmar Court of Appeal of 23 September 1993

20. The Colmar Court of Appeal, with which appeals concerning the *IDP* had also been lodged, delivered judgments on 23 September 1993 in which it held, having regard to the terms of the Court of Cassation's judgments of 22 April 1992, that the reference index had disappeared and that a practice had been established of paying the *IDP* at 3.95 times the value of the point since the amendment of 17 April 1974.

(f) The judgment given on 13 October 1993 by the Besançon Court of Appeal after rehearing pursuant to the Court of Cassation's decision

21. In a judgment of 13 October 1993 the Besançon Court of Appeal, after rehearing the case pursuant to the Court of Cassation's decision, held that the agreement of 28 March 1953 was lawful, that it had not lapsed and that no other practice had been established. It consequently ordered that the *IDP* should be calculated on the basis of 6.1055% of the minimum wage, which percentage corresponded to the amount of the *IDP* as calculated on the basis of twelve points at 1 January 1953. The Besançon Court of Appeal said, in particular:

"As the 1953 agreement has not been denounced and the *IDP* must continue to be paid, the only issue to be resolved, after the partial quashing of the judgments delivered by the Metz Court of Appeal, is the new method of calculating the allowance in 1963, which may be based either on a practice or, failing that, on the determination of the value which the reference index would have reached on each due date of the allowance if that index had been retained.

... The unilateral change made in 1963 to the method of calculating the *IDP* cannot have given rise to a practice which, moreover, would itself have been unilaterally changed in 1974 in breach of the relevant rules. ...

If the reference index disappears, it is necessary to create a linking index in accordance with the contracting parties' intention.

The method adopted by the social-security offices in 1963 and 1974, whereby the amount of the *IDP* was regarded as being fixed and was divided by the new value of the point to obtain the number of points necessary for calculating the *IDP*, disregards the general growth of salaries and has resulted in a progressive erosion of the *IDP*, as is shown by studies of the progression of the *IDP* compared with basic pay which the plaintiffs adduced in evidence.

In order for the common intention of the parties to be carried out, the allowance must be the same for officials in the three *départements*, irrespective of their category, and the benefits acquired by employees must be retained.

A comparison of the *IDP* with the minimum wage is revealing. … In January 1990, for instance, the *IDP* as calculated on the basis of 3.95 points, the point having a value of FRF 38.652, amounted to FRF 152.67, whereas if it had been calculated on the basis of 6.1055% of the statutory minimum wage (*SMPG*), which was then set at FRF 5,596, the *IDP* would have been FRF 341.66.

…"

22. The Court of Appeal accordingly ordered a fresh hearing to enable the plaintiffs to calculate the amounts of back pay to which they were individually entitled.

(g) Law no. 94-43 of 18 January 1994

23. During the passage through Parliament of a bill on public health and social welfare, which began on 26 October 1993, the government took the initiative of tabling an amendment. The debates on that amendment, which became section 85 of the eventual Act, took place mainly on 30 November 1993 in the National Assembly and 13 December 1993 in the Senate. Clause 85 of the bill was adopted.

24. Section 85 of the Act provided that, subject to any court judgment to the contrary that had become final on the merits, the amount of the *IDP* introduced by the agreement of 28 March 1953 for staff of the social-security bodies administering the general social-security scheme and their dependent institutions in the *départements* of Bas-Rhin, Haut-Rhin and Moselle would, with effect from 1 December 1983, be set at 3.95 times the value of the point as determined under the pay agreements and paid twelve times a year, notwithstanding any provisions to the contrary in collective or individual agreements that were in force on the date of commencement of section 85.

25. An application was made to the Constitutional Council by a number of members of parliament who considered, in particular, that section 85 of the Act contravened the principle of the separation of powers in that it represented an interference by the legislature with pending court proceedings and that, further, the section in issue, which related to employment law, was unconnected with the purpose of the Act.

26. In a decision of 13 January 1994 the Constitutional Council held that the legislative provisions complained of were not unconstitutional, on the following grounds:

"In setting the amount of the 'special difficulties' allowance at 3.95 times the value of the point as determined by applying pay agreements of 8 February 1957, with retrospective effect from 1 December 1983, the legislature intended to stop further conflicting decisions being given by the courts and thereby prevent fresh disputes arising whose outcome might adversely affect the financial stability of the social-security schemes in issue.

The legislature expressly preserved the position of persons who had obtained a court decision that had become final on the merits. There is nothing in the Act to warrant the inference that the legislature departed from the principle that criminal provisions must not have retrospective effect. The legislature was entitled, subject to compliance with the aforementioned principles, to make use, as it alone could do in the circumstances, of its power to make retrospective provisions in order to resolve, in the general interest, situations that had arisen from the conflicting court decisions mentioned above. That being so, the impugned provisions are not contrary to any rule, nor do they offend any constitutional principle. …"

27. Section 85 of the Act (Law no. 94-43) was consequently held to be constitutional. The Act was promulgated on 18 January 1994.

(h) The Court of Cassation's judgments of 15 February and 2 March 1995

28. On 15 February 1995 the Court of Cassation, ruling on the appeal brought by the Sarreguemines *CPAM*, the prefect of the Lorraine region and the Alsace Regional Director of Health and Social Affairs against the Besançon Court of Appeal's judgment of 13 October 1993, quashed that judgment in part, without ordering a rehearing by another court of appeal, in the following terms:

"... However, section 85 of the Act of 18 January 1994 sets the amount of the *IDP*, for each payment period, at 3.95 times the value of the point resulting from the application of the pay

agreements concluded in accordance with the national collective agreement of 8 February 1957 covering the staff of social-security bodies. In that the judgment under appeal adopts a different method of calculation from the one laid down in the aforementioned provision, it must be quashed.

In accordance with Article 627, second paragraph, of the New Code of Civil Procedure, the case should be disposed of by applying the appropriate rule of law.

For these reasons ...:

Quashes the judgment delivered on 13 October 1993 by the Besançon Court of Appeal but only in so far as that court held that the *IDP* should be calculated on the basis of 6.1055% of the statutory minimum wage;

Holds that it is unnecessary to order a rehearing of the case;

Holds that the amount of the *IDP* must be set, for each payment period, at 3.95 times the value of the point as determined by applying the pay agreements concluded in accordance with the national collective employment agreement of 8 February 1957 covering the staff of social-security bodies;

..."

29. In a judgment of 2 March 1995 the Court of Cassation likewise dismissed, in similar terms, the appeals on points of law brought against the Colmar Court of Appeal's judgments of 23 September 1993.

B. Proceedings relating to Mr Zielinski and Mr Pradal

1. The Metz industrial tribunal's judgments of 4 December 1991 and 21 October 1992

30. On 15 and 17 April 1991 Mr Zielinski and forty-seven other officials, represented by an officer from the French Democratic Labour Confederation (*Confédération française démocratique du travail* – "*CFDT*") likewise applied to the industrial tribunal seeking payment of arrears of the *IDP* (assessed at FRF 31,131.11 for the applicant) and an order that this allowance should in future be calculated on the basis of twelve points as provided in the 1953 agreement.

31. Before the Metz industrial tribunal the prefect of the region and the Director of Health and Social Affairs challenged the officials' arguments and sought to have the proceedings stayed pending the Court of Cassation's ruling on the appeals in the identical cases that had given rise to the Metz Court of Appeal's twenty-five judgments of 26 February 1991.

32. On 28 June and 12 July 1991 the second applicant and forty-eight other officials, represented by the *CFDT* officer, lodged identical claims with the Metz industrial tribunal.

33. In judgments of 4 December 1991 (Mr Zielinski) and 21 October 1992 (Mr Pradal) the Metz industrial tribunal awarded the plaintiffs back payment of the allowance and found that the *IDP* should be calculated on the basis of twelve monthly points, in accordance with the 1953 agreement. It held, *inter alia*:

"The agreement lays down that this allowance is equal to twelve times the value of the point, set by the national agreement covering the staff of social-security bodies.

In the wake of changes made to the latter agreement in amendments of 10 June 1963 and 17 April 1974 concerning the method of calculating salaries and the classification of jobs and the effects of those changes on the value of the point, the boards of the bodies that signed the 1953 agreement decided to keep the *IDP* at a constant value by means of adjustments.

It is established that those adjustments had the effect of reducing the *IDP* to the equivalent of six and then 3.95 points.

The terms of the 1953 agreement are precise and the basis of twelve points could not be changed unilaterally.

The social-security bodies should have denounced the agreement if they considered that the adjustments made in 1963 and 1974 resulted in an excessive burden.

Such a change must be disregarded unless the parties agreed it in advance, and the silence of the other signatories to the agreement cannot be regarded as signifying their approval (Article L. 143-4 of the Labour Code) ..." (wording of the judgment of 4 December 1991)

34. Acting on the authority of the prefect of the region, the Director of Health and Social Affairs appealed against those judgments.

2. The Metz Court of Appeal's judgments of 19 and 20 April 1993

35. In judgments of 19 April (Mr Pradal) and 20 April (Mr Zielinski) 1993 the Metz Court of Appeal upheld the industrial tribunal's judgments, holding that the allowance had been changed unilaterally in breach of the Collective Agreements Act of 1950, on the following grounds in particular:

"In the final analysis, the calculation of this allowance must be based on the value of the point as determined under the amendments of 10 June 1963 and 17 April 1974 and those in force on each occasion when the allowance becomes payable.

By Article 1134 of the Civil Code, lawfully concluded agreements are legally binding on those who have made them. They can only be revoked by common consent or on grounds permitted by law. Similarly, by Article 135-1 of the Labour Code, collective employment agreements are binding on all those who have signed them.

...

There is no escaping the fact that the agreement of 28 March 1953 has not been denounced by any of the parties. It must consequently continue to be implemented and the two reductions in the multiplier were imposed in breach of both Article 1134 of the Civil Code and the provisions governing collective employment agreements.

The allowance must consequently be paid on the basis of twelve points, as provided in the aforesaid agreement.

..."

3. The Court of Cassation's judgment of 2 March 1995

36. On 2 March 1995 the Court of Cassation gave judgment as follows on the appeal brought by the prefect and the Director of Health and Social Affairs against the Metz Court of Appeal's judgments of 19 and 20 April 1993 (in respect of Mr Zielinski and Mr Pradal) and also against two other judgments, of 21 April and 6 September 1993, 150 officials being concerned in all.

"As to the application of section 85 of the Act of 18 January 1994 (Law no. 94-43) on public health and social welfare:

...

Section 85 of the Act of 18 January 1994 (Law no. 94-43), however, which is applicable to pending proceedings, including those pending before the Court of Cassation, is intended, in the absence of agreement between the parties, to remedy the disappearance of a reference index and thus enable the amount of an allowance to be calculated. This legislative provision, on whose application the parties were able to present argument, does not amount to an intervention by the State in proceedings between it and private individuals. It does not call in question final court decisions and has been declared to be constitutional by the Constitutional Council. It follows that the provision is not contrary to Article 6 § 1 or Article 13 of the European Convention on Human Rights and Fundamental Freedoms.

As to the ground, raised of the Court's own motion, notice having been given to the parties:

Having regard to section 85 of the Act of 18 January 1994 (Law no. 94-43) on public health and social welfare,

In reaching its decision that the amount of the so-called special difficulties allowance must be calculated on the basis of twelve points as provided in the agreement of 28 March 1953 and that the value of the point must be that adopted for the calculation of pay in the collective agreements in

force, the Court of Appeal held that there was no contractual provision which made the retention of the chosen index conditional upon retention of the classification in force at the time of the agreement and that to decide the contrary would be to add to the terms of the agreement, which were perfectly clear and precise, and to alter its nature. It added that the agreement in dispute did not exclude taking into account changes in the value of the point that resulted from the grading reorganisation and that accordingly the value of the point as determined under the amendments of 10 June 1963 and 17 April 1974 had to be adopted for calculating the *IDP*. It noted, further, that the new methods of calculating the *IDP* that had been adopted following the classification changes in 1963 and 1974 had not been agreed on by all the signatories to the agreement of 28 March 1953 and that as the agreed index remained applicable, it was unnecessary to determine whether an alternative practice existed. Lastly, it noted that the agreement of 28 March 1953 was a collective agreement which could be called in question only if it were revised or denounced, which it had not been.

Section 85 of the Act of 18 January 1994 (Law no. 94-43), however, lays down the amount of the so-called special difficulties allowance, for each payment period, at 3.95 times the value of the point as determined by applying the pay agreements concluded in accordance with the national collective agreement of 8 February 1957 covering the staff of social-security bodies. In so far as they adopt a method of calculating the amount of this allowance that differs from the one laid down in the aforementioned enactment, the judgments under appeal must be quashed.

In accordance with Article 627, second paragraph, of the New Code of Civil Procedure, the case should be disposed of by applying the appropriate rule of law.

For these reasons:

Quashes the judgments delivered in these cases on 19, 20 and 21 April and 6 September 1993 by the Metz Court of Appeal but only in so far as that court held that the amount of the so-called special difficulties allowance must be calculated on the basis of twelve points, the value of the point being that adopted for the calculation of pay in the collective agreements currently in force;

Holds that it is unnecessary to order a rehearing of the cases;

Holds that the amount of the *IDP* must be set, for each payment period, at 3.95 times the value of the point as determined by applying the pay agreements concluded in accordance with the national collective employment agreement of 8 February 1957 covering the staff of social-security bodies;

..."

C. Proceedings relating to Ms Gonzalez and others

37. On 17 August 1990 (Ms Gonzalez, Ms Mary, Ms Delaquerrière, Mr Schreiber, Ms Kern, Mr Gontier, Ms Schreiber and Mr Cossuta) and 28 August 1990 (Ms Memeteau) the applicants applied to the industrial tribunal on the basis of the 1953 agreement seeking payment of arrears of the *IDP* and calculation of that allowance on the basis of twelve points in future. No compromise having been reached at the conciliation hearing on 18 December 1990, the case was referred to the adjudication panel on 9 April 1991.

38. In nine judgments of 2 July 1991 the Colmar industrial tribunal allowed the applications on the following grounds:

"... The agreement signed on 28 March 1953 ... introducing the special difficulties allowance (*IDP*) of twelve points is still in force and has acquired the force of law.

On 2 June 1953 the Ministry gave its approval to the agreement.

Following changes to the classification of the staff of social-security bodies in 1963 and 1974, this allowance was reduced by decision of the Common Interests and Coordination Department of the Social Security Offices.

This department, an advisory body which was not a signatory to the 1953 agreement, took that unilateral decision and had it approved by the social-security regional head office and the boards of the local offices.

Those changes are consequently not binding [on the plaintiffs], especially as in the letter of 11 February 1989 the Ministry of Solidarity, Health and Social Welfare stated that the agreement must be fully implemented.

Apart from the changes in the value of the point that were made unilaterally, no subsequent changes were made to the 1953 agreement by the signatory parties.

Clause 63 of the national collective agreement – schedule 7 – provides: 'This agreement cannot in any circumstances constitute a ground for reducing benefits acquired by staff at the date of signature.'

The 1953 agreement consequently remains applicable in its entirety. ..."

2. The Colmar Court of Appeal's judgments of 18 May 1995

39. The Colmar *CPAM* and the prefect of the Alsace region, who was represented by the Alsace Regional Director of Health and Social Affairs, appealed against those judgments on 10 September 1991.

40. On 12 July 1994 the Colmar Court of Appeal set the case down for hearing on 18 October 1994. On 30 September 1994, after the appellants had filed submissions in which they relied on the Act of 18 January 1994, the applicants lodged their pleadings in reply.

41. In nine decisions of 18 May 1995 the Colmar Court of Appeal gave judgment against the applicants on the ground that:

"... pursuant to [section 85 of the Act of 18 January 1994 (Law no. 94-43)], the judgment appealed against must be set aside, as the claim covers a period after 1 December 1983. ..."

3. The Court of Cassation's judgment of 18 June 1996

42. On 13 and 17 July 1995 the applicants appealed on points of law to the Court of Cassation. They filed their full pleadings on 13 October 1995 and a supplementary pleading on 10 February 1996. Pleadings in reply were filed on 22 December 1995. The reporting judge, who was appointed on 1 February 1996, submitted his report on 16 February 1996.

43. In a judgment of 18 June 1996, after a hearing on 6 May 1996, the Court of Cassation declared the applicants' appeals inadmissible as follows:

"... in matters in respect of which the parties are not required to be represented by a member of the *Conseil d'Etat* and Court of Cassation Bar the appeal on points of law and subsequent procedural steps must be made, taken, handed over or sent by the party himself or by any representative with special authority to act.

The notices of appeal submitted by the parties do not contain even a summary statement of the grounds of appeal, and the pleadings that do contain such a statement, which were dispatched within the three-month period laid down in Article 983 of the New Code of Civil Procedure, were all drawn up by a representative who produced no special authority to act.

The appeals are accordingly inadmissible. ..."

II. RELEVANT DOMESTIC LAW

A. General principles governing social-security bodies

44. The national, regional and local health-insurance offices have a public-service mission (Constitutional Council decision no. 82-148 DC of 14 December 1982), and this explains both why they are vested with special governmental powers and why they come under the supervision of the minister responsible for social security. They manage the compulsory social-security scheme, with a budget of their own distinct from that of the State.

The minister in charge of social security is responsible for overseeing them, a task in which he is assisted by departments of his ministry, namely a central department and regional departments of health and social affairs, together with a national inspectorate of social affairs. The minister is also represented by the prefects of the *départements* or regions in their capacity as persons exercising

State authority and as delegates of the government, the direct representatives of the Prime Minister and each of the other ministers.

The power of supervision is exercised firstly over persons, it being possible, on certain grounds, to dissolve or suspend the entire board of a social-security office, dismiss or require the resignation of certain members of such a board, and give or withhold consent to the appointment of managerial staff, as well as draw up lists of suitable candidates. The power of supervision also extends to decisions, the regional ministerial departments having the power to quash or suspend, on certain grounds, decisions of boards or directors of local social-security bodies and also to oppose decisions of national bodies. Certain special decisions of social-security offices are also subject to an approval procedure, namely constitutional and procedural rules and collective agreements laying down staff regulations and the rules governing retirement.

Lastly, social-security bodies are under the supervision of the Minister for Economic Affairs and Finances, being subject to monitoring by regional Treasury officials and the Court of Audit and also to audits by the national Inspectorate of Public Finances.

B. Law no. 94-43 of 18 January 1994

45. The relevant section of the Act reads as follows:

Section 85

"Subject to any court decisions to the contrary that have become final on the merits, the amount of the so-called special difficulties allowance introduced by the agreement of 28 March 1953 for staff of the social-security bodies administering the general social-security scheme and their dependent institutions in the *départements* of Bas-Rhin, Haut-Rhin and Moselle shall, with effect from 1 December 1983 and for each payment period, be set at 3.95 times the value of the point as determined by applying the pay agreements concluded in accordance with the national collective employment agreement of 8 February 1957 covering the staff of social-security bodies, notwithstanding any provisions to the contrary in collective or individual agreements in force on the date of publication of this Act. It shall be paid twelve times a year. With effect from the same period, the annual Christmas bonus shall be increased so as to reflect the amount of the so-called special difficulties allowance awarded in respect of the month of December."

PROCEEDINGS BEFORE THE COMMISSION

46. Mr Zielinski and Mr Pradal applied to the Commission on 5 July 1994; Ms Gonzalez did so on 19 August 1996; and Ms Mary, Ms Delaquerrière, Mr Schreiber, Ms Kern, Mr Gontier, Ms Schreiber, Ms Memeteau and Mr Cossuta did so on 9 September 1996. The applicants complained of violations of Article 6 § 1 and Article 13 of the Convention.

47. On 26 November 1996 the Commission declared Mr Zielinski's and Mr Pradal's application (no. 24846/94) admissible. On 22 October 1997 it declared the applications of Ms Gonzalez and others (nos. 34165/96 to 34173/96) admissible as to the complaints concerning the fairness and the length of the proceedings and inadmissible as to the remainder. In its reports of 9 September 1997 and 21 October 1998 (former Article 31 of the Convention), it expressed the unanimous opinion that there had been a violation of Article 6 § 1 of the Convention as regards the fairness of the proceedings and that it was unnecessary to consider the case under Article 13, and further, in respect of Ms Gonzalez, Ms Mary, Ms Delaquerrière, Mr Schreiber, Ms Kern, Mr Gontier, Ms Schreiber, Ms Memeteau and Mr Cossuta, that there had been a violation of Article 6 § 1 of the Convention as regards the length of the proceedings. The full texts of the Commission's opinions are reproduced as annexes to this judgment[5].

FINAL SUBMISSIONS TO THE COURT

48. In their memorials the Government requested the Court to hold that the application of the provisions of the new Act in the judicial proceedings concerning the applicants that were then pending had not contravened Articles 6 § 1 and 13 of the Convention.

49. The applicants asked the Court to find that there had been a violation of Article 6 § 1 of the Convention and to award them just satisfaction under Article 41.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION AS TO THE FAIRNESS OF THE PROCEEDINGS

50. The applicants submitted that the adoption of section 85 of the Act of 18 January 1994 (Law no. 94-43) had entailed a violation of Article 6 § 1 of the Convention, whose relevant part is worded as follows:

"In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing within a reasonable time by [a] ... tribunal ..."

51. The applicants pointed out that the Besançon Court of Appeal, when rehearing similar earlier cases after judgments in them had been quashed by the Court of Cassation, had determined the matters referred to in the Court of Cassation's direction and subsequently set the reference value by holding that the *IDP* had to be calculated on the basis of 6.1055% of the minimum wage and ordered a fresh hearing so that the calculations might be made (see paragraphs 21-22 above). Before the delivery of that judgment Mr Zielinski and Mr Pradal had obtained an even more favourable decision as the Metz Court of Appeal had held that the *IDP* was to be calculated on the basis of twelve points (see paragraph 33 above). Decisions favourable to the applicants had thus already been given before the passing of the Act in issue, in proceedings to which the State had been a party. The applicants considered that the Act, resulting as it did from a belated amendment, had had, if not the purpose, at least the effect of influencing the outcome of the case to the State's advantage.

The applicants disputed the assertion that the Act had been intended to forestall conflicting court decisions. They pointed out, firstly, that in French law the factual circumstances of a case were for the trial and appeal courts to determine and that the Court of Cassation reviewed only issues of law. It was thus inherent in the judicial system that the "facts" might be assessed differently when one and the same case was heard by different courts. Such differences did not in themselves warrant intervention by the legislature. Secondly, there had been no such risk in the instant case. Since what was at issue was an allowance exclusive to staff in post in given *départements*, only the Colmar and Metz courts of appeal had had normal jurisdiction to hear the cases, and the Court of Cassation had taken care, after the judgments of 22 April 1992, in which it had quashed the judgments of the court below, to order a rehearing of the cases by one and the same second court of appeal, namely the Besançon Court of Appeal (see paragraph 19 above).

As to the need for legislative intervention to preserve the stability of the social-security schemes, the applicants said that the case concerned only the staff in three *départements* and that the sum involved was very small by comparison with the total social-security budget.

The applicants considered that it was unhelpful to refer to the National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom case (judgment of 23 October 1997, *Reports of Judgments and Decisions* 1997-VII). In their submission, there was no question in the instant case of taking advantage of a mistake that frustrated the intention of the legislature but rather of seeking the intention of the employers and the employees when they concluded the collective agreement that had given rise to the rights in issue. It was therefore the Act's clear effect and purpose to prevent the parties' intention from being carried out, to the sole advantage of the State. On this point the applicants referred to the Papageorgiou v. Greece case (judgment of 22 October 1997, *Reports* 1997-VI). The only risk run by the State – one that had proved to be real – was that the courts might not uphold its view. The passing of legislation with retrospective effect had therefore had no other object than to ensure that the State's claims prevailed notwithstanding that the courts had ruled against it. The Court of Cassation – and also the Colmar Court of Appeal when determining the appeals brought by Ms Gonzalez, Ms Mary, Ms Delaquerrière, Mr Schreiber, Ms Kern, Mr Gontier, Ms Schreiber, Ms Memeteau and Mr Cossuta – had subsequently had no option but to endorse the terms of the Act.

52. The Government pointed out, firstly, that as regards retrospective legislative provisions, two levels of scrutiny made it possible to ensure adherence to the principle of legal certainty which had to govern court proceedings. The first scrutiny was carried out by the Constitutional Council when such provisions were submitted to it for review. While it declined to assess whether an Act was compatible with the European Convention on Human Rights, a comparison of Convention law with its decisions on fundamental rights showed that, on many points, the development of its case-law duly reflected that of the European Court's case-law. The Constitutional Council was particularly vigilant to circumscribe very narrowly the use of laws designed to legalise existing practices (*lois de validation*). It laid down three conditions to be satisfied if such laws were to be constitutional: the legalisation could only be preventive; the legalisation measure must not offend the principle that a criminal statute must not have retrospective effect; and the legislature could only intervene on grounds of the general interest. The second scrutiny was carried out by the ordinary courts when applying new legislation to pending cases. Laws to legalise existing practices were passed mainly in the sphere of administrative law, and that explained why there were so few decisions by the Court of Cassation on the subject. But there were very many court decisions concerning retrospective and interpretative legislation. The courts put a limit on the application of such legislation to pending proceedings, holding that they could not be applied for the first time in the Court of Cassation and could not be a ground for quashing a decision against which it was no longer possible to bring an ordinary appeal.

53. The Government considered that the applicants could not criticise the legislature's adoption of the disputed provision. For one thing, Article 34 of the Convention did not empower the applicants to bring an *actio popularis* and, for another, the adoption of section 85 of the Act of 18 January 1994 was, as such, irrelevant to the issue of equality of arms. The problem therefore lay solely in its application to the facts of the case.

In the Government's submission, the provisions in issue had been adopted on grounds of the general interest and pursued a "legitimate aim". In the first place, the concern had been to prevent further conflicting decisions being given by the courts. In its three judgments of 22 April 1992 the Court of Cassation had drawn the logical conclusion from the finding that the index which served as a basis for the allowance had disappeared; those judgments had the potential to give rise to conflicting decisions by the courts below, since three different courts of appeal had to deal with the issue. Divergences had appeared between the Besançon, Colmar and Metz courts of appeal, none of which had resolved the matter in the same way (see paragraphs 16, 20, 21, 35 and 41 above). Further such divergences could be expected. In the second place, the Government submitted that it had been necessary to avoid jeopardising the financial stability of the social-security schemes in issue, as had been expressly noted by the Constitutional Council. Furthermore, the court actions could have threatened the continuity of the social-security public service. An exponential increase in staff costs would have led to a corresponding reduction in the funds earmarked for paying benefits to those who were insured with the social-security system, especially as roughly 5,000 of the 9,000 or so officials receiving the *IDP* had instituted legal proceedings by the time the Act had been passed. If these actions had generally been successful, the budget of the bodies concerned would have been cut by approximately 350,000,000 francs. The 1994 Act had therefore been dictated by compelling grounds of the general interest (see the National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society judgment cited above).

54. The authorities' good faith was not in issue, in the Government's opinion. The Act was not designed to reduce the *IDP* in an authoritarian way but to guarantee its fixed percentage in staff remuneration, thereby adopting the solution found by the Colmar Court of Appeal in its judgments of 23 September 1993 (see paragraph 20 above). The intention of the legislature had been quite simply to revert to the method of calculation decided on at the time of the original pay agreement. Furthermore, contrary to what applied in the Papageorgiou case (see the judgment cited above), the existence of a link between the provisions of section 85 of the Act of 18 January 1994 and the remainder of that Act was clearly established and confirmed in the Constitutional Council's decision. The Government also considered that the instant case could be distinguished from the Stran Greek Refineries and Stratis Andreadis v. Greece case (judgment of 9 December 1994, Series A no. 301-B).

There had been a "reasonable relationship of proportionality", the Government continued, between the aim pursued and the means employed by the legislature. Firstly, the Court of Cassation had not been able to impose a uniform solution on the various courts of appeal, as it had jurisdiction to deal with matters only of "law", not of "fact". Since, in earlier cases, the Court of Cassation had held, in particular, that the determination of the parties' intention at the time of concluding a contract or agreeing a practice was a question of "fact", intervention by the legislature had been necessary in order to establish a uniform method of calculating the *IDP*. Secondly, the instant case had links with the National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society case (see the judgment cited above): certain trade unions had belatedly taken advantage of a "technical flaw" after several years of lawful application of the collective agreement without any dispute. The applicants therefore could not be unaware that the authorities would not let that "technical flaw" endanger the budget of the social-security schemes. The Government also considered that the State, which occupied a special place in relation to the dispute, had not had recourse to legalisation in consideration of the party concerned (*intuitu personae*) as the Greek State had been accused of doing in the Stran Greek Refineries and Stratis Andreadis case (see the judgment cited above). The applicants were not employees of the State but were employees, subject to private law, of the local social-security offices, which were private-law entities that enjoyed financial autonomy. That explained why the ordinary courts and not the administrative courts had jurisdiction. The State had been a party to the proceedings only very indirectly, in its capacity as "guardian" of the social-security offices and in the general interest of the social-security schemes. Thirdly and lastly, the Government considered that the scope of the legalisation had been as limited as possible. Contrary to what had been the position in the Stran Greek Refineries and Stratis Andreadis case (see the judgment cited above), the purpose of the Act had not been to ensure that pending proceedings failed, as the legislature had excluded from its scope court decisions that had become final on the merits.

55. As to the effect of applying a new statute in order to resolve a dispute, the Government considered that the circumstances of the instant cases were distinguishable from those noted in the National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society, Stran Greek Refineries and Stratis Andreadis, and Papageorgiou judgments (cited above).

The Metz Court of Appeal had given judgment in favour of Mr Zielinski and Mr Pradal but on the basis of reasoning that conflicted with that of the Court of Cassation, which had found that the reference index had disappeared (see paragraphs 18 and 35 above). The outcome of the litigation was therefore much more uncertain than in the earlier cases considered by the European Court of Human Rights. The Government pointed out that the retrospective application of a new statute to pending proceedings was compatible with the Convention, provided that there had still not been a decision against which it was no longer possible to bring an ordinary appeal. In the instant case Mr Zielinski and Mr Pradal had indeed obtained such a judgment from the Metz Court of Appeal by the time that the new statute was applied to the case. The Court of Cassation had nevertheless held that that was no obstacle to applying the new statute, given the purely "supplementary" (*supplétif*) nature of the Act following the disappearance of the reference index.

As regards Ms Gonzalez, Ms Mary, Ms Delaquerrière, Mr Schreiber, Ms Kern, Mr Gontier, Ms Schreiber, Ms Memeteau and Mr Cossuta, the Government submitted that the Colmar industrial tribunal's judgments of 2 July 1991 could not be regarded as unappealable, since an appeal with suspensive effect had been lodged against them (see paragraphs 38-39 above). The court decision obtained by those applicants was therefore neither enforceable nor final on the merits. It would not have been possible to pass legalising legislation excluding all pending proceedings regardless of the stage that they had reached; that would have removed the Act's *raison d'être* and would have led to discrimination between those who had applied to the courts and those who had not, who would have found that the legalising Act was raised against them. The Government noted that the legalisation had had no disproportionate effect on the position of those applicants, because while the Colmar Court of Appeal was bound by the provisions of the Act, it was not to be forgotten that the same court had already ruled on the dispute in terms identical with those of the legalising Act in judgments of 23 September 1993 (see paragraph 20 above).

56. The Commission was of the opinion that section 85 of the Act of 18 January 1994 had quite simply endorsed the State's position in the proceedings that had been brought against it and that were still pending in the ordinary courts. It noted that the State's arguments had been rejected by the courts hearing the cases, which had preferred those advanced by the applicants. It also considered that the legislature had once and for all overturned the decisions of the courts and upheld the State by expressly providing that the Act should have retrospective effect. Once the Constitutional Council had confirmed that the Act accorded with the Constitution, the Court of Cassation's decision had become inevitable. With regard more particularly to the "precedent" created by the Colmar Court of Appeal's judgments of 23 September 1993, which were expressed in terms identical with those of the Act in question, the Commission considered that the State could not thereby be dispensed from its obligation not to intervene in pending judicial proceedings with the aim of influencing their outcome.

The Commission consequently concluded that the State had intervened decisively to influence in its own favour the imminent outcome of the proceedings to which it was a party and whose merits had already been decided against it.

57. The Court reaffirms that while in principle the legislature is not precluded in civil matters from adopting new retrospective provisions to regulate rights arising under existing laws, the principle of the rule of law and the notion of fair trial enshrined in Article 6 preclude any interference by the legislature – other than on compelling grounds of the general interest – with the administration of justice designed to influence the judicial determination of a dispute (see the following judgments, cited above: Stran Greek Refineries and Stratis Andreadis, p. 82, § 49; Papageorgiou, p. 2288, § 37; and National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society, p. 2363, § 112).

58. In the instant case, as in the above-mentioned cases, the Court cannot overlook the effect of the content of section 85 of the Act of 18 January 1994 (Law no. 94-43), taken together with the method and timing of its adoption.

To begin with, while section 85 expressly excluded from its scope court decisions that had become final on the merits, it settled once and for all the terms of the dispute before the ordinary courts and did so retrospectively and "notwithstanding any provisions to the contrary in collective or individual agreements in force on the date of publication of this Act" (see paragraph 45 above).

Secondly, section 85 was part of an Act on "public health and social welfare" (see paragraph 23 above). It was only in the course of the parliamentary debates and shortly after the delivery on 13 October 1993 of the Besançon Court of Appeal's judgment that an amendment on the *IDP* was tabled.

Lastly, section 85 quite simply endorsed the position taken up by the State in pending proceedings. The Court notes that a majority of earlier decisions by the tribunals of fact had been favourable to the applicants. Admittedly, whereas the Metz Court of Appeal had found wholly in favour of the employees of the social-security offices concerned (see paragraphs 16 and 35 above), the Colmar Court of Appeal, unlike the Colmar industrial tribunal, had dismissed the claims (see paragraphs 20, 38 and 41 above). However, the special role of the Besançon Court of Appeal, the court which had to rehear the cases after the Court of Cassation's judgments of 22 April 1992 (see paragraphs 19 and 21 above), must be emphasised. The Besançon Court of Appeal had been designated to resolve the dispute, notably the issues of "fact", within the legal framework previously laid down by the Court of Cassation itself (see paragraphs 18 and 19 above). Keeping strictly within the compass of the issues as laid down in the Court of Cassation's judgments of 22 April 1992, it found that no practice had arisen and rejected the method contended for by the State. It set a new reference index and, allowing a claim in the alternative by certain employees of the social-security offices concerned, held that the *IDP* had to be calculated on the basis of 6.1055% of the minimum wage, this being the percentage corresponding to the amount of the *IDP* as calculated on the basis of twelve points at 1 January 1953. Such a decision, which clarified the issues while remaining within the limits laid down by the Court of Cassation on 22 April 1992, was favourable to the applicants, since it had the effect of more than doubling the amount of the allowance actually paid by the

social-security offices and conferred a right to back payment of the difference on allowances paid over several years (see paragraphs 21-22 above).

59. The Court cannot discern in the facts of the case why the conflicting court decisions required legislative intervention while proceedings were pending. It considers that such divergences are an inherent consequence of any judicial system which, like the French one, is based on a network of trial and appeal courts with authority over the area of their territorial jurisdiction. As the role of the Court of Cassation is precisely to resolve conflicts between decisions of the courts below, it is impossible to conjecture what its decision in the face of these conflicting decisions would have been but for the intervention of the Act in issue.

In the Court's opinion, the circumstances of the case do not make it possible to assert that the intervention of the legislature was foreseeable, any more than they can support the argument that an original intention had been frustrated (see the National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society judgment cited above, pp. 2362-63, §§ 110-12), seeing that the dispute was over the application of an agreement that had been discussed and adopted under a prescribed procedure by the employers and trade unions concerned.

The Court considers that the financial risk adverted to by the Government (see paragraph 53 above) and expressly noted by the Constitutional Council in the reasons it gave for its decision (see paragraph 26 above) cannot in itself warrant the legislature's substituting itself both for the parties to the collective agreement and for the courts in order to settle the dispute. On that point the Court notes that the Government put forward the sum of 350,000,000 francs' loss for the social-security bodies concerned if the court actions were generally successful (see paragraph 53 above), without providing any other comparative data, notably as to the total cost of the nine thousand employees and the details of the health expenditure of the bodies in Alsace-Moselle.

The adoption of section 85 in reality determined the substance of the dispute. The application of it by the domestic courts, in particular the Court of Cassation in its judgments of 2 March 1995 (see paragraphs 29 and 36 above), made it pointless to continue the proceedings.

Like the Commission, the Court considers that the Constitutional Council's decision does not suffice to establish that section 85 of the Act of 18 January 1994 is in conformity with the Convention (see paragraph 26 above).

In view of the foregoing, the Court also considers that no distinction can validly be made between the applicants according as they had or had not obtained a final decision on the merits.

60. As to the Government's argument that this was not a dispute between the applicants and the State (see paragraph 54 above) as the local health-insurance offices were entities subject to private law, not public law, the Court notes that the social-security bodies perform a public-service mission and come under the supervision both of the minister responsible for social security and the Minister for Economic Affairs and Finances. Apart from the potential variety and importance of the forms of oversight, including those affecting collective agreements laying down rules and regulations governing different categories of staff (see paragraph 44 above), the Court notes that the prefect – the State's representative in the *département* or region – or the Regional Department of Health and Social Affairs, an external department of the supervising ministry, systematically intervened as parties to the trial in the proceedings between the applicants and the bodies that employed them. At all events, the French system, with its bodies that manage a public service and have special governmental powers and are subject to ministerial supervisory authorities, is an illustration of the special role and the duties of the member States of the Council of Europe – as may result from the European Social Charter – in relation to the social welfare of their peoples. The finding is therefore inescapable that the intervention of the legislature in the instant case took place at a time when legal proceedings to which the State was a party were pending.

61. There has consequently been a violation of Article 6 § 1 in respect of the right to a fair trial.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION AS TO THE LENGTH OF THE PROCEEDINGS

62. Ms Gonzalez, Ms Mary, Ms Delaquerrière, Mr Schreiber, Ms Kern, Mr Gontier, Ms Schreiber, Ms Memeteau and Mr Cossuta maintained that the proceedings did not take place within a reasonable time as required by Article 6 § 1 of the Convention.

63. The Commission accepted the applicants' argument, while the Government submitted that the facts of the case disclosed no violation of the Article in question.

A. Period to be taken into consideration

64. The Court notes that the periods to be taken into consideration in order to assess the length of the proceedings in the light of the "reasonable time" requirement of Article 6 § 1 began on 17 and 28 August 1990, the dates of the applications to the Colmar industrial tribunal (see paragraph 37 above) and ended with the Court of Cassation's judgment of 18 June 1996 (see paragraph 43 above). The proceedings consequently lasted for almost five years and ten months.

B. Reasonableness of the length of the proceedings

65. The reasonableness of the length of proceedings must be assessed in the light of the particular circumstances of the case and having regard to the criteria laid down in the Court's case-law, in particular the complexity of the case and the conduct of the applicant and of the relevant authorities (see, among many other authorities, the Vernillo v. France judgment of 20 February 1991, Series A no. 198, pp. 12-13, § 30).

1. Arguments before the Court

66. The applicants considered that a duration of four years in the Colmar Court of Appeal, to which had to be added almost a year at first instance as well as the proceedings in the Court of Cassation, was plainly excessive. In their submission, the case was not complex and no argument could be based on the time at which they had filed their submissions, since that had no effect on the date set for hearing cases on appeal from industrial tribunals. The cases were set down for hearing by the Court of Appeal and it was in the light of the date on which that decision was taken that the parties subsequently determined how they would proceed. Setting down took place without its being necessary for submissions to have been filed beforehand, as the court was validly seised by means of the notice of appeal and the proceedings were oral. The applicants noted that in the instant case the appeal was lodged on 10 September 1991 but that it was only on 12 July 1994 that the case was set down for hearing on 18 October 1994 (see paragraph 40 above). It was therefore only on 12 July 1994 that pleadings could usefully be filed, once the appellants had filed their submissions, in which they relied on the Act of 18 January 1994.

The applicants maintained that if the Court of Appeal had given judgment without waiting until the Act was passed, like the Metz Court of Appeal, they would have been in possession of an enforceable decision when the Act was passed. They therefore argued that the excessive length of the proceedings had also had the effect of making it possible to raise the Act of 18 January 1994 against them.

67. The Government contested that analysis. They submitted that the facts of the case and, in particular, the numerous conflicting court decisions made it possible to appreciate the special complexity of the case. The Court of Cassation had not given judgment by the time the Colmar industrial tribunal rendered its decisions on 2 July 1991 (see paragraph 38 above). All the points of law raised by the parties had therefore been in abeyance.

As to the conduct of the applicants, the Government said that in civil cases the parties' conduct was vital since the initiative in conducting the proceedings lay with them. The applicants' representative had not filed pleadings until 30 September 1994, three years after the beginning of the proceedings in the Court of Appeal (see paragraph 40 above). The length of the proceedings at first instance was perfectly reasonable and the Court of Cassation had acted with especial diligence. Responsibility for the length of the proceedings in the Court of Appeal had lain with the applicants.

68. The Commission considered that the proceedings were somewhat complex and, as to the conduct of the parties, that the length of time was not reasonable, regard being had to a number of delays or periods of inactivity for which it regarded the domestic authorities as having been responsible.

2. The Court's assessment

(a) Complexity of the case

69. The Court considers that the subject matter of the case before the domestic courts was undoubtedly complex, as was confirmed by the finding in the Court of Cassation's judgments of 22 April 1992 that the reference index had ceased to exist (see paragraph 18 above).

(b) Conduct of the applicants

70. The Court can find nothing to suggest that the applicants were responsible for prolonging the proceedings. In particular, the date on which the applicants' grounds of appeal were filed had no effect on the Colmar Court of Appeal's setting down of the case for hearing (see paragraph 40 above).

(c) Conduct of the judicial authorities

71. The Court finds that the proceedings lasted three years, eight months and eight days in the Colmar Court of Appeal. Although the appeals had been lodged on 10 September 1991 (see paragraph 39 above), the Court of Appeal did not set a date for the hearing until 12 July 1994, almost three years later (see paragraph 40 above). The Court considers that no persuasive explanation of that delay has been put forward. In particular, it notes that the Colmar Court of Appeal had already ruled on the issue of the *IDP* in its judgments of 23 September 1993 (see paragraph 20 above), more than two years after the appeals lodged in the instant case. Furthermore, the Colmar Court of Appeal's judgment was delivered on 18 May 1995 (see paragraph 41 above), almost a year and a half after the passing of the Act of 18 January 1994.

(d) Conclusion

72. Having regard to all the evidence, the Court considers that the "reasonable time" within which Article 6 § 1 requires a case to be heard was exceeded.

There has accordingly been a violation of Article 6 § 1 of the Convention as regards the length of the proceedings.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

73. The applicants considered that the adoption of section 85 of the Act of 18 January 1994 (Law no. 94-43) had entailed a breach 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."

74. Having regard to the finding in paragraph 61 above, the Court holds that it is unnecessary to rule on the complaint in question.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

75. 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

76. The applicants alleged that they had sustained pecuniary damage corresponding to the sums they would have received had the legislation remained as it was before the passing of the Act of 18 January 1994. Mr Zielinski and Mr Pradal assessed their pecuniary damage at 47,000 French francs (FRF) each and did not make any claim in respect of non-pecuniary damage. Ms Gonzalez, Ms Mary, Ms Delaquerrière, Mr Schreiber, Ms Kern, Mr Gontier, Ms Schreiber, Ms Memeteau and Mr Cossuta each sought FRF 21,434 in respect of back payment of the *IDP* for the five-year period before 17 August 1990, FRF 22,257 in respect of back payment of the *IDP* for the period from 18 August 1990 to 30 November 1995, plus FRF 15,000 for interest at the statutory rate and increased with effect from 17 August 1990. They assessed compensation for the non-pecuniary damage

sustained by each of them on account of the length of the proceedings at FRF 20,000 and compensation for the non-pecuniary damage stemming from the unfairness of the trial at FRF 50,000.

77. The Government did not express a view.

78. The Delegate of the Commission wished to leave the matter to the Court's discretion.

79. The Court notes that in the present case an award of just satisfaction can only be based on the fact that the applicants did not have the benefit of the guarantees of Article 6, including the one regarding the length of the proceedings in respect of Ms Gonzalez, Ms Mary, Ms Delaquerrière, Mr Schreiber, Ms Kern, Mr Gontier, Ms Schreiber, Ms Memeteau and Mr Cossuta. As to the fairness of the proceedings, whilst the Court cannot speculate as to the outcome of the trial had the position been otherwise, it does not find it unreasonable to regard the applicants as having suffered a loss of real opportunities (see the Colozza and Rubinat v. Italy judgment of 12 February 1985, Series A no. 89, p. 17, § 38). To that must be added non-pecuniary damage, which the findings of violations in this judgment do not suffice to remedy, except in the case of Mr Zielinski and Mr Pradal, who made no claim under this head. Making its assessment on an equitable basis as required by Article 41, the Court awards FRF 47,000 each to Mr Zielinski and Mr Pradal and FRF 80,000 to each of the other nine applicants, in respect of all heads of damage taken together.

B. Costs and expenses

80. The applicants each sought FRF 30,000 in respect of the costs and expenses relating to their representation.

81. The Government did not express a view.

82. The Delegate of the Commission wished to leave the matter to the Court's discretion.

83. The Court notes that Mr Zielinski and Mr Pradal were represented by the same lawyer throughout the proceedings before the Commission and the Court, the other nine applicants having used the services of the same lawyer only after the Grand Chamber had ordered the joinder of the applications. Consequently, and on the basis of the information in its possession, the Court, making its assessment on an equitable basis, awards Mr Zielinski and Mr Pradal FRF 30,000 each in respect of the proceedings before the Commission and the Court and each of the other applicants FRF 4,000.

C. Default interest

84. According to the information available to the Court, the statutory rate of interest applicable in France at the date of adoption of the present judgment is 3.47% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

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

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention as regards the length of the proceedings in respect of Ms Gonzalez, Ms Mary, Ms Delaquerrière, Mr Schreiber, Ms Kern, Mr Gontier, Ms Schreiber, Ms Memeteau and Mr Cossuta;

3. *Holds* that it is unnecessary to rule on the complaint under Article 13 of the Convention;

4. *Holds*

(a) that the respondent State is to pay, within three months, 47,000 (forty-seven thousand) French francs each to Mr Zielinski and Mr Pradal for pecuniary damage, 80,000 (eighty thousand) French francs to Ms Gonzalez, Ms Mary, Ms Delaquerrière, Mr Schreiber, Ms Kern, Mr Gontier, Ms Schreiber, Ms Memeteau and Mr Cossuta for pecuniary and non-pecuniary damage, and 30,000 (thirty thousand) French francs each to Mr Zielinski and Mr Pradal and 4,000 (four thousand) French francs to each of the other nine applicants for costs and expenses;

(b) that simple interest at an annual rate of 3.47% shall be payable on those sums from the expiry of the above-mentioned three months until settlement;

5. *Dismisses* the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 28 October 1999.

Luzius Wildhaber
President

Maud de Boer-Buquicchio
Deputy Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the concurring opinion of Mr Bacquet is appended to this judgment.

L.W.

M.B.

Concurring opinion of judge Bacquet

I voted in favour of this judgment, which, firstly, provides a balanced answer to the question of principle whether laws designed to legalise existing practices (*lois de validation*) are compatible with the Convention and, secondly, applies that answer rigorously but logically to the present case.

1. On the general question the Court reaffirms the principle, based on Article 6 § 1 of the Convention, that the legislature must not intervene with the aim of retrospectively establishing or altering a given legal situation so as to influence the judicial determination of a dispute; but it makes an exception for cases in which such an intervention would be justified on compelling grounds of the general interest. The Court therefore confirms all its decisions in earlier cases, in which initially the principle was laid down that the legislature must not interfere with the administration of justice (Stran Greek Refineries and Stratis Andreadis v. Greece judgment of 9 December 1994, Series A no. 301-B, and Papageorgiou v. Greece judgment of 22 October 1997, *Reports of Judgments and Decisions* 1997-VI), and then the idea introduced that such interference could, however, be justified on compelling grounds of the general interest (judgment of 23 October 1997 in the National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom case, *Reports* 1997-VII), grounds which are assessed by the Court against the background and in the circumstances of each case and which may, exceptionally, be held by it to be more legitimate than the rights relied on by certain individuals or, at any rate, held to prevail over them.

2. In the instant case the reason for the legislature's intervention (section 85 of the Act of 18 January 1994) was primarily, if not exclusively, the fact that there was a conflict of case-law, on a question of fact, between two tribunals of fact, the Colmar and Besançon courts of appeal, the latter of which had ruled on a case referred to it after a judgment of the Metz Court of Appeal had been quashed. The financial considerations relating to the substantial costs to the social-security bodies of the ruling given by any particular court should not, in my view, be regarded as having been decisive in the legislature's intervention in this instance.

Where it is impossible, or no longer possible, for the Court of Cassation to remedy them, conflicting decisions rendered by trial and appeal courts are undoubtedly likely to surprise, perturb or shock the public, but they are the price to be paid for operating a decentralised system of courts, whose supreme overseer, the Court of Cassation, respects the wholly independent assessment of the facts by the tribunals of fact and rules only on issues of law. The European Court therefore cannot accept too lightly, on the sole ground of rationality and of an abstract application of the idea of justice, that such conflicts constitute a compelling ground of the general interest which justifies the intervention of the legislature.

There are, however, very cogent reasons for accepting such an intervention where, in certain temporal and geographical circumstances, the conflicting decisions in practice lead to a denial of justice, for example where the execution of irreconcilable decisions is physically impossible or, if

not impossible, would immediately create an intolerable inequality of position between the parties concerned.

The present case in fact appears to be such an instance at first blush. In 1988, staff members of the local social-security offices of Alsace-Moselle challenged before several industrial tribunals the method whereby the offices had, for nearly fifteen years, calculated the amount of a special allowance introduced by an agreement of 1953. In April 1992 the Court of Cassation quashed judgments of the Metz Court of Appeal relating to some of these cases, held that the 1953 agreement could no longer apply in its original terms and ordered that the cases should be reheard by a tribunal of fact in order that it might be determined whether a practice had been established (on account of the application of a given method of calculation by the social-security offices over many years) or, in the absence of such a practice, in order that the method of calculating the allowance should be determined. In September 1993, however, the Colmar Court of Appeal held that a practice had been established for paying the allowance by the method adopted by the social-security offices, while in October the Besançon Court of Appeal held, on the contrary, that no practice had been established and laid down a new method of calculation – in other words, two unappealable but contradictory assessments of one and the same question of fact, namely whether a practice existed. At that stage, there is no doubt that an unjustifiable inequality of position arose between staff members of the local social-security offices of Alsace-Moselle in respect of the calculation of the allowance in question, according as they came, as litigants, within the jurisdiction of the Colmar Court of Appeal or within that of the Metz Court of Appeal. Besides, how could the social-security offices in practice have applied these irreconcilable decisions to their staff?

Did that situation, however, constitute in autumn 1993 a compelling ground of the general interest which justified the intervention of the legislature? That would have been so, in my view, if the legislature alone had been in a position to remedy the contradictions between the judgments. But in fact the interested parties could still have applied to the Court of Cassation, relying precisely on the conflict of judgments. A judicial resolution of the difficulty, which would have remedied the denial of justice, was therefore possible. It was ultimately for that reason that the conflict between decisions given in autumn 1993 by the Colmar and Metz courts of appeal did not amount to a compelling ground of the general interest justifying the legislature's intervention, it being remembered that, regardless of the resulting confusion, that conflict did not in itself cause any financial difficulties for the social-security bodies.

Sentenza del 18 dicembre 2008, sez. V, causa UNEDIC c. Francia (in particolare, par. 47-78)

Nel caso Unédic c. Francia,
La Corte europea dei diritti dell'uomo (Quinta Sezione), riunita in una Camera composta da:
Peer Lorenzen, presidente, Jean-Paul Costa, Karel Jungwiert, Volodymyr Butkevych, Renate Jaeger, Isabelle Berro-Lefèvre, Mirjana Lazarova Trajkovska, giudici, e de Claudia Westerdiek, Cancelliere di Sezione,
Dopo aver deliberato in camera di consiglio il 25 novembre 2008,
Rende la seguente sentenza, adottata in tale ultima data:

PROCEDURA

1. Il caso trae origine da un ricorso (n. 20153/04) diretto contro la Repubblica francese e nel quale un'associazione sottoposta al regime della legge del 1° luglio 1901, incaricata della gestione del regime di assicurazione dei crediti dei dipendenti, la A.G.S. Unédic, avente sede a Parigi («la ricorrente»), il 18 maggio 2004 ha adito la Corte in virtù dell'art. 34 della Convenzione per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali (« la Convenzione »).

2. La ricorrente è rappresentata da F. Sicard, un avvocato del foro di Parigi. Il Governo francese (« il Governo ») è rappresentato dal suo agente E. Belliard, direttrice degli affari giuridici presso il Ministero degli affari esteri.

3. La ricorrente denuncia una violazione del suo diritto a un processo equo, garantito dall'art. 6 § 1 della Convenzione.

4. Il 3 luglio 2007 la Corte ha deciso di comunicare la richiesta al Governo. Come previsto ai sensi dell'art. 29 § 3 della Convenzione, essa ha inoltre deciso che saranno esaminati allo stesso tempo la ricevibilità ed il merito della questione.

IL FATTO

1. Il regime di assicurazione dei crediti dei dipendenti

5. La legge n. 73-1194 del 27 dicembre 1973 volta ad assicurare, in caso di regolamento o liquidazione dei beni, il pagamento dei crediti derivanti dal contratto di lavoro, ha istituito in Francia, a carico dei datori di lavoro, un obbligo di assicurazione contro il rischio di non pagamento delle somme dovute ai dipendenti e più in generale delle somme dovute in esecuzione del loro contratto di lavoro, in caso di procedimenti collettivi (art. L. 143-11-1 del codice del lavoro).

6. In seguito, il regime giuridico della garanzia di pagamento dei crediti derivanti dal contratto di lavoro è stato modificato con la legge n. 85-98 del 25 gennaio 1985, relativa alla procedura di fallimento in amministrazione controllata e alla liquidazione giudiziaria delle imprese, ed è oggi codificato agli articoli L. 143-11-1 e successivi del codice del lavoro.

7. L'obbligo di garanzia dei dipendenti riguarda dunque tutti i datori di lavoro aventi la qualifica di commercianti, artigiani o persone giuridiche di diritto privato che impiegano uno o più dipendenti. Essa è volta a garantire l'insieme dei dipendenti, compresi quelli distaccati all'estero ed i dipendenti francesi emigrati.

8. Ai sensi dell'art. L. 143-11-4 del codice del lavoro, il regime di assicurazione è messo in atto ed è gestito da una associazione sottoposta al regime della legge del 1° luglio 1901, la A.G.S., che è finanziata da contributi a carico esclusivo dei datori di lavoro. Tale contributo, basato sui salari che servono da base imponibile per il calcolo dei contributi per la cassa integrazione, è coperto allo stesso tempo da quelli versati dalle Associazioni per l'impiego nell'industria e nel commercio («ASSEDIC»).

9. Una volta che una procedura collettiva è aperta, l'Unédic delegazione A.G.S. ha come compito mettere a disposizione del rappresentante dei creditori, attraverso l'intermediazione della sua sede locale, nel luogo in cui è localizzata l'impresa, le somme dovute ai dipendenti quando queste somme non possono essere pagate in tutto o in parte a valere sui fondi propri disponibili dell'impresa.

10. L'Unédic delegazione A.G.S. avendo effettuato tale anticipo si trova poi a subentrare nei diritti dei dipendenti beneficiari.

11. Al fine di garantire equità, si cumulano tutti i crediti salariali, indipendentemente dalla qualifica di salario della somma in causa, poiché il solo criterio pertinente è il collegamento del credito con il contratto di lavoro. Sono così garantiti: i salari dei primi sei mesi, le indennità di compensazione del congedo pagato, le indennità di fine rapporto, le indennità di interruzione illegittima, le indennità di licenziamento, le spese professionali, i premi annuali, le somme dovute in virtù di un contratto integrativo d'impresa, ecc.

12. Se all'inizio il legislatore del 1973 aveva respinto la creazione di un tetto di pagamento dei salari, nel 1975 il Parlamento è diventato incline a farlo. In effetti, due anni dopo la creazione del regime A.G.S., poiché i contributi da versare decuplicarono (dallo 0,02% allo 0,2%), fu ritenuto opportuno definire un massimale delle prestazioni, ossia dei pagamenti delle somme dovute ai dipendenti. Questo fu l'oggetto della legge n. 75-1251 del 27 dicembre 1975, codificato all'art. L. 43-11-6 divenuto L. 143-11-8 del codice del lavoro attraverso la legge n. 85-98 del 25 gennaio 1985.

13. L'art. D 143-2, primo punto, dispone:

«L'ammontare massimo della garanzia prevista all'art. L. 143-11-8 del Codice del lavoro è fissato a tre volte il tetto mensile trattenuto per il calcolo dei contributi al regime di cassa integrazione quando i crediti risultano da disposizioni legislative o regolamentari o da stipulazioni di un contratto collettivo e derivano da un contratto di lavoro la cui data di conclusione è anteriore di più di sei mesi dalla decisione di procedura di fallimento in amministrazione controllata.»

14. Lo stesso articolo prevede:

«Negli altri casi l'ammontare di questa garanzia è limitato a quattro volte il tetto sopra menzionato.»

2. La giurisprudenza della Corte di cassazione

15. La Corte di cassazione, conformandosi alla lettera degli artt. L. 143-11-8 e D 143-2 del codice del lavoro, ha applicato il tetto 4 ogni volta che i crediti derivavano da un contratto di lavoro durato meno di sei mesi, al momento dell'apertura della procedura collettiva, o che delle modifiche economiche erano state apportate a questo contratto in quest'arco di tempo. Al contrario, quando il legame contrattuale era di più di sei mesi, il testo imponeva di distinguere due ipotesi: quella che dà apertura al tetto 13 e che concerne «i crediti risultanti da disposizioni legislative o regolamentari o da stipulazioni di un contratto collettivo»; quelle che concernono «gli altri casi» per le quali il tetto inferiore (tetto 4) è il solo applicabile. Tale giurisprudenza ha avuto per effetto l'esclusione dei

crediti contrattuali del tetto 13, dato che l'enumerazione figurante nel testo riguarda i crediti derivanti da disposizioni legislative, regolamentari o convenzionali.

16. In questa direzione, con due sentenze del 13 maggio 1980 – Isabelle Adjani e Michel Piccoli –, la Corte di cassazione ha deciso che è esclusa dal tetto 13 «una remunerazione il cui ammontare doveva essere liberamente negoziato tra le parti» e che è ammesso a questo tetto superiore solo «il salario minimo imperativamente fissato con legge, regolamento o contratto collettivo».

17. Inoltre, nelle sentenze successive, l'interpretazione della Corte di cassazione si è fatta più precisa, nell'estendere alle indennità la precedente regola applicabile inizialmente ai salari. La Corte di cassazione richiedeva così che «gli stessi loro ammontari» siano fissati attraverso la legge, i regolamenti o il contratto collettivo, dal momento che lo stesso principio del credito trova la sua origine in uno di questo testi.

18. Con una sentenza del 15 dicembre 1998, A.G.S. di Parigi e Unédic c. Boue e Sudre, la camera sociale della Corte di cassazione riunita in seduta plenaria ha rivisto la sua giurisprudenza ritenendo nei suoi considerando di principio che i crediti risultanti da disposizioni legislative, regolamentari o convenzionali ai sensi di questo testo (art. D 143-2, prima alinea del Codice del lavoro) erano quelli che trovano fondamento in una legge, un regolamento o un contratto collettivo, poco importa che il loro ammontare non sia lo stesso fissato da una di queste fonti di diritto; che la remunerazione dei dipendenti, contropartita del loro lavoro, rientri nelle disposizioni dell'art. D 143-2, prima alinea del Codice del lavoro, lo stesso allorché il suo ammontare sia stato fissato da un accordo tra le parti. Di conseguenza, essa ritiene che giustamente la corte di appello ha deciso che il credito salariale, costituito dalle indennità convenzionali di fine rapporto e da un saldo della remunerazione, è garantito dall'A.G.S. nel limite del tetto 13.

19. L'avvocato generale della Corte di cassazione, avendo esaminato l'equilibrio degli interessi in gioco, ritenne che le conseguenze finanziarie della modifica della giurisprudenza sarebbero limitate. Più precisamente, egli sottolineò che la giurisprudenza precedente avrebbe potuto condurre a gravi ineguaglianze tra dipendenti della stessa impresa in fase di procedura di fallimento in amministrazione controllata e che una modifica della giurisprudenza, che avrebbe necessariamente avuto effetto retroattivo, avrebbe provocato certamente un appesantimento dei compiti della A.G.S., ma sarebbe stata contenuta in un ambito ristretto.

20. Ai sensi di questa nuova giurisprudenza, la Corte di cassazione ha accomunato tutti i crediti dei dipendenti e ha applicato il tetto 13 quando i crediti risultano da disposizioni legislative o regolamentari o dalla stipula di un contratto collettivo, e derivano da un contratto di lavoro la cui data di conclusione è anteriore di più dei sei mesi alla decisione con cui si stabilisce la procedura di fallimento in amministrazione controllata. In tutti gli altri casi, l'ammontare della garanzia è limitato al tetto 4.

21. Inoltre, essa a ritenuto che tutte le conseguenze derivanti dal contratto di lavoro, compreso e soprattutto l'obbligo di pagare un salario, sono di origine giuridica, essendo fissato convenzionalmente solo il quantum. Così, ai sensi di questa nuova posizione introdotta dalla sentenza della Corte di cassazione del 15 dicembre 1998, la camera sociale ha distinto la natura di un credito dal suo quantum, e ha sostenuto che il salario fissato dal contratto deve essere ritenuto come avente origine giuridica e non contrattuale, sebbene la legge non fissi l'ammontare. In base a questa nuova posizione, il tetto 13 diventa il principio di garanzia dei crediti salariali, il tetto 4 l'eccezione.

3. La situazione di M. H.

22. M. H. fu assunto dalla società La Mosaïque, società specializzata nella fornitura di rivestimenti e piastrelle, in qualità di agente tecnico-commerciale.

23. Con una sentenza del 20 ottobre 1997, il tribunale del commercio di Parigi ha aperto una procedura di fallimento in amministrazione controllata nei confronti della società.

24. Con una lettera del 5 gennaio 1998, M. H. fu informato che era stato licenziato per motivi economici. La lettera faceva riferimento alla sentenza del tribunale del commercio di Parigi, del 20 ottobre 1997, che si era pronunciato per la procedura di fallimento in amministrazione controllata della Sarl La mosaïque così come per la necessità di procedere ad una riorganizzazione del personale al fine di favorire il risanamento dell'impresa.

25. Il contratto di lavoro che legava M. H. alla società fu sciolto attraverso l'adesione ad un accordo di conversione in vigore dal 5 aprile 1998.

26. Nel contesto di questa procedura collettiva, furono chieste, per conto di M. H., le seguenti somme: arretrati del salario dal 6 settembre 1997 al 19 ottobre 1997: 69.996 franchi (10.670,82 euro (EUR)); indennità di compensazione del preavviso: 30.207 franchi (4.605,03 EUR); contributo all'A.G.S.: 48.908 franchi (7.608,43 EUR). Tutte questa somme furono versate, per un totale di 150.111 franchi, ossia 22.884,27 EUR. Di contro, l'indennità di licenziamento fu oggetto di una richiesta specifica di 457.425 franchi, ossia 69.734 EUR, e solo la somma di 76.329 franchi, ossia 11.636,28 EUR, fu versata.

27. Il credito di M. H., di un ammontare totale di 606.536 franchi, ossia 92.465,82 EUR, fu garantito fino al limite di 225.440 franchi, ossia 34.368,11 EUR, corrispondenti a quattro volte il tetto mensile trattenuto calcolando i contributi al regime di cassa integrazione (di seguito tetto 4).

28. Infatti, in base alla giurisprudenza allora prevalente, la remunerazione di M. H. era ampiamente superiore al tabellario del contratto collettivo pertinente applicabile. Così, la suddetta remunerazione non poteva essere analizzata come risultante dal contratto collettivo ai sensi delle disposizioni applicabili derivanti dalla prima alinea dell'art. D 143-2 del codice del lavoro e dalla giurisprudenza stabilita dalla Corte di cassazione.

29. La A.G.S. ritenne quindi di dover limitare la portata di quanto doveva versare al tetto 4.

30. Con una sentenza del 25 maggio 1998 del tribunale del commercio di Parigi, la società La Mosaïque fu dichiarata in liquidazione giudiziaria ed il sig. J. fu designato quale agente liquidatore.

31. Il 12 giugno 1998, M. H. prese informazioni presso il liquidatore designato circa le regole ed il quantum di garanzia dei crediti salariali. M. H. accettò la regola della garanzia fino al limite del tetto 4 (225.440 franchi, ossia 34.368,11 EUR).

4. La procedura dinanzi alle giurisdizioni del lavoro

a) Il Collegio dei probiviri di Parigi

32. Il 16 aprile 1999 M. H. adì il consiglio dei probiviri di Parigi affinché il saldo del suo credito salariale, costituito dal saldo dell'indennità di licenziamento per un ammontare di 381.096 franchi (58.097,71 EUR), fosse garantito nel limite del tetto 13.

33. In seguito all'udienza della camera di giudizio in data 26 ottobre 1999, il consiglio dei probiviri di Parigi si pronunciò in parità di voti.

34. Con delle conclusioni ricapitolative, l'A.G.S. sosteneva in via primaria l'esistenza di un'eccezione di inammissibilità di ordine pubblico conforme alle disposizioni dell'art. L. 143-11-7 del codice del

lavoro. In via sussidiaria, essa affermava che M. H. non adduceva, oltre all'invocazione della giurisprudenza del 15 dicembre 1998 contraria di per sé all'art. 5 del codice civile, alcun fondamento giuridico alla sua richiesta di beneficiare del tetto 13. Peraltro, essa indicava che in virtù dell'art. 6 della Convenzione europea dei diritti dell'uomo, la giurisprudenza non poteva essere retroattiva a meno di negare il principio generale di certezza del diritto. Infine, tale applicazione era analizzata dall'A.G.S. come una violazione flagrante dell'uguaglianza dei salari, a danno di coloro che hanno presentato un'azione giudiziaria e che hanno chiesto l'applicazione del solo tetto 4.

35. Con una sentenza del 18 luglio 2000, il consiglio, dopo un'udienza di spareggio, rigettò l'eccezione di inammissibilità sollevata dall'A.G.S., ordinò la comunicazione del dossier al procuratore della Repubblica e rinviò la causa e le parti all'udienza del 2 ottobre 2000.

36. Con sentenza del 6 novembre 2000, il consiglio dei probiviri di Parigi ritenne che il credito di M. H., costituito dal saldo dell'indennità legale di licenziamento, fosse garantito nel limite del tetto 13 e dichiarò la sentenza opponibile all'A.G.S.

37. I consiglieri probiviri ripresero il considerando di principio enunciato nella decisione del 15 dicembre 1998, A.G.S. di Parigi e Unédic c. Boue e Sudre e ritennero che, ai sensi dell'art. L. 143-11-8 e D 143-2 del codice del lavoro, i crediti trattati erano quelli che trovavano il loro fondamento in una legge, un regolamento o un contratto collettivo e poco importava che il loro ammontare fosse fissato nel testo. La remunerazione

del dipendente, obbligo del datore di lavoro definito dal codice del lavoro, rientrava nelle disposizioni dell'art. L. 143-11-8 stesso dato che il suo ammontare era fissato dall'accordo tra le parti. Non era lo stesso per l'indennità di licenziamento, prevista dalla legge e la cui remunerazione serviva da base per il calcolo. Nel caso di specie, il credito di M. H. era costituito dal saldo dell'indennità di licenziamento. Il dipendente beneficiava di un contratto di lavoro la cui conclusione era anteriore di più di sei mesi alla decisione di con cui si stabiliva la procedura di fallimento in amministrazione controllata. C'era dunque motivo di affermare che il credito di M. H. doveva essere garantito dall'A.G.S. nel limite del tetto 13.

b) La corte di appello di Parigi

38. L'Unédic delegazione A.G.S., rappresentata dalla delegazione regionale dell'Île-de-France, ricorse in appello contro questa decisione. Nelle sue conclusioni d'appello, l'Unédic delegazione A.G.S. sollevò parecchi motivi a sostegno della sua contestazione. In primo luogo, sostenne che l'applicazione che era stata fatta della nuova giurisprudenza a fatti nati e venuti in rilievo prima della sua formulazione si concretizzava in definitiva in un'applicazione retroattiva della giurisprudenza così era stata modificata. Quand'anche la stessa A.G.S. non intendeva contestare i postulati e i fondamenti della nuova giurisprudenza relativa ai tetto di garanzia, non poteva accettare che si applicasse a situazioni regolate in via definitiva.

39. In secondo luogo, essa sottolineò che, sulla base dell'art. 5 del codice civile, era negato ai giudici «pronunciarsi, a mezzo di disposizioni generali e regolamentari, sulle cause a loro sottoposte». Però, il dipendente guardava semplicemente, a sostegno della sua domanda, alla giurisprudenza del 15 dicembre 1998, allo stesso titolo che ad una disposizione legislativa o regolamentare.

40. In terzo luogo, fu sostenuto ugualmente che una tale applicazione violava direttamente le disposizioni dell'art. 6 della Convenzione, che disciplinano il principio generale di certezza del diritto.

41. In quarto ed ultimo luogo, le conclusioni di appello sollevavano la questione dell'imprevedibilità del risarcimento, ulteriore ostacolo alla sua applicazione in virtù tanto del

principio della certezza del diritto che del principio comunitario di legittimo affidamento. Il regime era completamente incapace, ai sensi di una giurisprudenza costante di venti anni, di prevedere questo nuovo obbligo di garanzia.

42. Inoltre, essa considerò che il passaggio dal tetto 4 (34.368,11 EUR) al tetto 13 (111.696,35 EUR) contro ogni attesa era passibile di mettere gravemente in pericolo la situazione finanziaria dell'A.G.S. e lo stesso equilibrio del sistema istituito con la legge del 1973 quale ripreso dalla legge n. 85-98 del 25 gennaio 1985 relativa alla procedura di fallimento in amministrazione controllata e alla liquidazione giudiziaria delle imprese.

43. Con una sentenza resa il 3 luglio 2001, la corte di appello di Parigi confermò la pronuncia di primo grado. I giudici d'appello rilevarono che i giudici di primo grado avevano correttamente analizzato i fatti della causa e considerato a giusto titolo che il credito di M. H., quanto ad ammontare, di 381.096 franchi, non era in discussione, dovendo essere garantito nel limite del tetto 13. L'argomentazione sviluppata dall'A.G.S., fondata sull'art. 2 del codice civile era inapplicabile, poiché il principio di garanzia applicato non derivava da una legge successiva ai fatti della causa. Peraltro, in applicazione dell'art. 5 dello stesso codice, la giurisprudenza non era essa stessa applicabile ad una causa determinata. Infine, per soddisfare l'esigenza di certezza del diritto, non era competenza di una giurisdizione di merito limitare con effetti normativi la portata di una modifica della giurisprudenza.

c) La Corte di cassazione

44. L'Unédic delegazione A.G.S. ha ricorso in cassazione. Essa ha presentato un unico motivo di cassazione secondo il quale si ricorreva nei confronti della sentenza per aver affermato che il tetto 13 era applicabile ai crediti di M. H.

45. L'A.G.S. sosteneva che una giurisprudenza non poteva avere effetto retroattivo se non nella misura in cui non rimetteva in causa situazioni giuridiche che avevano esplicato i loro effetti in passato, e ciò in conformità con il principio di certezza del diritto quale interpretato dai giudici della Corte di giustizia delle Comunità europee e dalla Corte europea dei diritti dell'Uomo. Essa ha ritenuto che tutte le interpretazioni contrarie violavano l'art. 6 della Convenzione. M H. aveva beneficiato della garanzia dell'Unédic delegazione A.G.S. nel limite del tetto 4, prima che intervenisse il mutamento della giurisprudenza del 1998. Pertanto, la corte di appello on aveva esitato ad applicare la nuova giurisprudenza della Corte di cassazione al saldo del credito salariale di M H., allorché la situazione del'interessato era stata definitivamente presa in carico e regolata dall'A.G.S.

46. Con una sentenza del 26 novembre 2003, la camera sociale della Corte di cassazione ha rigettato il ricorso presentato dall'A.G.S.. Essa ha ritenuto che l'unico motivo di cassazione sviluppato dall'A.G.S. non era fondato, sottolineando che la certezza del diritto, invocata a fondamento del diritto ad un processo equo, previsto dall'art. 6 della Convenzione, non potrebbe assoggettare un diritto acquisito ad una giurisprudenza immutabile, dal momento che l'evoluzione della giurisprudenza ha rilievo per un giudice nell'applicazione della legge.

DIRITTO

SULLA DEDOTTA VIOLAZIONE DELL'ART. 6 § 1 DELLA CONVENZIONE

47. La ricorrente lamenta una violazione del suo diritto ad un equo processo, in ragione del carattere retroattivo della sentenza della Corte di cassazione del 15 dicembre 1998. Essa invoca l'art. 6 § 1 della Convenzione che nella parte rilevante dispone:

«Ogni persona ha diritto a che la sua causa sia esaminata equamente (...) da un tribunale (...) il quale sia chiamato a pronunciarsi sulle controversie sui suoi diritti e doveri di carattere civile (...)»

A. Sull'eccezione del Governo relativa all'incompatibilità *ratione personae*

48. In via principale, il Governo sostiene che la richiesta è incompatibile rationae personae con le disposizioni della Convenzione dato che la ricorrente non può essere considerata come una «organizzazione non governativa» ai sensi dell'art. 34 della Convenzione.

49. Il Governo sottolinea le relazioni molto strette tra lo Stato e l'Unédic in merito alla cassa integrazione. Adduce a questo riguardo un estratto del rapporto della Corte dei conti del marzo 2006 relativo all'«evoluzione della cassa integrazione, dell'indennizzo all'aiuto al reimpiego».

50. Tale regime di assicurazione è interamente determinato dallo Stato. L'A.G.S. ha poco peso sull'evoluzione del regime e le sue modalità di funzionamento poiché il legislatore è intervenuto per modificare l'ambito di applicazione del regime e le modalità di anticipo e di recupero.

51. L'A.G.S. dipende dai poteri pubblici per mantenere l'equilibrio finanziario del regime in caso di congiuntura economica difficile. Lo Stato interviene nel caso di squilibrio persistente per fornirle i mezzi per assicurare la sua missione, come già fatto nel 1975 e nel 2003.

52. L'A.G.S. dispone di prerogative di potere pubblico. Essa procede al recupero dei fondi anticipati presso le imprese, a partire dal controllo dei piani di risarcimento e nell'ambito delle operazioni di liquidazione giudiziaria e fissa il tasso delle contribuzioni che devono versare i datori di lavoro. Essa può allo stesso modo agire in giudizio per difendere gli interessi del regime. Se è vero che le autorità pubbliche non dispongono di un potere di tutela, il sistema di garanzia dei salari in caso di procedura collettiva è stato instaurato dal legislatore: la legge del 27 dicembre 1973 ha posto i principi di assicurazione obbligatoria e ne ha fissato le modalità di funzionamento.

53. La ricorrente sostiene che il solo quadro normativo di un'attività svolta dai poteri pubblici non conduce ipso facto a qualificare l'insieme degli attori del settore interessato quale organizzazione governativa. Le autorità di tutela non dispongono di alcun potere di tutela sull'associazione ricorrente. Infatti, l'A.G.S. beneficia di una totale indipendenza organica, istituzionale e finanziaria. Se essa partecipa ad una «missione di servizio pubblico», non detiene prerogative di autorità pubblica.

54. La Corte ricorda che emerge dalla sua giurisprudenza che rientrano nella categoria delle «organizzazioni governative» le persone giuridiche che partecipano all'esercizio dell'autorità pubblica o che svolgono un servizio pubblico sotto il controllo delle autorità. Per determinare se tale è il caso di una persona giuridica diversa da una collettività territoriale, bisogna prendere in considerazione il suo status giuridico e, all'occorrenza, le prerogative che le sono riconosciute, la natura dell'attività che esercita ed il contesto nel quale si iscrive, ed in suo grado di indipendenza in relazione alle autorità politiche (caso Radio France et al. c. Francia (dec.), n. 53984/00, 23 settembre 2003).

55. La Corte rileva, in primo luogo, che la ricorrente, la Delegazione Unédic A.G.S., creata nel 1996 in seno all'Unédic perché si dedicasse alla realizzazione operativa delle missioni dell'A.G.S., è una persona giuridica di diritto privato, un'associazione regolata dalla legge del 1° luglio 1901, sottoposta esclusivamente al diritto privato, che si tratti delle sue regole di gestione contabile o finanziaria e delle sue modalità di funzionamento e delle regole di assunzione della sua responsabilità.

56. La ricorrente è composta da membri di organizzazioni dei datori di lavoro rappresentative che sono indipendenti dal potere politico. Il fatto che l'A.G.S. abbia delegato all'Unédic, attraverso un accordo di gestione, la realizzazione operativa delle sue missioni non dovrà mettere in discussione la sua

indipendenza. Il suo consiglio di amministrazione è esclusivamente composto da tali membri (sei membri del Medef, otto della Confederazione nazionale delle PMI e dieci del settore agricolo), senza che alcun'altra autorità abbia un ruolo deliberativo o consultivo. Il regime delle garanzie dei crediti dei dipendenti, fondati sulla solidarietà interprofessionale dei datori di lavoro, è finanziato esclusivamente dai contributi a carico dei datori di lavoro basati sulle remunerazioni che fanno da base al calcolo dei contributi per la cassa integrazione. Se, in principio, il regime è finanziato attraverso contributi privati, il fatto che possa avere in via eccezionale finanziamenti da parte dello Stato non cambia nulla.

57. Il recupero presso imprese dei fondi anticipati non può configurarsi quale prerogativa di autorità pubblica ma quale surroga di pieno diritto nell'ambito dei diritti ed azioni dei dipendenti che essa ha contribuito a liquidare. Inoltre, la possibilità di agire in giudizio per difendere gli interessi del regime costituisce una prerogativa di diritto comune detenuta dall'A.G.S. nella sua sola qualità di istituzione per la gestione del regime. In aggiunta, l'A.G.S. non beneficia del meccanismo della protezione della prescrizione quadriennale, ai termini del quale l'esecuzione di un credito non può essere ottenuta dopo che siano passati quattro anni; i dipendenti possono cercare presso la ricorrente la garanzia dei loro crediti salariali secondo le regole di prescrizione del diritto comune.

58 Bisogna quindi considerare la ricorrente come un'«organizzazione non governativa» ai sensi dell'art. 34 della Convenzione.

59. La Corte riconosce, inoltre, che il ricorso non è manifestamente infondato ai sensi dell'art. 35 § 3 della Convenzione. La Corte rileva, peraltro, che non vi è alcun altro motivo di irricevibilità. Esso deve quindi essere dichiarato ricevibile.

B. Sul merito

1. Argomenti delle parti

a) La ricorrente

60. Secondo la ricorrente, dalla sentenza Brumarescu c. Romania, ([GC], n. 28342/95, ECHR 1999-VII) emerge che il principio della certezza del diritto è consacrato dal diritto ad un equo processo. Il ragionamento seguito in materia di leggi di convalida è del tutto trasferibile nella fattispecie dal momento che tale legge assolve alla stessa funzione della variazione nel tempo di una decisione giudiziale.

61. L'applicazione retroattiva di una nuova giurisprudenza può essere in contraddizione con le esigenze della Convenzione in materia di accessibilità e di prevedibilità del diritto. Dato che la Corte riconosce la violazione dei diritti garantiti dalla Convenzione allorquando si trova di fronte a testi che producono i loro effetti su dei fatti passati e che modificano le attese legittime delle parti in giudizio, essa potrebbe fare lo stesso quando constati che la modifica di una data giurisprudenza ha di fatto gli stessi effetti.

62. La ricorrente pretende che ogni mutamento della giurisprudenza risulti contrario al diritto ad un processo equo. Essa raccomanda il riconoscimento di un diritto transitorio derivante dalle modifiche della giurisprudenza. Al riguardo, essa fa riferimento alla giurisprudenza della Corte di giustizia delle comunità europee ma anche alla politica giurisprudenziale della Corte di cassazione e del Consiglio di Stato che si sono di recente dedicati al principio della certezza del diritto.

63. La ricorrente suggerisce l'adozione di certi criteri suscettibili di essere tenuti in considerazione dal giudice nella valutazione di situazioni meritevoli o no di un adeguamento temporale, quali sono stati rilevati dalla dottrina: il gran numero delle persone coinvolte, le conseguenze finanziarie rilevanti, l'imprevedibilità della modifica giurisprudenziale, il sostegno apportato alla prassi

anteriore e alla certezza del diritto. Ora, applicati alle circostanze del caso, tali criteri erano in tutto e per tutto presenti: la decisione della Corte di cassazione in sede contenziosa ha comportato delle conseguenze finanziarie di estrema pesantezza, comportando per l'A.G.S. un deficit globale di 107.505.000 euro sugli esercizi 1999 e 2000; tenuto conto della grande stabilità della soluzione precedente, l'A.G.S. non ha potuto preparare ed assicurare utilmente, almeno finanziariamente, le conseguenze dell'evoluzione pretoria delle sue regole di garanzia; l'equilibrio generale del regime di solidarietà interprofessionale è stato messo in difficoltà da questa nuova giurisprudenza, a causa dei numerosi dipendenti che hanno invocato le garanzie dell'A.G.S.; in quel momento, la loro situazione era stata definitivamente regolata; nessun interesse generale sembra presiedere alla rimessa in discussione della garanzia.

b) Il Governo

64. Secondo il Governo, il principio della certezza del diritto ha due dimensioni distinte ma complementari: una dimensione formale ed una temporale. La prima riguarda la qualità della norma giuridica sottoponendola alle esigenze di intelligibilità e di accessibilità. La seconda mira essenzialmente a disciplinare le situazioni giuridiche. Inoltre, l'interpretazione giurisprudenziale ha portata retroattiva, dato che l'interpretazione normativa alla quale si affida il giudice al momento in cui si pronuncia riguarda necessariamente fatti che si sono svolti in passato. A ulteriore conferma, un mutamento della giurisprudenza, quale che sia la sostanza della «regola» giurisprudenziale che va a modificare, contiene, in ipotesi, un pregiudizio alla certezza del diritto. Malgrado tale pregiudizio, l'utilità e la stessa necessità delle modifiche della giurisprudenza non è da dimostrare. La Corte stessa ha ammesso nella sentenza Vilho Eskelinen c. Finlandia ([GC], n. 63235/00, 29 aprile 2007, § 56) che pur se deve mancare di seguire un approccio dinamico ed evolutivo, il fatto di non allontanarsi dai suoi precedenti rischierebbe di ostacolare ogni cambiamento o miglioramento.

65. Nondimeno, il pregiudizio alla certezza del diritto può variare secondo la natura delle modifiche, esistendo differenze di grado.

66. Il principio della certezza del diritto è più ampio del diritto ad un processo equo. Esso ispira e trascende i diritti consacrati dalla Convenzione che devono essere interpretati, notoriamente, alla luce di questo principio. Più sentenze della Corte sostengono una tale interpretazione. Le due nozioni vanno di pari passo, dato che la violazione del principio della certezza del diritto comporta direttamente un danno ai diritti garantiti dall'art. 6 § 1 (caso Brumarescu c. Romania, sopra citato, § 62).

67. Secondo il Governo esiste un forte consenso in Europa sul carattere eccezionale che deve presentare il ricorso alla tecnica di variazione degli effetti nel tempo della giurisprudenza. Come ha affermato la Corte di giustizia delle comunità europee, tale facoltà non è consigliata se non in caso di grave pregiudizio alla certezza del diritto. Del resto, la Corte europea dei diritti dell'uomo vi ha fatto riferimento nel caso Marckx c. Belgio (sentenza del 13 giugno 1979, serie A n. 31). Infine, il Governo contesta la confusione operata dalla ricorrente con il controllo da parte della Corte del carattere retroattivo di una legge di convalida, come nel caso Arnolin et al. c. Francia (n. 20127/03, 9 gennaio 2007).

68. Il Governo afferma che nessuna delle differenti componenti dell'art. 6 § 1 è stata ignorata che si trattasse di diritti procedurali, dell'uguaglianza dei rimedi o del diritto al giudizio. La ricorrente non invoca alcun argomento oltre alla violazione della certezza del diritto. Il nuovo stato del diritto introdotto dalla modifica giurisprudenziale del 15 dicembre 1998, anteriore alla nascita della causa che oppone M. H. all'Unédic, era perfettamente noto alle due parti che sono state messe su un rigoroso piano di parità nell'espressione dei loro rispettivi punti di vista. Inoltre, la situazione di M.

H. non era irrevocabilmente fissata prima della modifica della giurisprudenza. L'erogazione da parte dell'A.G.S. degli anticipi non poteva, indipendentemente dalla modifica della giurisprudenza, privare M. H. del suo diritto di adire il consiglio dei probiviri per contestare l'ammontare delle somme accordate. M. H. ha potuto, nello specifico, esercitare questo diritto dopo il mutamento dal momento che la procedura collettiva non era ancora chiusa.

69. Il Governo ritiene che la modifica operata dalla Corte di cassazione il 15 dicembre 1998 non è stata eccessiva per la ricorrente, ma moderata in termini di miglioramento apportato alla regola di diritto in questione e di esigenze di la giustizia sociale. Da un lato, nessun diritto acquisito dall'Unédic in via definitiva era stato rimesso in causa retroattivamente e, dall'altro, la Corte di cassazione ha esaminato accuratamente l'equilibrio degli interessi in causa.

70. Del resto, la modifica giurisprudenziale non era così imprevedibile, come sostiene la ricorrente. Numerose critiche erano state espresse dalla dottrina, da membri del parlamento e dal mediatore della Repubblica sull'interpretazione adottata dalla Corte di cassazione nel 1980 e riaffermata fino a quel momento.

2. La valutazione della Corte

71. Nella sua giurisprudenza, la Corte ha numerose volte riaffermato che se, in principio, al potere legislativo non è impedito regolamentare in materia civile, con nuove disposizioni a portata retroattiva, i diritti derivanti da leggi in vigore, il principio della prevalenza del diritto e la nozione del processo equo sanciti dall'art. 6 vengono si oppongono, salvo che nel caso di motivi imperativi di interesse generale, all'ingerenza del potere legislativo nell'amministrazione nella giustizia allo scopo di influire sulla conclusione giudiziaria della causa (sentenze Raffinerie greche Stran e Stratis Andreadis c. Grecia, 9 dicembre 1994, § 49, serie A n. 301-B, National & Provincial Building Society, Leeds Permanent Building Society e Yorkshire Building Society c. Regno Unito, 23 ottobre 1997, § 112, Raccolta delle sentenze e decisioni 1997-VII e Zielinski e Pradal e Gonzalez et al. c. Francia [GC], nn. 24846/94 e da 34165/96 a 34173/96, § 57, CEDH 1999-VII). Nella sentenza Brumărescu sopra citata (§ 61-62), la Corte ha allo stesso modo ritenuto che la corte suprema rumena, accogliendo il ricorso presentato dal procuratore generale della Romania in virtù del suo potere di contestare una sentenza definitiva attraverso un ricorso per annullamento, senza che egli sia vincolato da alcun termine, aveva violato il principio della certezza del diritto.

72. In primo luogo, la Corte rileva che il caso di specie e il problema che esso solleva – le conseguenze di una modifica della giurisprudenza sulla prevedibilità di situazioni giuridiche – si distingue chiaramente dal caso Raffinerie greche Stran e Stratis Andreadis (sentenza sopra citata), che invocava la ricorrente nel suo ricorso, e nella quale era in causa l'ingerenza del potere legislativo nell'amministrazione della giustizia al fine di influire sulla conclusione giudiziaria di una causa. Essa si distingue anche dalla sentenza Sovtransavto Holding c. Ucraina (n. 48553/99, ECHR 2002-VII), nella quale la Corte aveva concluso che un sistema giuridico caratterizzato da una procedura che ammette l'annullamento ripetuto delle sentenze definitive era in quanto tale incompatibile con il principio della certezza dei rapporti giuridici.

73. In secondo luogo, essa richiama il fatto che nella sua sentenza Marckx, sopracitata (ibidem § 58), la Corte aveva dichiarato che il principio di certezza del diritto, necessariamente inerente al diritto della Convenzione così come al diritto comunitario, esimeva lo Stato belga dal rimettere in causa gli atti o le situazioni giuridiche anteriori alla pronuncia della sentenza della Corte. Si trattava in quel caso di un obiter dictum in risposta all'interesse manifestato dal Governo belga di conoscere la portata a quel tempo della sentenza della Corte nel caso in questione.

74. La Corte ritiene tuttavia che le esigenze di certezza del diritto e di tutela del legittimo affidamento di coloro che sono sottoposti a giudizio non sanciscono un diritto acquisito ad una giurisprudenza costante.

75. Nello specifico, la Corte ritiene che la situazione di M. H. non era definitivamente regolata, anche se questi aveva accettato l'ammontare della garanzia nel giugno 1998. La situazione di M. H. non è comparabile a quella del caso Brumărescu sopra citato, in cui un giudizio definitivo regolava una data situazione e a dispetto di quella il procuratore generale aveva la facoltà di contestare dinanzi alla corte suprema una sentenza passata in giudicato. L'erogazione da parte dell'A.G.S. degli anticipi non poteva, in ogni caso ed indipendentemente dalla modifica della giurisprudenza, privare M. H. del diritto di adire il consiglio dei probiviri per contestare l'ammontare delle somme accordategli. M. H. ha potuto esercitare tale diritto dopo l'intervento

della modifica della giurisprudenza, dato che la procedura collettiva non era chiusa. Il nuovo stato di diritto introdotto dal mutamento giurisprudenziale del 15 dicembre 1998, anteriore alla nascita della causa che oppone M. H. all'Unédic relativa all'ottenimento del saldo del suo credito salariale, era perfettamente noto alle due parti. M. H. non ha fatto altro che adire le giurisdizioni, come gli era possibile, a seguito di una sentenza che gli era stata favorevole e che gli permetteva di rivendicare un'indennità di licenziamento complementare. Se la ricorrente percepisce come un'ingiustizia il fatto che i tribunali hanno dato causa vinta a M. H., tale ingiustizia è inerente ad ogni cambiamento di soluzione giuridica. L'applicazione della soluzione sostenuta nella sentenza del 15 dicembre 1998 al caso di specie ha avuto come unica conseguenza aumentare l'ammontare della garanzia che l'A.G.S. doveva anticipare; essa non ha rimesso in discussione i diritti che erano stati acquisiti in via definitiva da quella (Augusto c. Francia, n. 71665/01, CEDH 2007-... (estratto)).

76. Quanto alle conseguenze finanziarie che aveva comportato la decisione della Corte di cassazione, esse sono per forza di cose limitate al caso della ricorrente.

77. Inoltre, la Corte rileva che l'avvocato generale della Corte di cassazione ha esaminato, nel quadro della questione che ha dato luogo alla sentenza del 15 dicembre 1998, l'equilibrio degli interessi in gioco e ritenuto che le conseguenze finanziarie della modifica della giurisprudenza sarebbero moderate. Più precisamente, egli ha sottolineato che la giurisprudenza anteriore poteva condurre a gravi ineguaglianze tra dipendenti della stessa impresa in fase di procedura di fallimento in amministrazione controllata e che un capovolgimento della giurisprudenza, che avrebbe sicuramente effetto retroattivo, provocherebbe di certo un appesantimento dei compiti della A.G.S., ma che sarebbe contenuto in un ambito ristretto.

78. In conclusione, la Corte rileva che la ricorrente non ha subito alcun ostacolo ad uno dei diritti garantiti dall'art. 6, ossia l'accesso ad un tribunale, la certezza sullo stato di diritto al momento in cui le giurisdizioni interne si sono pronunciate, o il carattere equo della procedura. Pertanto, non c'è stata violazione dell'art. 6 § 1 della Convenzione.

PER QUESTI MOTIVI, LA CORTE, ALL'UNANIMITÀ,

1. Dichiara il ricorso ricevibile;

2. Ritiene che non c'è stata violazione dell'art. 6 § 1 della Convenzione.

Redatta in francese e notificata per iscritto il 18 dicembre 2008 ai sensi dell'art. 77 §§ 2 e 3 del Regolamento della Corte.

Claudia Westerdiek — Peer Lorenzen
Cancelliere — Presidente

Sentenza del 21 giugno 2007, sez. III, causa SCM SCANNER DE L'OUEST LYONNAIS c. Francia (in particolare, par. 18-34)

En l'affaire SCM Scanner de l'Ouest Lyonnais et autres c. France,

La Cour européenne des Droits de l'Homme (troisième section), siégeant en une chambre composée de :
MM. B.M. ZUPANCIC,président,
C. BIRSAN,
J.-P. COSTA,
Mmes E. FURA-SANDSTRÖM,
A. GYULUMYAN
M. DAVID THOR BJÖRGVINSSON
Mme I. BERRO-LEFEVRE, juges,
et de M. S. QUESADA, greffier de section,
Après en avoir délibéré en chambre du conseil le 31 mai 2007,
Rend l'arrêt que voici, adopté à cette date :

PROCÉDURE

1. A l'origine de l'affaire se trouve une requête (no 12106/03) dirigée contre la République française, et dont une société de droit français, la société civile de moyen SCM Scanner de l'Ouest Lyonnais, ainsi que ses membres, médecins dont les noms figurent en annexe (« les requérants »), ont saisi la Cour le 26 mars 2003 en vertu de l'article 34 de la Convention de sauvegarde des Droits de l'Homme et des Libertés fondamentales (« la Convention »).

2. Les requérants sont représentés par Me Gallat, avocat au barreau de Lyon. Le gouvernement français (« le Gouvernement ») est représenté par son agent, Mme E. Belliard, directrice des Affaires juridiques au ministère des Affaires étrangères.

3. Les requérants alléguaient en particulier une rupture de l'égalité des armes en raison de l'adoption d'une loi de validation tendant à modifier l'issue d'une procédure à laquelle l'Etat était partie.

4. Le 5 juillet 2005, la Cour a déclaré la requête partiellement irrecevable et a décidé de communiquer le grief tiré de l'article 6 § 1 de la Convention au Gouvernement. Se prévalant de l'article 29 § 3, elle a décidé que seraient examinés en même temps la recevabilité et le bien-fondé de l'affaire.

EN FAIT

I. LES CIRCONSTANCES DE L'ESPÈCE

5. Les requérants se composent de la SCM Scanner de l'Ouest Lyonnais ayant son siège social à Lyon, et de ses membres, médecins électroradiologistes, résidant tous à Lyon.

6. Ceux-ci exploitaient ensemble un appareil de type scanner, installé sur le site d'une clinique située à Lyon.

7. Les actes de scanographie sont pris en charge par la Sécurité sociale. A cette fin, ils doivent être cotés, c'est-à-dire mentionnés sur une feuille de soins sous la forme d'une cotation définie par la nomenclature générale des actes professionnels (NGAP). Cette cotation résultait, pour la scanographie, d'un arrêté ministériel du 16 mars 1978, qui définissait un acte coté « Z 90 ». La même cotation s'est appliquée pendant plus de douze ans.

8. Par un arrêté ministériel du 11 juillet 1991, le ministre des Affaires sociales et de l'Intégration abrogea la cotation « Z 90 ». Une lettre interministérielle du même jour instaura provisoirement en lieu et place une cotation « Z 19 » traduisant une réduction sensible du montant de l'honoraire, complétée par la cotation d'un forfait technique destiné à couvrir l'amortissement de l'appareil. Ce système de double cotation, dont la rémunération totale était inférieure de 30 euros à celle correspondant à la cotation « Z 90 », fut renouvelée par les arrêtés des 1er février 1993, 14 février 1994, 22 février 1995 et 9 avril 1996.

9. L'ensemble du dispositif fut déféré à la censure du Conseil d'Etat par les requérants (en ce qui concerne l'arrêté du 11 juillet 1991) ainsi que par d'autres justiciables (s'agissant de la lettre interministérielle du 11 juillet 1991).

10. Par un arrêt du 4 mars 1996, le Conseil d'Etat annula l'arrêté du 11 juillet 1991 au motif que l'un de ses signataires au moins n'avait pas compétence pour le prendre. Saisi par d'autres plaignants, il annula également, par un arrêt du même jour, la lettre précitée pour illégalité au motif que les actes de scanographie couramment pratiqués ne pouvaient donner lieu à une cotation provisoire. Saisi enfin par les requérants d'une question préjudicielle dans le cadre d'une procédure devant les juridictions de l'ordre judiciaire, le Conseil d'Etat annula, dans un arrêt du 20 novembre 2000, les arrêtés précités de 1993, 1994, 1995 et 1996 renouvelant la cotation litigieuse.

11. Postérieurement aux arrêts du Conseil d'Etat du 4 mars 1996, les requérants saisirent les caisses d'assurance maladie de demandes tendant au paiement d'un complément de rémunération, découlant du rétablissement de la cotation Z 90, sur une période comprise entre le 6 septembre 1991 – date de prise d'effet de la substitution illégale de cotation – et le 28 février 1997 – date d'entrée en vigueur d'un nouveau régime d'assurance maladie, soit une somme évaluée au total de 6 815 157 FRF (soit environ 1 038 895 EUR). En octobre 1996, suite aux réponses négatives des caisses d'assurance maladie, les requérants saisirent les commissions de recours amiable concernées, lesquelles confirmèrent les décisions de refus, soit implicitement, soit expressément en affirmant qu'il convenait de surseoir à statuer au paiement dans l'attente du dispositif de régularisation sur le point d'être mis en place par la caisse nationale d'assurance maladie.

12. Parallèlement, à l'initiative du Gouvernement, fut introduit dans la loi no 97-1164 du 19 décembre 1997 portant loi de financement de la Sécurité sociale pour l'année 1998, un article 27, lequel validait les actes pris sur le fondement de l'arrêté du 11 juillet 1991, de la lettre interministérielle du 11 juillet 1991 ainsi que des arrêtés subséquents, sous réserve des décisions de justice passées en force de chose jugée. Cette disposition avait été déclarée conforme à la Constitution par une décision du Conseil constitutionnel no 97-393 DC du 18 décembre 1997.

13. Les requérants reprirent alors leurs demandes de remboursement et saisirent le tribunal des affaires de sécurité sociale de Lyon de plusieurs recours. Par des jugements rendu le 18 novembre 1998, le tribunal débouta les requérants de leurs demandes ; ces jugements furent tous confirmés par des arrêts de la cour d'appel de Lyon datés du 25 janvier 2000, au motif que la mesure de validation législative les privait de tout droit à remboursement. Parmi les nombreuses décisions rendues en appel, figure celle de la cour d'appel de Lyon du 25 janvier 2000 (arrêt no 199901695) ; dans un litige opposant les requérants à la Mutuelle générale de l'éducation nationale de Villeurbanne (MGEN), la cour d'appel de Lyon les débouta de leurs demandes de remboursement dans les termes suivants :

« Sur l'application de l'article 27 de la loi du 19 décembre 1997

(...) Attendu qu'il n'appartient évidemment pas aux tribunaux de l'ordre judiciaire d'écarter l'application des actes administratifs postérieurs au 11 juillet 1991 au seul motif qu'ils seraient entachés du même vice, à savoir que les actes de scanographie ne relevaient plus du champ d'application des cotations provisoires, une telle décision n'entrant pas dans leur compétence. (...).

Attendu que cette validation réserve expressément les décisions de justice passées en force de chose jugée, et qu'il est constant qu'aucune décision judiciaire n'était intervenue entre les parties en cause lors de la promulgation de la loi.

Qu'en outre, il n'y a pas lieu pour le juge judiciaire d'effectuer un contrôle de légalité interne sur le texte législatif pour savoir si, comme l'affirment les appelants, le législateur a outrepassé ses pouvoirs en validant des actes privés, étant observé d'une part que le Conseil constitutionnel après une analyse de fond des divers arguments soulevés devant lui, a déclaré l'article 27 précité non contraire à la constitution par décision du 18 décembre 1997, et d'autre part que les dispositions en cause, de portée générale, ont pour objet de valider les effets des actes administratifs annulés ou

susceptibles de l'être, le parlement décidant ainsi de couvrir l'illégalité des textes administratifs, avec toutes les conséquences en découlant.

Qu'enfin la validation législative des actes pris au titre de la période en cause, leur confère un caractère définitif qui interdit de remettre en cause les facturations et paiements effectués et qui met ainsi obstacle à toute réclamation et à tout versement d'une somme supplémentaire quelconque de même qu'à toute répétition de la part des caisses. Que sauf à en dénaturer l'esprit et la lettre, l'article 27 de la loi produit donc un effet libératoire à l'égard des caisses qui s'oppose à toute réclamation des appelants.

Sur la compatibilité de la loi à la Convention européenne des droits de l'homme et aux engagements internationaux

Attendu que l'application de l'article 27 de la loi du 19 décembre 1997 ne peut être écartée que dans la mesure où ses dispositions contreviennent à des dispositions normatives bénéficiant d'une autorité supra législative.

Qu'en outre, il convient de rappeler que les droits reconnus par la CEDH sont susceptibles de supporter certaines limitations dès lors que ces restrictions tendent à un but légitime et qu'il existe un rapport raisonnable de proportionnalité entre les moyens employés et le but visé.

Attendu que le principe de non rétroactivité ne s'impose qu'en matière pénale et que le législateur peut, pour des raisons d'intérêt général, modifier rétroactivement les textes applicables dans le domaine de la sécurité sociale et de la santé publique, sous réserve de ne pas porter atteinte au principe de l'autorité de la chose jugée.

Attendu que la loi en cause tendait à valider les effets d'une réglementation antérieure, qu'elle n'avait pas pour objet ou pour effet de remettre en cause une situation individuelle judiciairement consacrée.

Qu'elle avait pour but de suppléer à la disparition d'un arrêté et d'une circulaire connexe fixant les modalités de cotation des actes de scanographie et de régler ainsi les situations nées au cours de la période litigieuse.

(...) Attendu qu'à défaut d'adoption des dispositions de l'article 27 l'annulation de plusieurs actes administratifs aurait entraîné la remise en cause d'un nombre important de règlements afférents à une période pour laquelle les organismes de sécurité sociale ne détenaient plus les dossiers, aurait généré le développement d'actions contentieuses et, compte tenu des sommes en jeu, aurait été susceptible d'induire des conséquences préjudiciables à l'équilibre général des régimes de protection sociale dont se préoccupait le législateur dans le cadre de la loi du 19 décembre 1997.

Qu'ainsi la mesure revêtait incontestablement un caractère d'utilité publique. Que par ailleurs la preuve n'est pas rapportée de l'existence d'une disproportion entre la réduction de financement imposée aux appelants et l'intérêt général que représente l'équilibre financier de l'ensemble des régimes de protection sociale (...) »

14. Par un arrêt (no 2826) du 26 septembre 2002, la Cour de cassation rejeta le pourvoi des requérants formé contre l'arrêt d'appel susmentionné :

« Mais attendu que l'article 27 de la loi [précitée] a validé, sous réserve des décisions de justice passées en force de chose jugée, les décisions de refus de remboursement prises sur le fondement de l'arrêté du 11 juillet 1991, annulé par le Conseil d'Etat, qui a abrogé l'arrêté du 16 mars 1978, fixant à titre provisoire à Z 90 la cotation des actes de scanographie ; que ce texte, de nature législative, adopté antérieurement à l'introduction du recours de la SCM et des médecins membres de la société civile, qui ne constitue pas une intervention de l'Etat dans une procédure l'opposant à des parties, qui ne remet pas en cause des décisions de justice irrévocables et qui ne porte atteinte ni au droit au respect des biens, ni au droit de propriété, n'est contraire ni aux dispositions des articles 6-1 et 13 de la Convention, ni à celles de l'article 1er du protocole additionnel ; qu'ainsi la cotation Z 90 n'était plus applicable après le 1er août 1991 ; qu'il résulte par ailleurs de l'annulation par le Conseil d'Etat des arrêtés des 1er février 1993, 14 février 1994, 22 février 1995 et 9 avril 1996, portant cotation à titre provisoire, pour une durée d'un an, des actes de scanographie, que le remboursement de ces actes, par application de la cotation Z 19 déterminée par ces arrêtés, n'était pas autorisé ;

D'où il suit qu'abstraction faite des motifs inopérants critiqués par les moyens la décision attaquée se trouve légalement justifiée par ces motifs de pur droit ; .(...) »

15. Saisie de multiples pourvois formés à l'encontre de des décisions de rejet précitées, la Cour de cassation a rendu, le 26 septembre 2002, vingt-huit autres arrêts formulés de manière identique.

II. LE DROIT ET LA PRATIQUE INTERNES PERTINENTS

16. L'article 27 de la loi no 97-1164 du 19 décembre 1997 de financement de la sécurité sociale pour 1998 est ainsi rédigé :

« Sont validés, sous réserve de décisions de justice passées en force de chose jugée, les actes pris sur le fondement :

- de l'arrêté du 11 juillet 1991 modifiant la Nomenclature générale des actes professionnels et portant abrogation des dispositions de l'arrêté du 16 mars 1978 complétant la Nomenclature générale des actes professionnels des médecins, chirurgiens-dentistes, sages-femmes et auxiliaires médicaux ;

- de la lettre interministérielle en date du 11 juillet 1991 portant cotation provisoire des actes de scanographie ;

- de la circulaire interministérielle en date du 30 mars 1992 portant cotation provisoire des actes de scanographie ;

- de l'arrêté du 1er février 1993 modifié, modifiant la Nomenclature générale des actes professionnels des médecins, chirurgiens-dentistes, sages-femmes et auxiliaires médicaux et portant cotation provisoire des actes de scanographie ;

- de l'arrêté du 14 février 1994 modifié, modifiant la Nomenclature générale des actes professionnels des médecins, chirurgiens-dentistes, sages-femmes et auxiliaires médicaux et portant cotation provisoire des actes de scanographie ;

- de l'arrêté du 22 février 1995 modifié, modifiant la Nomenclature générale des actes professionnels des médecins, chirurgiens-dentistes, sages-femmes et auxiliaires médicaux et portant cotation provisoire des actes de scanographie,

en tant que leur légalité serait contestée pour un motif tiré de l'incompétence des auteurs de ces arrêtés et circulaires ministérielles. »

17. Le Conseil Constitutionnel, au sujet de la loi de financement de la sécurité sociale pour 1998, rendit une décision no 97-393 DC du 18 décembre 1997, qui se lit comme suit :

« 45. Considérant que cet article valide, sous réserve des décisions passées en force de chose jugée, les actes pris sur le fondement de décisions administratives relatives à la cotation des actes de scanographie, en tant que leur légalité serait contestée pour un motif tiré de l'incompétence de leurs auteurs ;

46. Considérant que, par arrêt du 4 mars 1996, le Conseil d'Etat a annulé, comme entaché d'incompétence, l'arrêté du 11 juillet 1991, modifiant la nomenclature générale des actes professionnels ; que, par décision du même jour, il a annulé la circulaire du 11 juillet 1991, portant cotation provisoire des actes de scanographie, au motif qu'à la date de sa publication, ces actes ne pouvaient plus être regardés comme relevant du champ d'application des cotations provisoires, cette technique étant devenue de pratique courante ; que les autres actes administratifs mentionnés par l'article 27 sont entachés de l'une des incompétences ainsi censurées par le Conseil d'Etat ;

47. Considérant que les députés requérants soutiennent que la mesure de validation figurant à l'article 27 n'a pas sa place dans une loi de financement de la sécurité sociale et qu'elle est, en outre, par son contenu, inconstitutionnelle ;

48. Considérant, en premier lieu, que les professionnels intéressés pourraient, en excipant des incompétences relevées par le Conseil d'Etat dans ses décisions précitées, réclamer le paiement de la différence entre l'ancienne cotation et celle résultant des actes partiellement validés ; qu'eu égard à l'incidence financière de ce paiement, la mesure de validation critiquée concourt de façon significative à l'équilibre financier des régimes obligatoires de la sécurité sociale ; que, dès lors, elle est au nombre de celles qui, en vertu des dispositions du III de l'article L.O. 111-3 du code de la sécurité sociale, peuvent figurer dans une loi de financement de la sécurité sociale ;

49. Considérant, en second lieu, que, si le législateur peut, comme lui seul est habilité à le faire, valider un acte administratif dans un but d'intérêt général ou lié à une exigence de valeur constitutionnelle, c'est sous réserve du respect des décisions de justice ayant force de chose jugée et du principe de non-rétroactivité des peines et des sanctions ; qu'en outre, l'acte validé ne doit contrevenir à aucune règle, ni à aucun principe de valeur constitutionnelle, sauf à ce que le législateur, le cas échéant sous le contrôle du Conseil constitutionnel, concilie entre elles les différentes exigences constitutionnelles en cause ;

50. Considérant, en l'espèce, que le législateur a entendu prévenir le développement de nombreuses contestations dont l'aboutissement aurait sensiblement aggravé le déséquilibre de la branche santé des régimes obligatoires de sécurité sociale ; que, par ailleurs, la validation ne concerne pas des actes contraires à une règle ou à un principe de valeur constitutionnelle et ne porte atteinte ni au respect des décisions de justice passées en force de chose jugée, ni au principe de non rétroactivité des peines et des sanctions ; que, par suite, le législateur pouvait prendre la mesure de validation critiquée ; (...) »

EN DROIT

I. SUR LA VIOLATION ALLÉGUÉE DE L'ARTICLE 6 § 1 DE LA CONVENTION

18. Les requérants estiment que l'adoption par le législateur de l'article 27 de la loi du 19 décembre 1997 est contraire au principe de la prééminence du droit et au droit à un procès équitable garantis par l'article 6 § 1 de la Convention dont les dispositions pertinentes se lisent ainsi :

« Toute personne a droit à ce que sa cause soit entendue équitablement (...) par un tribunal (...), qui décidera (...) des contestations sur ses droits et obligations de caractère civil (...) »

19. Le Gouvernement s'oppose à cette thèse.

A. Sur la recevabilité

20. La Cour constate que la requête n'est pas manifestement mal fondée au sens de l'article 35 § 3 de la Convention. Elle relève par ailleurs que celle-ci ne se heurte à aucun autre motif d'irrecevabilité. Il convient donc de la déclarer recevable.

B. Sur le fond

1. Thèses des parties

21. Le Gouvernement rappelle tout d'abord les grandes lignes qui se dégagent selon lui de la jurisprudence de la Cour en matière de validation législative, citant les affaires Raffineries grecques Stran et Stratis Andreadis c. Grèce (arrêt du 9 décembre 1994), Papageorgiou c. Grèce (arrêt du 22 octobre 1997, Recueil des arrêts et décisions 1997-VI), National & Provincial Building Society, Leeds Permanent Building Society et Yorkshire Building Society c. Royaume-Uni (arrêt du 23 octobre 1997), Zielinski et Pradal & Gonzalez et autres c. France ([GC], arrêt du 28 octobre 1999) et Forrer-Niedenthal c. Allemagne (arrêt du 20 février 2003), pour considérer que la Cour prend en compte dans son appréciation tant l'effet de la validation législative que la méthode et le moment de son adoption. A la lumière de ces affaires, il estime que l'adoption de l'article 27 de la loi du 19 décembre 1997 n'a pas porté atteinte à l'équité du procès au sens de l'article 6 § 1 de la Convention.

22. Il est d'avis que l'ingérence du législateur dans l'administration de la justice était justifiée par « d'impérieux motifs d'intérêt général ». Contrairement à ce que soutiennent les requérants, il considère que l'objectif pour le législateur n'était pas de faire échec aux procédures en cours mais d'intervenir pour ne pas aggraver le déséquilibre financier de la branche santé des régimes obligatoires de sécurité sociale, et souligne que ce motif a été clairement rappelé par le Conseil constitutionnel dans sa décision du 18 décembre 1997. Il estime qu'un tel objectif constitue, en l'espèce, un « impérieux motif d'intérêt général », au motif qu'en l'absence d'intervention de la loi de validation litigieuse, l'annulation par le Conseil d'Etat des actes administratifs relatifs à la nouvelle cotation des actes de scanographie aurait généré de nombreuses actions contentieuses afin de verser un complément de rémunération pour la période comprise entre le 6 septembre 1991, date de la prise d'effet de la substitution illégale de cotation, et le 28 février 1997, date d'entrée en vigueur d'un nouveau régime d'assurance maladie. Le Gouvernement soutient que le risque financier était à la fois réel et conséquent. Il souligne que les seuls requérants ont réclamé le versement d'une somme de 6 815 157 FRF, et qu'à l'échelle nationale, l'incidence du surcoût sur l'équilibre financier de la sécurité sociale avait été évalué à 660 000 000 FRF (soit environ 100 609 756 EUR) dans l'exposé des motifs de l'article 27 de la loi du 19 décembre 1997. En outre, il rappelle que le contexte financier actuel de la branche santé des régimes obligatoires de sécurité sociale français est extrêmement dégradé, à tel point que de profondes réformes ont dû être engagées depuis plusieurs années, le retour à l'équilibre financier étant devenu une priorité, et que dans ces conditions, l'intervention du législateur consistait à préserver la bonne organisation du système de santé français et donc la protection sociale des populations.

23. Par ailleurs, le Gouvernement observe que la loi litigieuse a été adoptée alors qu'aucune décision judiciaire n'était intervenue et avant même la tenue d'une audience contradictoire. Or, la Cour, dans sa jurisprudence, tient compte dans son appréciation du moment où intervient la loi de validation (Zielinski et Pradal & Gonzalez et autres précité).

24. Enfin, le Gouvernement considère que l'article 27 de la loi en cause respecte le principe de proportionnalité devant exister entre les moyens employés et le but visé, soulignant le caractère limité du champ d'application de la loi de validation en raison, d'une part, de l'exclusion des décisions de justice passées en force de chose jugée et, d'autre part, de ce que les actes pris sur le fondement des décisions administratives relatives à la cotation des actes de scanographie ne sont réputés réguliers qu'en tant que leur légalité serait contestée pour un motif tiré de l'incompétence de leurs auteurs.

25. Les requérants, sur l'ingérence du pouvoir législatif dans l'administration de la justice, estiment tout d'abord que l'adoption de l'article litigieux caractérise une immixtion du pouvoir législatif dans la bonne administration de la justice dans le but d'influer sur le dénouement judiciaire d'un litige.

Contrairement au Gouvernement qui soutient que l'intervention du législateur n'avait pas eu pour but de s'immiscer dans des relations contractuelles préexistantes ni dans l'administration de la justice, ils rappellent que c'est en vertu de leurs relations contractuelles avec les organismes d'assurance maladie que les requérants ont sollicité le paiement d'un complément de rémunération des actes médicaux qu'ils avaient réalisés. Ils soulignent que, dans la mesure où la disposition législative en cause était destinée à prévenir les contentieux portant sur le même objet du litige auquel les requérants étaient parties, il ne saurait être soutenu que l'intervention du législateur n'avait pas pour but d'influer sur l'issue des procédures contentieuses. S'agissant de l'avancement des procédures et du moment où est intervenue la loi de validation, les requérants font valoir, en premier lieu, que l'ingérence en cours de procédure est avérée dès lors que celle-ci est engagée ; or, la phase précontentieuse de la procédure, qui constituait en l'espèce une condition sine qua non pour déclencher la phase judiciaire, était née lorsque la loi du 19 décembre 1997 a été adoptée. En second lieu, les requérants considèrent qu'il n'était pas nécessaire que des décisions de justice interviennent pour savoir que l'annulation d'une cotation illégale faisait revivre la précédente cotation et engendrait dès lors un droit à récupération, puisque sans la loi litigieuse l'obligation de paiement ne faisait aucun doute, le résultat étant éminemment prévisible.

26. Sur l'existence d'impérieux motifs d'intérêt général, les requérants estiment que si le souci de ne pas aggraver de manière sensible le déséquilibre financier du régime obligatoire de l'assurance maladie puisse constituer un motif impérieux d'intérêt général, encore faut-il que la législation en cause soit à la fois adaptée et proportionnée à l'objectif poursuivi. Or, ils observent qu'en 1998, selon le rapport annuel de la Cour des comptes au Parlement sur la sécurité sociale de septembre 1999, les dépenses de santé du régime sus-énoncé se sont élevées à 742,7 milliards de francs (soit 113 216 463 414 euros), et que le solde de l'exercice en encaissement-décaissement (correspondant à la variation du fonds de roulement) fait apparaître pour cette même année un déficit de 15,9 milliards de francs (2 423 780 487 euros) selon le rapport de la commission des comptes de la sécurité sociale de mai 2000. Au regard de ces chiffres l'impact des demandes de complément de remuneration empêchées par la validation législative sur le budget de l'assurance maladie apparaissait donc négligeable. Sur ce point, même à supposer exacte la somme de 660 millions de francs correspondant à l'incidence sur l'équilibre financier de la sécurité sociale évalué par le Gouvernement, les requérant soulignent que ce chiffre aurait représenté une augmentation inférieure à 0,09 % des dépenses d'assurance maladie sur l'année 1998, augmentant le déficit de 4,1 %.

27. En outre, les requérants soutiennent que la disposition législative en cause ne respecte pas le principe de proportionnalité, dans la mesure où, à la date de sa parution, elle n'avait pas exclu de son champ d'application les cas ayant donné lieu à l'engagement de contentieux, comme en l'espèce. Or, dès 1991, les requérants avaient formé une requête en annulation ayant fait l'objet en 1996 de l'arrêt du Conseil d'Etat et qu'ils ne l'avaient fait que dans le seul but de pouvoir ensuite demander un complément de rémunération. Ils soutiennent enfin que lorsque la loi de validation a été publiée, ils étaient à l'évidence les seuls à avoir engagé des procédures en paiement, et en déduisent que le montant réclamé de 6 815 157 francs ne représentait que 1,03 % des 660 millions de francs de risque de pertes alléguées par le Gouvernement.

2. Appréciation de la Cour

28. La Cour réaffirme que si, en principe, le pouvoir législatif n'est pas empêché de réglementer en matière civile, par de nouvelles dispositions à portée rétroactive, des droits découlant de lois en vigueur, le principe de la prééminence du droit et la notion de procès équitable consacrés par l'article 6 s'opposent, sauf pour d'impérieux motifs d'intérêt général, à l'ingérence du pouvoir législatif dans l'administration de la justice dans le but d'influer sur le dénouement judiciaire du

litige (arrêts Raffineries grecques Stran et Stratis Andreadis précité, série A no 301-B, § 49 ; Zielinski et Pradal & Gonzalez et autres précité, CEDH 1999-VII, § 57). La Cour rappelle en outre que l'exigence de l'égalité des armes implique l'obligation d'offrir à chaque partie une possibilité raisonnable de présenter sa cause dans des conditions qui ne la placent pas dans une situation de net désavantage par rapport à son adversaire (voir notamment les arrêts Dombo Beheer B.V. c. Pays-Bas du 27 octobre 1993, série A no 274, § 33, et Raffineries grecques Stran et Stratis Andreadis, précité, § 46).

29. En l'espèce, si l'article 27 de la loi no 97-1164 du 19 décembre 1997 portant loi de financement de la sécurité sociale pour l'année 1998 excluait expressément de son champ d'application les décisions de justice passées en force de chose jugée, il fixait définitivement les termes du débat et ce, de manière rétroactive s'agissant des recours pendants devant les juridictions compétentes au moment de l'entrée en vigueur de la disposition litigieuse. A cet égard, la Cour relève que, conformément au droit national, les requérants avaient engagé une phase précontentieuse, dite administrative, devant plusieurs commissions de recours amiable dès octobre 1996 ; or, cette réclamation préalable et obligatoire auprès de l'administration est une phase indispensable en ce qui concerne le contentieux général de la sécurité sociale. En conséquence, dès lors que cette phase administrative a constitué une condition sine qua non pour déclencher la phase judiciaire proprement dite, la Cour considère, contrairement à ce qu'a retenu la Cour de cassation dans ses arrêts du 26 septembre 2002, que la procédure était déjà née lorsque la loi du 19 décembre 1997 fut adoptée, et que le litige portait précisément sur le droit au paiement d'un complément de rémunération, objet de la contestation (voir OGIS-Institut Stanislas, OGEC Saint-Pie X et Blanche de Castille et autres c. France, nos 42219/98 et 54563/00, § 62, 27 mai 2004, voir également, mutatis mutandis, Duclos c. France, arrêt du 17 décembre 1996, Recueil 1996-VI, § 54, et Kadri c. France (déc.), no 41715/98, 26 septembre 2000).

30. En définitive, l'article 27 de la loi du 19 décembre 1997 a donc permis d'entériner la position adoptée par l'Etat dans le cadre de procédures pendantes, en réglant le fond du litige et rendant vaine toute continuation des procédures. Le Gouvernement, sur ce point, ne conteste d'ailleurs pas l'existence d'une ingérence dans le droit des requérants à un procès équitable, au sens de l'article 6 § 1 de la Convention. Dans ces conditions, la Cour estime que l'on ne saurait parler d'égalité des armes entre les deux parties.

31. Quant aux « impérieux motifs d'intérêt général », évoqués par le Gouvernement, ils résulteraient uniquement de la nécessité de sauvegarder l'équilibre financier de la branche santé des régimes obligatoires de sécurité sociale. La Cour note que le Gouvernement avance, outre des arguments généraux relatifs aux difficultés financières rencontrées par le système de sécurité sociale français, le chiffre de six cent soixante millions d'euros correspondant, selon lui, aux économies réalisées grâce à l'adoption de la validation législative litigieuse. Or, la Cour rappelle qu'en principe un motif financier ne permet pas à lui seul de justifier une telle intervention législative (voir, notamment, Zielinski et Pradal & Gonzalez et autres, précité, § 59). Elle relève surtout que la corrélation entre le risque financier invoqué et les procédures pendantes dont l'issue a été déterminée par la loi de validation n'est nullement établi. En effet, le Gouvernement ne fournit aucun renseignement de quelque nature que ce soit quant au nombre de recours en annulation pendants devant la juridiction administrative, ni aucune évaluation concrète, et partant crédible, du coût virtuel de l'issue favorable de ces procédures.

32. La Cour observe enfin que l'exclusion des procédures pendantes du champ d'application de l'article 27 de la loi du 19 décembre 1997 n'aurait pas empêché d'atteindre l'objectif poursuivi, à savoir sécuriser pour l'avenir la légalité des arrêtés ministériels en cause, tout en respectant l'égalité des armes pour les instances en cours (voir, sur ce point, Chiesi SA c. France, no 954/05, § 40, 16 janvier 2007).

33. Aucun des arguments présentés par le Gouvernement ne convainc donc la Cour de la légitimité et de la proportionnalité de l'ingérence. Compte tenu de ce qui précède, l'intervention législative litigieuse, qui réglait définitivement, de manière rétroactive, le fond du litige opposant les requérants à l'Etat devant les juridictions internes, n'était pas justifiée par d'impérieux motifs d'intérêt général.

34. Partant, la Cour conclut à la violation de l'article 6 § 1 de la Convention.

II. SUR L'APPLICATION DE L'ARTICLE 41 DE LA CONVENTION

35. 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. »

A. Dommage

36. Les requérants réclament 1 038 969,99 EUR au titre du préjudice matériel subi. Ils considèrent qu'il est certain que la validation législative en cause les a privés, conformément à son objectif, de la possibilité d'obtenir le paiement d'un complément de rémunération dont le montant s'élève à 1 038 969,99 EUR. A l'appui de leur prétention, ils fournissent un tableau récapitulatif comprenant le nombre d'actes de scanographie réalisés par année, du 5 septembre 1991 au 28 février 1997, ainsi que la différence de remboursement pour l'ensemble desdits actes entre l'ancienne cotation Z 90 et la nouvelle cotation Z 19, dont le montant équivaut à la somme réclamée. Ils expliquent que la demande de satisfaction équitable tend à voir compenser le préjudice matériel résultant de l'impossibilité dans laquelle ils se sont trouvés d'obtenir des juridictions nationales une condamnation des organismes d'assurance maladie au paiement de cette somme.

37. Le Gouvernement considère cette demande excessive et non fondée. Il soutient que les requérants ne justifient pas du montant du préjudice matériel invoqué en se bornant à exposer une simple estimation, non accompagnée de pièces justificative et dépourvue de toute explication. En outre, il fait valoir que rien ne permet d'affirmer qu'ils auraient obtenu la somme demandée devant les juridictions nationales, si la loi de validation n'était pas intervenue. Il estime, en tout état de cause, que le constat de violation de cette disposition constituerait une satisfaction équitable adéquate au titre des préjudices matériel et moral.

38. La Cour relève que la seule base à retenir pour l'octroi d'une satisfaction équitable réside en l'espèce dans le fait que les requérants n'ont pu jouir des garanties de l'article 6 § 1 de la Convention. A cet égard, la Cour rappelle qu'elle ne saurait spéculer sur ce qu'eût été l'issue du procès dans le cas contraire, qui plus est lorsque, comme en l'espèce, les requérants n'ont bénéficié d'aucune décision interne rendue en leur faveur (voir, a contrario, Arnolin et autres c. France, nos 20127/03, 31795/03, 35937/03, 2185/04, 4208/04, 12654/04, 15466/04, 15612/04, 27549/04, 27552/04, 27554/04, 27560/04, 27566/04, 27572/04, 27586/04, 27588/04, 27593/04, 27599/04, 27602/04, 27605/04, 27611/04, 27615/04, 27632/04, 34409/04 et 12176/05, § 87, 9 janvier 2007). Cependant, elle n'estime pas déraisonnable de penser que les intéressés ont néanmoins subi une perte de chances réelles (voir Zielinski et Pradal & Gonzalez et autres précité, § 79 ; voir aussi Cabourdin c. France, no 60796/00, § 45, 11 avril 2006). A cela s'ajoute un préjudice moral auquel le constat de violation figurant dans le présent arrêt ne suffit pas à remédier. Statuant en équité, comme le veut l'article 41, elle alloue 7 000 EUR aux requérants conjointement, toutes causes de préjudice confondues.

B. Frais et dépens

39. Les requérants demandent également 10 000 EUR pour les frais et dépens encourus devant la Cour. Ils ne produisent cependant qu'une facture, établi par leur conseil et datée du 27 mars 2003, relative à la saisine de la Cour, d'un montant de 5 980 EUR.

40. Le Gouvernement, au vu de l'unique facture produite, propose d'allouer aux requérants conjointement la somme de 5 980 EUR.

41. La Cour rappelle qu'un requérant ne peut obtenir le remboursement de ses frais et dépens encourus devant elle que dans la mesure où se trouvent établis leur réalité, leur nécessité et le caractère raisonnable de leur taux (voir, par exemple, Kress c. France [GC], no 39594/98, § 102, CEDH 2001). En l'espèce, la Cour constate que la somme réclamée par les requérants au titre des dépens encourus devant la Cour n'est justifiée qu'au regard de l'unique facture produite susmentionnée. Dans ces conditions, la Cour, statuant en équité comme le veut l'article 41, décide d'accorder à ce titre aux requérants conjointement la somme de 5 980 EUR.

C. Intérêts moratoires

42. 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. Déclare le restant de la requête recevable ;

2. Dit qu'il y a eu violation de l'article 6 § 1 de la Convention ;

3. Dit

a) que l'Etat défendeur doit verser aux requérants conjointement, dans les trois mois à compter du jour où l'arrêt sera devenu définitif conformément à l'article 44 § 2 de la Convention, 7 000 EUR (sept mille euros) au titre du dommage matériel et moral, ainsi que 5 980 EUR (cinq mille neuf cent quatre-vingts euros) pour les frais et dépens, plus tout montant pouvant être dû à titre d'impôt ;

b) qu'à compter de l'expiration dudit délai et jusqu'au versement, ce montant sera à majorer d'un intérêt simple à un taux égal à celui de la facilité de prêt marginal de la Banque centrale européenne applicable pendant cette période, augmenté de trois points de pourcentage ;

4. Rejette la demande de satisfaction équitable pour le surplus.

Fait en français, puis communiqué par écrit le 21 juin 2007 en application de l'article 77 §§ 2 et 3 du règlement.

Santiago QUESADA Boštjan M. ZUPANCIC Greffier Président

B. PRONUNCE RESE NEI CONFRONTI DI ALTRI PAESI

<u>Retroattività della legge “civile”</u>

Art. 6 § 1 della Convenzione (equo processo)

<u>In materia di responsabilità civile dello Stato</u>

Estratto (par. 24-55) della sentenza dell'11 dicembre 2012, sez. I, causa TARBUK c. Croazia

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

24. The applicant complained that he had not had a fair trial as provided for in Article 6 § 1 of the Convention, which reads as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. Admissibility

1. The parties' arguments

25. The Government submitted that the applicant had lodged his application with the Court outside the six-month time-limit. In the Government's view, this time-limit had started to run from when the judgment of the Supreme Court concerning the applicant's appeal on points of law was served on the applicant, namely on 25 October 2007, and not from the time of service of the decision of the Constitutional Court, which the applicant relied on when lodging his application with the Court on 14 May 2010. This was because the applicant had failed to expressly rely on the provision of the Constitution guaranteeing the right to a fair hearing when lodging his constitutional complaint.

26. The Government also argued that the applicant should have lodged a civil action for damages against the State if he had considered that he had sustained any damage as a result of the illegal or irregular actions of a judge in the civil proceedings.

27. The applicant argued that he had complied with the procedure provided for in the domestic law in that he had lodged his complaints about lack of fairness in the civil proceedings with the Constitutional Court, asking that court to quash the decisions of the lower courts.

2. The Court's assessment

28. The Court reiterates that the requirements contained in Article 35 § 1 concerning the exhaustion of domestic remedies and the six-month period are closely interrelated, since not only are they combined in the same Article, but they are also expressed in a single sentence whose grammatical construction implies such correlation (see *Hatjianastasiou v. Greece*, no. 12945/87, Commission decision of 4 April 1990, and *Berdzenishvili v. Russia* (dec.), no. 31697/03, ECHR 2004-II (extracts)).

29. As a rule, the six-month period runs from the date of the final decision in the process of exhaustion of domestic remedies. Article 35 § 1 cannot be interpreted in a manner which would require an applicant to inform the Court of his complaint before his position in connection with the matter has been finally settled at the domestic level. In this regard, the Court has already held that in order to comply with the principle of subsidiarity, before bringing

complaints against Croatia to the Court applicants are in principle required to afford the Croatian Constitutional Court a possibility of remedying their situation (see *Orlić v. Croatia*, no. 48833/07, § 46, 21 June 2011).

30. The Court notes that in the course of the domestic proceedings the applicant first lodged an appeal with the Zagreb County Court against the first-instance judgment of the Zagreb Municipal Court dismissing his civil action for damages, complaining about the retroactive application of the relevant law. When the Zagreb County Court dismissed his appeal, the applicant formulated the same complaints in his appeal on points of law before the Supreme Court and then in his constitutional complaint before the Constitutional Court. In his constitutional complaint the applicant complained that the retroactive application of Article 484(a) of the Code of Criminal Procedure to his civil action, which had been lodged one year before that provision had come into force, had extinguished his right to compensation, and asked the Constitutional Court to quash all the decisions of the lower courts.

31. As to the Government's arguments that in his constitutional complaint the applicant had failed to expressly rely on the provision of the Constitution guaranteeing the right to a fair hearing, the Court reiterates that the requirement to exhaust domestic remedies means that a complaint submitted to the Court must first have been made to the appropriate national courts, at least in substance, in accordance with the formal requirements of domestic law and within the prescribed time-limits (see, among many others, *Gluhaković v. Croatia*, no. 21188/09, § 42, 12 April 2011, and *Saliba and Others v. Malta*, no. 20287/10, § 73, 22 November 2011).

32. Therefore, the Court considers that, by complaining about the retroactive application of the relevant law throughout the domestic proceedings, the applicant made normal use of the domestic remedies, as required by Article 35 § 1 of the Convention, before bringing the same complaints before the Court. Consequently, in lodging his application with the Court within the six-month time-limit after the decision of the Constitutional Court was served on him, the applicant complied with the six-month rule for lodging his application with the Court.

33. As to the Government's arguments that the applicant could have lodged a civil action for damages against the State on the ground of illegal or irregular actions on the part of the judge in the civil proceedings, the Court considers that complaints about a lack of fairness in proceedings are best addressed in the proceedings in connection with which such complaints are raised. Therefore, since he had pursued the relevant remedies in the course of the civil proceedings, it was not necessary for the applicant to lodge an additional civil action for damages against the State.

34. Against the above background, the Court considers that the Government's objections must be rejected.

35. The Court considers further that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' arguments

36. The applicant contended that the manner in which the national courts had applied the laws regulating the right to compensation in respect of detention to his case had been unfair. He argued that the Constitution and the relevant law, as in force at the time of his release from detention, had provided a right to compensation to all persons who had been detained but against whom the criminal proceedings had been discontinued. There had been no reason to apply these principles differently in his case and the fact that he had been granted an amnesty had been of no relevance since the General Amnesty Act had never excluded the right to compensation. That right had been extinguished one year after he had lodged his civil action for damages on account of the amendments to the Code of Criminal Procedure. The only purpose of the legislative amendments had been to avoid the payment of compensation for his detention – which had not been justified by any reasonable suspicion, much less a conviction – since at that time a number of claims for compensation had already been pursued in the domestic courts. In that way the Government had directly influenced the outcome of his pending civil proceedings and retroactively extinguished the right to compensation which had previously existed.

37. The Government argued that it had been the well-established practice of the domestic courts that Article 484(a) of the Code of Criminal Procedure had retroactive effect in that it extinguished the right to compensation of persons who had been detained but had then been granted an amnesty. Therefore, the applicant must have known about that practice of the domestic courts at least from August 2005 when the case-law of the Supreme Court was fully settled. Retroactive effect of certain provisions of law was within the competence of the law-maker and was not contrary to the Constitution. The decisions of the domestic courts dismissing the applicant's civil action had been based on the relevant domestic law, namely Article 484(a) of the Code of Criminal Procedure, and had been sufficiently reasoned. Moreover, all the applicant's arguments had been examined by the domestic courts at three levels of jurisdiction and also by the Constitutional Court, which had found that all the decisions of the lower courts had been based on the relevant domestic law.

2. The Court's assessment

(a) General principles

38. The Court reiterates that in the context of civil disputes it has repeatedly held that although, in principle, the legislature is not prevented from regulating, through new retrospective provisions, rights derived from the laws in force, the principle of the rule of law and the notion of fair trial enshrined in Article 6 preclude, except for compelling public-interest reasons, interference by the legislature with the administration of justice designed to influence the judicial determination of a dispute (see, among many other authorities, *Stran Greek Refineries and Stratis Andreadis v. Greece*, 9 December 1994, § 49, Series A no. 301-B; *National & Provincial Building Society, Leeds Permanent Building Society and*

Yorkshire Building Society v. the United Kingdom, 23 October 1997, § 112, *Reports of Judgments and Decisions* 1997-VII; *Zielinski and Pradal and Gonzalez and Others v. France* [GC], nos. 24846/94 and 34165/96 to 34173/96, § 57, ECHR 1999-VII; and *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 126, ECHR 2006-...).

39. The Court considers that these principles are essential elements of the concepts of legal certainty and protection of litigants' legitimate trust (see *Unédic v. France*, no. 20153/04, § 74, 18 December 2008).

40. Therefore, in assessing whether the interference by the legislature with the administration of justice, which had been designed to influence the judicial determination of a dispute by the introduction of retrospective provisions, infringed the applicant's right to a fair trial, the Court will primarily assess the existence of compelling public-interest reasons for such legislative changes (see *Scordino v. Italy (no. 1)* [GC], cited above, § 132). In addition, the Court must examine the effects of such legislative changes taken together with the method and timing of their enactment (see *Papageorgiou v. Greece*, 22 October 1997, § 38, *Reports* 1997-VI, and *Smokovitis and Others v. Greece*, no. 46356/99, § 24, 11 April 2002).

(b) Application of these principles to the present case

41. The Court notes that prior to the amendments of the Code of Criminal Procedure on 2 June and 27 October 1999, Article 480 of that Code provided for a right to compensation for anyone who had been in pre-trial detention but against whom criminal proceedings had either not been instituted or had been discontinued by a final decision. The applicant in the present case was detained from 23 October 1995 to 7 October 1996 and the criminal proceedings against him were discontinued pursuant to the General Amnesty Act of 24 September 1996 granting general amnesty from the criminal prosecution and proceedings to the alleged perpetrators of the criminal offences committed during, and in relation to, the Homeland war in Croatia (see paragraph 22). The General Amnesty Act does not, however, contain any provisions concerning the right to compensation.

42. The said amendments to the Code of Criminal Procedure of 2 June and 27 October 1999 excluded the application of Article 480 in cases where an amnesty had been granted in connection with criminal proceedings for offences allegedly committed in the period between 17 August 1990 and 23 August 1996 in connection with the aggression, armed rebellion or armed conflict in Croatia during the Homeland war. In the present case these amendments had the effect of excluding the applicant as the beneficiary of the right to claim compensation under Article 480 of the Code of Criminal Procedure.

43. In order to discern the nature of these amendments and their influence on the applicant's particular situation, the Court must examine them against the rules and principles of the domestic legal system as a whole, in so far as they concern the right to compensation for detention in criminal proceedings which did not result in a conviction.

44. In this regard the Court notes that Article 25 § 4 of the Croatian Constitution provides for a right to compensation only for those individuals who have been unlawfully deprived of their liberty or unlawfully convicted (see paragraph 18). In its interpretation of this constitutional provision and the relevant provisions of the Code of Criminal Procedure, the Constitutional Court held that unlawfulness of detention and flaws in the conduct of proceedings attributable to the domestic authorities were decisive elements in respect of the right to compensation. Consequently, in the absence of unlawfulness or flaws in the conduct of the proceedings there was no call to award any compensation (see paragraph 23).

45. In the light of the principle that the domestic authorities are best placed to interpret the domestic law (see *Dolca v. Romania* (dec.), no. 59282/11, § 23, 2 September 2012), the Court accepts such an interpretation of the relevant domestic rules, particularly since they appear to be in compliance with the relevant provisions of the Convention.

46. In this connection, the Court reiterates that it has to examine the situation impugned by an applicant in the light of the Convention read as a whole (see, for example, *Büker v. Turkey*, no. 29921/96, § 31, 24 October 2000). The Court further reiterates that the right to compensation set forth in Article 5 § 5 of the Convention presupposes that a violation of one of the other paragraphs of Article 5 has been established, either by a domestic authority or by the Convention institutions (see, among many others, *Stanev v. Bulgaria* [GC], no. 36760/06, § 182, ECHR 2012). Similarly, the Court has held that the aim of Article 3 of Protocol No. 7 is to confer the right to compensation on persons convicted as a result of a miscarriage of justice where such conviction has been reversed by the domestic courts on the ground of a new or newly discovered fact (see, for example, *Matveyev v. Russia*, no. 26601/02, §§ 38-39, 3 July 2008).

47. The Court notes that in the present case the domestic authorities did not establish any miscarriage of justice or any unlawfulness in the applicant's detention, nor does the applicant claim that his detention was unlawful in itself or otherwise in breach of the Convention or the domestic law. The applicant rather claimed the right to compensation on the ground that, by virtue of the General Amnesty Act, the criminal proceedings against him had not terminated in a conviction.

48. However, the Court notes that the General Amnesty Act, as a sovereign act resulting in the applicant's immunity from criminal prosecution, cannot be considered to suggest that there was a miscarriage of justice or that the applicant's detention was unlawful, or that there was otherwise a ground on which the applicant could claim any compensation in connection with the criminal proceedings against him or his detention. It merely meant that the State had decided to grant a certain class of defendants, to whom the applicant belonged, immunity from further prosecution.

49. Therefore, it appears that a legal gap existed between the General Amnesty Act and the general provision of Article 480 of the Code of Criminal Procedure concerning the question of compensation for detention in a criminal case whose termination without a conviction was not due, as

the Constitutional Court noted, to a lack of diligence or to arbitrariness on the part of the domestic authorities.

50. The Court is ready to accept that this legal gap had to be resolved by enacting the amendments to Article 480 of the Code of Criminal Procedure that had the effect of extinguishing the right to compensation where an amnesty had been granted (see, *mutatis mutandis*, *Unédic v. France*, § 77, cited above) even if it meant, in concrete terms, the retroactive application of these amendments to cases such as the applicant's. Moreover, the Convention organs have already held that, even in such fundamental areas of the protection of human rights as the right to life, the State is justified in enacting, in the context of its criminal policy, any amnesty laws it might consider necessary, with the proviso, however, that a balance is maintained between the legitimate interests of the State and the interests of individual members of the public (see *Dujardin and Others v. France*, no. 16734/90, Commission decision of 2 September 1991, Decisions and Reports 72, p. 236).

51. In this connection, the Court also observes that it has constantly held that, under Article 6 of the Convention, the legislature is not precluded in civil matters from adopting new retrospective provisions to regulate rights arising under existing laws in so far as there appear to be compelling grounds in the general interest, such as, in the Court's view, existed in the present case (see *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society*, cited above, § 112).

52. The Court is mindful of the fact that the amendments were enacted while the applicant's civil proceedings for compensation were pending, but it cannot fail to observe that the provision of Article 480 of the Code of Criminal Procedure, on which the applicant relied in his civil action, was not specific to cases involving an amnesty. Furthermore, the constitutional provision granting the right to compensation only to those individuals who have been unlawfully deprived of their liberty or unlawfully convicted had already been in force. In that connection the Court notes that the Constitution is above the regular statutes (see paragraph 18).

53. Therefore, it cannot be said that it was absolutely unforeseeable that new legislation could be enacted with the effect of clarifying the existing general rules of the Code of Criminal Procedure (see, *mutatis mutandis*, *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society*, cited above, § 112, and *Zielinski and Pradal and Gonzalez and Others*, cited above, § 59).

54. These amendments were enacted before the first-instance judgment in the applicant's case was adopted (see, by contrast, *Papageorgiou*, § 38) or any other relevant progress in the proceedings achieved, which distinguishes the case from other cases dealt with by the Court in which the legislative changes altered the course of proceedings which had been pending for years and in which an enforceable judgment had been adopted (see *Stran Greek Refineries and Stratis Andreadis*, cited above).

55. Against the above background, the Court considers that there has been no violation of Article 6 of the Convention.

B. PRONUNCE RESE NEI CONFRONTI DI ALTRI PAESI

Retroattività della legge "civile"

Art. 6 § 1 della Convenzione (equo processo)

In materia previdenziale

Estratto (par. 16-21) della sentenza del 7 novembre 2000, sez. III, causa ANAGNOSTOPOULOS c. Grecia

THE LAW

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

16. The applicants alleged that there had been a double violation of Article 6 § 1 of the Convention, which provides:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing within a reasonable time by [a] ... tribunal ... "

They submitted, firstly, that the adoption of Law no. 2320/1995 and its application to applicants nos. 2, 4, 5, 6 and 7 had deprived them of a fair trial and, secondly, that the length of the proceedings brought by the seven applicants to secure an increase in the amount of their pensions had exceeded a "reasonable time".

A. Fair trial

17. Applicants nos. 2, 4, 5, 6 and 7 complained of an interference by the legislature in the judicial process. They complained, among other things,

that they had not had a fair trial to determine their civil right to an increase in their pensions because the question submitted to the national courts had been settled by the legislature and not by the judiciary.

18. In the Government's submission, the impugned statute had not been adopted in order to resolve the dispute between the applicants and the authorities. Worded in objective and impersonal terms, it regulated the cases of thousands of retired officers and was mainly aimed at future proceedings. In order to facilitate its implementation, proceedings which were already pending were also – inevitably – affected.

In any event, the Government maintained that the applicants could not complain of an unlawful interference by the legislature with the exercise of the judiciary's power because the Court of Audit had referred only subsidiarily to the statute in question in dismissing the applicants' appeals.

19. The Court reiterates that in principle the legislature is not precluded in civil matters from adopting new retrospective provisions to regulate rights arising under existing laws (see, among other authorities, *Zielinski and Pradal and Gonzalez and Others v. France* [GC], nos. 24846/94 and 34165/96 to 34173/96, § 57, ECHR 1999-VII).

20. However, it has already held that the principle of the rule of law and the notion of fair trial enshrined in Article 6 precluded any interference by the legislature with the administration of justice designed to influence the judicial determination of the dispute. In cases raising similar issues, the Court has found that the legislature had intervened at a time when court proceedings to which the State was a party were pending. Accordingly, it has concluded that the State had infringed the applicants' rights under Article 6 by intervening in a manner which was decisive to ensure that the – imminent – outcome of proceedings to which it was a party was favourable to it (see, *inter alia*, the Stran Greek Refineries and Stratis Andreadis v. Greece judgment of 9 December 1994, Series A no. 301-B, and the Papageorgiou v. Greece judgment of 22 October 1997, *Reports of Judgments and Decisions* 1997-VI).

21. In the instant case the Court considers that even if the proceedings in question were not declared null and void under Law no. 2320/1995, that statute did, nevertheless, influence the judicial determination of the dispute. While it is true that the Court of Audit dismissed the applicants' appeals after examining the merits of the case, the Court notes that it did nonetheless make reference to the provisions of the impugned statute in support of its decisions. In the Court's opinion, the fact that the Court of Audit's decision to dismiss the appeals was based even subsidiarily on the impugned statute amounts to an interference by the legislature with the judicial process designed to influence the determination of the dispute.

Accordingly, there has been a violation of Article 6 § 1 of the Convention as regards the right of applicants nos. 2, 4, 5, 6 and 7 to a fair trial.

[omissis]

DISSENTING OPINION OF JUDGE ROZAKIS

I have voted against finding a violation in respect of the complaint about the unfairness of the proceedings. My reasons are as follows. The case-law of the Convention institutions recognises that in principle the legislature is not precluded in civil matters from adopting new retrospective provisions to regulate rights arising under existing laws (see, among other authorities, *Zielinski and Pradel and Gonzalez and Others v. France* [GC], nos. 24846/94 and 34165/96 to 34173/96, § 57, ECHR 1999-VII). Accordingly, it is not the regulation by legislative action of matters subject to the examination of the national courts which is deemed to be contrary to the Convention, but the direct application of a new statute by a court to which a dispute has already been referred, with the result that the proceedings are declared null and void or the case dismissed on the merits, contrary to the case-law applied hitherto.

Unlike the position in the Andreadis v. Greece and Papageorgiou v. Greece cases, on which the applicants relied in support of their complaints, and in which pending proceedings were annulled in direct application of laws adopted by the Greek parliament (see the Stran Greek Refineries and Stratis Andreadis v. Greece judgment of 9 December 1994, Series A no. 301-B, and the Papageorgiou v. Greece judgment of 22 October 1997, *Reports of Judgments and Decisions* 1997-VI), in the instant case Law no. 2320/1995 did not directly affect the judicial outcome of the dispute. The Court of Audit did not annul the proceedings pursuant to the above-mentioned statute, but dismissed the appeals after having undertaken an examination on the merits of the parties' submissions. Its subsidiary reference to the provisions of the impugned statute should not lead us to conclude that the cases were dealt with by legislative action.

Consequently, I consider the complaint raised by the second, fourth, fifth, sixth and seventh applicants relating to the unfairness of the proceedings to be ill-founded.

Sentenza dell'11 febbraio 2010, sez. V, causa JAVAUGUE c. Francia (in particolare, par. 28-44)

En l'affaire Javaugue c. France,
La Cour européenne des droits de l'homme (cinquième section), siégeant en une chambre composée de :
Peer Lorenzen, président,
Jean-Paul Costa,
Karel Jungwiert,
Rait Maruste,
Mark Villiger,
Isabelle Berro-Lefèvre,
Mirjana Lazarova Trajkovska, juges,
et de Claudia Westerdiek, greffière de section,
Après en avoir délibéré en chambre du conseil le 19 janvier 2010,
Rend l'arrêt que voici, adopté à cette date :

PROCÉDURE

1. A l'origine de l'affaire se trouve une requête (no 39730/06) dirigée contre la République française et dont un ressortissant de cet Etat, M. P. J. (« le requérant »), a saisi la Cour le 24 septembre 2006 en vertu de l'article 34 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales (« la Convention »).

2. Le requérant est représenté par Me Y. C., avocat à Paris. Le gouvernement français (« le Gouvernement ») est représenté par son agent, Mme E. Belliard, directrice des affaires juridiques au ministère des Affaires étrangères.

3. Le requérant alléguait en particulier, sous l'angle des articles 6 et 13 de la Convention et 1 du Protocole no 1, de l'application rétroactive d'une loi nouvelle à son égard.

4. Le 1er avril 2008, la Cour a décidé de communiquer la requête au Gouvernement. Comme le permet l'article 29 § 3 de la Convention, il a en outre été décidé que la chambre se prononcerait en même temps sur la recevabilité et le fond.

EN FAIT

I. LES CIRCONSTANCES DE L'ESPÈCE

5. Le requérant est né en 1951 et réside à Goos. Il est agent de la fonction publique hospitalière et père de trois enfants.

6. Le 7 janvier 2004, il demanda à son employeur sa mise à la retraite anticipée, à compter du 26 novembre 2004. Pour justifier sa demande, le requérant se prévalait du principe

Nella causa Javaugue c. Francia,
La Corte europea dei diritti dell'uomo, quinta sezione, riunendosi in una camera composta da:
Peer Lorenzen, presidente, Jean-Paul Costa, Karel Jungwiert, Rait Maruste, Marco Villiger, Isabelle Berro-Lefèvre, Mirjana Lazarova Trajkovska, giudici,
e da Claudia Westerdiek, cancelliera di sezione,
Dopo avere deliberato in camera del consiglio il 19 gennaio 2010,
Rende la sentenza che ha adottato in questa data:

PROCEDIMENTO

1. All'origine della causa si trova una richiesta (no 39730/06) diretta contro la Repubblica francese e in cui un cittadino di questo Stato, il Sig. P. J. ("il richiedente"), ha investito la Corte il 24 settembre 2006 in virtù dell'articolo 34 della Convenzione di salvaguardia dei diritti dell'uomo e delle libertà fondamentali ("la Convenzione").

2. Il richiedente è rappresentato da Y. C., avvocato a Parigi. Il governo francese ("il Governo") è rappresentato dal suo agente, la Sig.ra E. Belliard, direttrice delle cause giuridiche al ministero delle Cause estere.

3. Il richiedente adduceva in particolare, sotto l'angolo degli articoli 6 e 13 della Convenzione e 1 del Protocollo no 1, dell'applicazione retroattiva di una nuova legge a suo riguardo.

4. Il 1 aprile 2008, la Corte ha deciso di comunicare la richiesta al Governo. Come permesso dall'articolo 29 § 3 della Convenzione, è stato deciso inoltre che la camera si sarebbe pronunciata sull'ammissibilità ed il merito allo stesso tempo.

IN FATTO

I. LE CIRCOSTANZE DELLA FATTISPECIE

5. Il richiedente è nato nel 1951 e risiede a Goos. E' agente di funzione pubblica ospedaliera e padre di tre bambini.

6. Il 7 gennaio 2004, chiese al suo datore di lavoro il suo collocamento in pensione anticipata, a contare dal 26 novembre 2004. Per giustificare la sua richiesta, il richiedente si avvaleva del principio di uguaglianza delle rimunerazioni poste dal diritto comunitario come interpretato dalla Corte di giustizia delle Comunità europee (CJCE) e dal Consiglio di stato. Difatti, nelle sue sentenze

d'égalité des rémunérations posé par le droit communautaire tel qu'interprété par la Cour de justice des Communautés européennes (CJCE) et par le Conseil d'Etat. En effet, dans ses arrêts Griesmar, du 29 novembre 2001, et Mouflin, du 13 décembre 2001, la CJCE avait notamment sanctionné les dispositions de l'article L. 24 du code des pensions civiles et militaires de retraite, comme contraires au principe de l'égalité de rémunération entre hommes et femmes, dans la mesure où cet article ne réservait qu'aux seules femmes le droit à la retraite anticipée (voir la partie « droit interne pertinent »).

7. Le 9 mars 2004, l'employeur du requérant accepta sa demande de mise à la retraite avec liquidation de pension à compter du 1er décembre 2004, sous réserve de la décision de la Caisse nationale de retraites des agents des collectivités locales (CNRACL).

8. Par une décision du 5 avril 2004, la Caisse des dépôts et consignations, gestionnaire de la CNRACL, rejeta la demande du requérant. Elle considéra que selon les dispositions en vigueur, seul un agent féminin réunissant au moins quinze ans de service effectif et mère de trois enfants pouvait prétendre à la liquidation de sa pension.

9. Par requête du 14 avril 2004, le requérant saisit le juge administratif d'un recours en annulation de cette décision, toujours sur le fondement des jurisprudences Griesmar et Mouflin précitées.

10. Le 30 décembre 2004, une nouvelle loi modifia les dispositions de l'article L. 24 du code des pensions civiles et militaires de retraite. Les nouvelles dispositions prévoient désormais que les fonctionnaires peuvent bénéficier d'une jouissance immédiate de leur pension de retraite, s'ils ont interrompu leur activité dans des conditions fixées par décret en Conseil d'Etat. Il était par ailleurs prévu que ces nouvelles dispositions devaient s'appliquer aux demandes présentées avant leur entrée en vigueur qui n'avaient pas donné lieu à une décision de justice passée en force de chose jugée.

11. Le 30 avril 2005, l'instruction du recours du requérant devant le tribunal administratif fut close.

12. Le décret en Conseil d'Etat susmentionné fut adopté le 10 mai 2005. Les nouvelles dispositions entrèrent en vigueur le lendemain de la publication du décret d'application, soit le

Griesmar, del 29 novembre 2001, e Mouflin, del 13 dicembre 2001, la CJCE aveva sanzionato in particolare le disposizioni dell'articolo L. 24 del codice delle pensioni civili e militari, come contrarie al principio dell'uguaglianza di rimunerazione tra uomini e donne, nella misura in cui questo articolo riservava solamente alle sole donne il diritto alla pensione anticipata (vedere "diritto interno pertinente" la parte).

7. Il 9 marzo 2004, il datore di lavoro del richiedente accettò la sua richiesta di collocamento alla pensione con liquidazione di pensione a contare dal 1 dicembre 2004, sotto riserva della decisione della Cassa nazionale di pensioni degli agenti delle collettività locali (CNRACL).

8. Con una decisione del 5 aprile 2004, la Cassa dei depositi e consegne, gestore del CNRACL, respinse l'istanza del richiedente. Considerò che secondo le disposizioni in vigore, solo un agente femminile che abbia maturato almeno quindici anni di servizio effettivo e madre di tre bambini poteva pretendere la liquidazione della sua pensione.

9. Con richiesta del 14 aprile 2004, il richiedente investì il giudice amministrativo di un ricorso per annullamento di questa decisione, sempre sul fondamento delle giurisprudenze Griesmar e Mouflin precitate.

10. Il 30 dicembre 2004, una nuova legge modificò le disposizioni dell'articolo L. 24 del codice delle pensioni civili e militari. Le nuove disposizioni contemplavano oramai che i funzionari potessero beneficiare di un godimento immediato della loro pensione, se avessero interrotto la loro attività nelle condizioni fissate dal decreto del Consiglio di stato. Era contemplato peraltro che queste nuove disposizioni dovevano applicarsi alle domande presentate prima della loro entrata in vigore che non avevano dato adito a decisione di giustizia passata in giudicato.

11. Il 30 aprile 2005, l'istruzione del ricorso del richiedente dinnanzi al tribunale amministrativo fu chiusa.

12. Il suddetto decreto del Consiglio di stato fu adottato il 10 maggio 2005. Le nuove disposizioni entrarono in vigore l'indomani della pubblicazione del decreto di applicazione, o il 12 maggio 2005.

13. Il 27 maggio 2005, il Consiglio di stato, deliberando con parere contenzioso in un'altra causa (vedere la parte "diritto e pratica interna pertinenti"), stimò che queste nuove disposizioni, retroattive, disconoscevano 6 § 1 l'articolo della Convenzione. Considerò tuttavia che questa

12 mai 2005.
13. Le 27 mai 2005, le Conseil d'Etat, statuant par avis contentieux dans une autre affaire (voir la partie « droit et pratique internes pertinents »), estima que ces nouvelles dispositions, rétroactives, méconnaissaient l'article 6 § 1 de la Convention. Il considéra toutefois que cette incompatibilité ne pouvait être invoquée que par les fonctionnaires qui, à la date d'entrée en vigueur des dispositions litigieuses, avaient, à la suite d'une décision leur refusant le bénéfice du régime antérieurement applicable, déjà engagé une action contentieuse en vue de contester la légalité de cette décision. Il estima en outre que ces dispositions étaient contraires à l'article 1 du Protocole no 1, lorsque les fonctionnaires remplissaient les conditions antérieurement applicables et qu'ils avaient présenté, avant la publication de la loi, une demande ayant donné lieu à une décision de refus antérieure au 12 mai 2005, le jour de l'entrée en vigueur de la loi.
14. Par un jugement du 5 juillet 2005, le tribunal administratif de Melun rejeta le recours du requérant, en faisant application des dispositions de la loi nouvelle. Il considéra que le requérant ne faisait état d'une interruption d'activité d'une durée supérieure à deux mois que pour l'un de ses trois enfants et que dès lors, il ne remplissait pas la condition posée par le législateur et précisée par le pouvoir réglementaire pour bénéficier de la liquidation immédiate de sa pension.
15. Par requête du 28 septembre 2005, le requérant saisit le Conseil d'Etat d'un pourvoi en cassation dans le cadre duquel il invoqua l'article 6 § 1 de la Convention et l'article 1 du Protocole no 1.
16. Le 24 mars 2006, le Conseil d'Etat déclara le pourvoi non admis. Les visas de cette décision laissent apparaitre que le commissaire du Gouvernement était présent lors du délibéré de cette juridiction.
B. Le droit et la pratique internes pertinents
1. Etat du droit avant les jurisprudences Griesmar et Mouflin
17. Article L24-I-3o du code des pensions civiles et militaires de retraite
« La jouissance de la pension civile est immédiate :
(...)
3o Pour les femmes fonctionnaires : a) soit lorsqu'elles sont mère de trois enfants vivants ou décédés par faits de guerre ou d'un enfant vivant âgé de plus d'un an et atteint d'une

incompatibilità poteva essere invocata solo dai funzionari che, in data di entrata in vigore delle disposizioni controverse, avevano, in seguito ad una decisione che rifiutava loro anteriormente il beneficio del regime applicabile, già impegnato un'azione di contenzioso in vista di contestare la legalità di questa decisione. Stimò inoltre che queste disposizioni erano contrarie all'articolo 1 del Protocollo no 1, quando i funzionari assolvevano le condizioni anteriormente applicabili e che avevano presentato, prima della pubblicazione della legge, una domanda che aveva dato adito ad una decisione di rifiuto anteriore al 12 maggio 2005, il giorno dell'entrata in vigore della legge.
14. Con un giudizio del 5 luglio 2005, il tribunale amministrativo di Melun respinse il ricorso del richiedente, facendo applicazione delle disposizioni della legge nuova. Considerò che il richiedente faceva stato di un'interruzione di attività di una durata superiore a due mesi solo per uno dei suoi tre bambini e che quindi, non assolveva la condizione posta dal legislatore e precisata dal potere regolamentare per beneficiare della liquidazione immediata della sua pensione.
15. Con richiesta del 28 settembre 2005, il richiedente investì il Consiglio di stato di un ricorso in cassazione nella cornice del quale invocò l'articolo 6 § 1 della Convenzione e l'articolo 1 del Protocollo no 1.
16. Il 24 marzo 2006, il Consiglio di stato dichiarò il ricorso non ammesso. I dettagli di questa decisione lasciano apparire che il commissario del Governo era presente all'epoca della deliberazione i n camera del consiglio di questa giurisdizione.
B. Il diritto e la pratica interna pertinenti
1. Stato del diritto prima delle giurisprudenze Griesmar e Mouflin
17. L'Articolo L24-I-3o del codice delle pensioni civili e militari
"Il godimento della pensione civile è immediato:
(...)
3o Per le donne funzionarie: a) quando sono madri di tre bambini viventi o deceduti in seguito a fatti di guerra o di un bambino che vivente di più di un anno d'età e colpito da un'invalidità uguale superiore al l'80% (...) ; b) quando è giustificato, (...) che sono colpite di un'infermità o che il loro coniuge è colpito da un'infermità "
2. Sentenze Griesmar e Mouflin della Corte di giustizia delle Comunità europee del 29 novembre e del 13 dicembre 2001 e susseguente giurisprudenza francese
18. In queste sentenze, la Corte di giustizia delle

invalidité égale ou supérieure à 80 % (...) ; b) Soit lorsqu'il est justifié, (...) qu'elles sont atteintes d'une infirmité (...) ou que leur conjoint est atteint d'une infirmité (...) »

2. Arrêts Griesmar et Mouflin de la Cour de justice des Communautés européennes des 29 novembre et 13 décembre 2001 et jurisprudence française subséquente

18. Dans ces arrêts, la Cour de justice des communautés européennes considéra que les dispositions du code des pensions civiles et militaires de retraite en cause étaient incompatibles avec le principe d'égalité des rémunérations entre les hommes et les femmes tel qu'il est affirmé par le droit communautaire, en ce qu'elles en réservaient le bénéfice aux seules femmes.

19. Dans le prolongement de ces contentieux, le Conseil d'Etat a jugé l'article L. 24-I-3 du code des pensions, relatif au droit à la retraite anticipée, incompatible avec le principe communautaire d'égalité des rémunérations et a conclu ainsi que les fonctionnaires masculins se trouvant dans des situations identiques aux femmes avaient droit au bénéfice de ses dispositions et que le principe de l'égalité des rémunérations s'opposait à ce que la jouissance immédiate d'une pension de retraite, accordée aux personnes qui assurent ou ont assuré l'éducation de trois enfants au moins, soit réservée aux femmes, alors que les hommes assurant ou ayant assuré l'éducation de trois enfants au moins seraient exclus du bénéfice de cette mesure (voir, entre autres, Conseil d'Etat, 29 janvier 2003, no 245601, Béraudo ; 26 février 2003, no 187401, Llorca ; 29 décembre 2004, no 267651, Martin).

3. L'article 136 de la loi du 30 décembre 2004, modifiant l'article L. 24 du code des pensions civiles et militaires de retraite

Article 136 I

« La liquidation de la pension intervient :

(...)

3o Lorsque le fonctionnaire civil est parent de trois enfants, (...) à condition qu'il ait, pour chaque enfant, interrompu son activité dans des conditions fixées par décret en Conseil d'Etat. »

Article 136 II

« Les dispositions du I sont applicables aux demandes présentées avant leur entrée en vigueur qui n'ont pas donné lieu à une décision de justice passée en force de chose jugée. »

4. Avis Provin du Conseil d'Etat du 27 mai 2005

comunità europee considerò che le disposizioni del codice delle pensioni civili e militari di congedo in causa erano incompatibili col principio di uguaglianza delle rimunerazioni tra gli uomini e le donne come è affermato dal diritto comunitario, per il fatto che ne riservavano il beneficio solo alle donne.

19. Nel prolungamento di questi contenziosi, il Consiglio di stato ha giudicato l'articolo L. 24-I-3 del codice delle pensioni, relativo al diritto alla pensione anticipata, incompatibile col principio comunitario di uguaglianza delle rimunerazioni e ha concluso così che i funzionari maschili che si trovavano in situazioni identiche alle donne avevano diritto a beneficiare delle sue disposizioni e che il principio dell'uguaglianza delle rimunerazioni si opponeva al fatto che il godimento immediato di una pensione, accordata alle persone che assicurano o hanno assicurato l'educazione di almeno tre bambini, sia riservata alle donne, mentre gli uomini che assicurano o che hanno assicurato l'educazione di almeno tre bambini sarebbero esclusi dal beneficio di questa misura (vedere, tra altre, Consiglio di stato, 29 gennaio 2003, no 245601, Béraudo; 26 febbraio 2003, no 187401, Llorca; 29 dicembre 2004, no 267651, Martin).

3. L'articolo 136 della legge del 30 dicembre 2004, modificante l'articolo L. 24 del codice delle pensioni civili e militari di pensione

Articolo 136 I

"La liquidazione della pensione interviene:

(...)

3o Quando il funzionario civile è affine di tre bambini, (...) purché abbia, per ogni bambino, interrotto la sua attività nelle condizioni fissate da decreto in Consiglio di stato. "

Articolo 136 II

"Le disposizioni dell'I sono applicabili alle domande presentate prima della loro entrata in vigore che non hanno dato adito a decisione di giustizia passata in giudicato. "

4. Parere Provin del Consiglio di stato del 27 maggio 2005

20. Il Consiglio di stato si pronunciò sulla compatibilità delle disposizioni dell'II dell'articolo 136 della legge su richiesta del tribunale amministrativo di Nancy, nella cornice di un altro ricorso, il 27 maggio 2005, del 30 dicembre 2004 con gli articoli 6 § 1 della Convenzione e 1 del Protocollo no 1. Rese il parere qui di seguito:

"(...)

Se le nuove disposizioni emesse dall'I dell'articolo 136 della legge del 30 dicembre 2004 sono entrate

20. Le 27 mai 2005, à la demande du tribunal administratif de Nancy, dans le cadre d'un autre recours, le Conseil d'Etat se prononça sur la compatibilité des dispositions du II de l'article 136 de la loi du 30 décembre 2004 avec les articles 6 § 1 de la Convention et 1 du Protocole no 1. Il rendit l'avis ci-après :
« (...)
Si les nouvelles dispositions issues du I de l'article 136 de la loi du 30 décembre 2004 sont entrées en vigueur le lendemain de la publication de ce décret au journal officiel de la République française, soit le 12 mai 2005, il résulte toutefois du II du même article qu'elles sont applicables aux demandes présentées avant leur entrée en vigueur qui n'ont pas donné lieu à une décision de justice passée en force de chose jugée. (...)
En ce qui concerne la compatibilité du II de l'article 136 de la loi du 30 décembre 2004 avec l'article 6 § 1 de la convention européenne des droits de l'homme :
(...)
Pour être compatible avec ces stipulations, l'intervention rétroactive du législateur en vue de modifier au profit de l'Etat les règles applicables à des procès en cours doit reposer sur d'impérieux motifs d'intérêt général.
S'agissant des dispositions du II de l'article 136 de la loi du 30 décembre 2004 qui font l'objet de la demande d'avis, issues d'un amendement parlementaire dont l'adoption ne pouvait être regardée comme prévisible, il ne ressort ni des travaux préparatoires – au cours desquels n'a été évoquée que la nécessité de mettre les termes de l'article L. 24 du code des pensions civiles et militaires de retraite en conformité avec le droit communautaire – ni des pièces du dossier soumis au Conseil d'Etat que le fait de rendre applicables les dispositions du I du même article aux actions en justice engagées avant leur entrée en vigueur en vue d'obtenir le bénéfice des dispositions auxquelles elles se substituent puisse être regardé comme reposant sur d'impérieux motifs d'intérêt général. En conséquence, dans la mesure où ces dispositions rétroactives ont pour objet d'influer sur l'issue des procédures juridictionnelles engagées par des fonctionnaires s'étant vu refuser le bénéfice des dispositions alors applicables de l'article L. 24 de ce code – lesquelles, ainsi qu'il a été dit, devaient être interprétées comme ouvrant aux hommes comme aux femmes ayant eu trois enfants le droit à l'entrée en jouissance

in vigore l'indomani della pubblicazione di questo decreto sulla gazzetta ufficiale della Repubblica francese, o il 12 maggio 2005, risulta tuttavia dall'II dello stesso articolo che sono applicabili alle domande presentate prima della loro entrata in vigore che non hanno dato adito a decisione di giustizia passata in giudicato. (...)
Per ciò che riguarda la compatibilità dell'II dell'articolo 136 della legge del 30 dicembre 2004 con l'articolo 6 § 1 della convenzione europea dei diritti dell'uomo:
(...)
Per essere compatibile con queste stipulazioni, l'intervento retroattivo del legislatore in vista di modificare alprofitto dello stato le regole applicabili ai processi in corso deve fondarsi su degli imperiosi motivi di interesse generale.
Trattandosi delle disposizioni dell'II dell'articolo 136 della legge del 30 dicembre 2004 che sono oggetto della richiesta di parere, emesse da un emendamento parlamentare la cui adozione non poteva essere riguardata come prevedibile, non risulta né dai lavori preparatori- nel corso dai quali è stata menzionata solo la necessità di mettere i termini dell'articolo L. 24 del codice delle pensioni civili e militari di pensione in conformità col diritto comunitario -né dai documenti della pratica sottomessa al Consiglio di stato che il fatto di rendere applicabili le disposizioni dell'I dello stesso articolo alle azioni in giustizia impegnate prima della loro entrata in vigore in vista di ottenere il beneficio delle disposizioni alle quali si sostituiscono possa essere riguardato come fondato su degli imperiosi motivi di interesse generale. Perciò, nella misura in cui queste disposizioni retroattive hanno per oggetto di influire sulla conclusione dei procedimenti giurisdizionali impegnati dai funzionari che si sono visti rifiutare l'utile delle disposizioni allora applicabili dell'articolo L. 24 di questo codice-che, così come è stato detto, dovevano essere interpretate come se aprissero agli uomini così come alle donne che avevano avuto tre bambini il diritto al godimento immediato della loro pensione -ignorano le stipulazioni dell'articolo 6 § 1 della convenzione europea di salvaguardia dei diritti dell'uomo e delle libertà fondamentali. Deriva tuttavia dallo stesso oggetto di queste stipulazioni che questa incompatibilità può essere invocata utilmente solo dai funzionari che, in data di entrata in vigore delle disposizioni controverse, avevano, in seguito ad una decisione che rifiutava loro il beneficio del regime applicabile anteriormente , impegnato un'azione di

immédiate de leur pension de retraite – elles méconnaissent les stipulations du § 1 de l'article 6 de la convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales. Il découle toutefois de l'objet même de ces stipulations que cette incompatibilité ne peut être utilement invoquée que par les fonctionnaires qui, à la date d'entrée en vigueur des dispositions litigieuses, avaient, à la suite d'une décision leur refusant le bénéfice du régime antérieurement applicable, engagé une action contentieuse en vue de contester la légalité de cette décision.

En ce qui concerne la compatibilité des dispositions en cause avec l'article 1er du Protocole additionnel à la Convention européenne des droits de l'homme :

(...)

Si ces stipulations ne font en principe pas obstacle à ce que le législateur adopte de nouvelles dispositions remettant en cause, fut-ce de manière rétroactive, des droits découlant de lois en vigueur, c'est à la condition de ménager un juste équilibre entre l'atteinte portée à ces droits et les motifs d'intérêt général susceptibles de la justifier.

En l'espèce, il résulte de la comparaison des dispositions combinées des articles L. 24 et R. 37 du code des pensions civiles et militaires de retraite, désormais applicables, avec celles qui régissaient antérieurement le droit des fonctionnaires à la jouissance immédiate de leurs pensions de retraite que tous ceux qui ne peuvent remplir les nouvelles conditions relatives à la durée et à la nature de l'interruption de leur activité sont désormais privés de la substance même de ce droit. S'agissant des décisions prises, après l'entrée en vigueur de ces nouvelles dispositions, sur des demandes présentées antérieurement, l'atteinte portée à la situation des intéressés découle de l'application des principes du droit national relatifs à l'entrée en vigueur des lois et règlements au texte du I de l'article 136 de la loi du 30 décembre 2004 et non des dispositions rétroactives du II du même article qui n'ont d'effet qu'à l'égard des décisions intervenues avant cette entrée en vigueur. Au surplus, l'atteinte ainsi portée par le I de l'article 136 est proportionnée à l'objectif poursuivi par le législateur qui est de mettre les dispositions du code des pensions civiles et militaires de retraite en conformité avec le droit communautaire.

En revanche, en remettant en cause

contenzioso in vista di contestare la legalità di questa decisione.

Per ciò che riguarda la compatibilità delle disposizioni in causa con l'articolo 1 del Protocollo addizionale alla Convenzione europea dei diritti dell'uomo:

(...)

Se queste stipulazioni non fanno in principio ostacolo al fatto che il legislatore adotti delle nuovi disposizioni che rimettono in causa, fosse anche in modo retroattivo, dei diritti derivanti dai leggi in vigore, è a condizione di predisporre un giusto equilibrio tra l' attentato portato a questi diritti ed i motivi di interesse generale suscettibili di giustificarlo.

Nello specifico, risulta dal paragone delle disposizioni combinate degli articoli L. 24 e R. 37 del codice delle pensioni civili e militari di congedo, oramai applicabili, con quelle che regolavano anteriormente il diritto dei funzionari al godimento immediato delle loro pensioni che tutti quelli che non possono assolvere le nuove condizioni relative alla durata ed alla natura dell'interruzione della loro attività sono privati oramai della sostanza stessa di questo diritto. Trattandosi delle decisioni prese, dopo l'entrata in vigore di queste nuove disposizioni, su delle domande presentate anteriormente, l'attentato portato alla situazione degli interessati deriva dall'applicazione dei principi del diritto nazionale relativo all'entrata in vigore delle leggi e degli ordinamenti al testo dell'I dell'articolo 136 della legge del 30 dicembre 2004 e non delle disposizioni retroattive dell'II dello stesso articolo che hanno effetto solo a riguardo delle decisioni intervenute prima di questa entrata in vigore. Inoltre, l'attentato così portato dall'I dell'articolo 136 è proporzionato all'obiettivo perseguito dal legislatore che è di mettere le disposizioni del codice delle pensioni civili e militari di congedo in conformità col diritto comunitario.

In compenso, rimettendo in causa in modo retroattivo la situazione dei funzionari che assolvevano le condizioni applicabili anteriormente e che avevano presentato, prima della pubblicazione della legge, una domanda che aveva dato adito a decisione di rifiuto prima del 12 maggio 2005, l'II dell'articolo 136 di questa legge ha portato a dei crediti detenuti dagli interessati-che abbiano o meno impegnato un'azione in giustizia in vista di farlo riconoscere - un attentato che, in mancanza di motivi di interesse generale suscettibili di giustificarlo, deve essere considerato come sproporzionato.

rétroactivement la situation des fonctionnaires remplissant les conditions antérieurement applicables et ayant présenté, avant la publication de la loi, une demande qui avait donné lieu à une décision de refus avant le 12 mai 2005, le II de l'article 136 de cette loi a porté aux créances détenues par les intéressés – qu'ils aient ou non engagé une action en justice en vue de la faire reconnaître – une atteinte qui, en l'absence de motifs d'intérêt général susceptibles de la justifier, doit être regardée comme disproportionnée. L'application aux intéressés des dispositions en cause méconnaît donc les stipulations de l'article 1er du premier protocole additionnel à la convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales.

Ces stipulations ne sont toutefois pas méconnues à l'égard des fonctionnaires qui ont présenté des demandes, entre la publication de la loi et celle du décret qui en a permis l'entrée en vigueur, en vue d'obtenir le bénéfice des dispositions antérieures. Dès lors, en effet, qu'il existe un intérêt général suffisant à ce que de telles demandes puissent se voir appliquer les nouvelles dispositions, le II de l'article 136 de la loi du 30 décembre 2004 ne peut être regardé comme portant une atteinte disproportionnée aux créances que détenaient les fonctionnaires en cause. »

21. A la suite de cet avis, et dans d'autres affaires, le Conseil d'Etat écarta les nouvelles dispositions issues de l'article 136 de la loi du 30 décembre 2004, lorsqu'elles étaient intervenues pendant la durée d'une procédure (voir, par exemple, 26 septembre 2005, no 255656, Barritault).

EN DROIT

I. SUR LES VIOLATIONS ALLÉGUÉES DE L'ARTICLE 6 § 1 DE LA CONVENTION

22. Le requérant se plaint de la présence du commissaire du gouvernement au délibéré de la formation de jugement du Conseil d'Etat et de l'application rétroactive du nouveau dispositif introduit par la loi du 30 décembre 2004, sans qu'il n'ait été tenu compte de l'avis Provin du Conseil d'Etat du 27 mai 2005 et sans qu'il n'ait été en mesure d'en débattre devant le tribunal administratif, la loi étant entrée en vigueur après la clôture de l'instruction. Il invoque l'article 6 § 1 de la Convention, ainsi libellé :

« Toute personne a droit à ce que sa cause soit entendue équitablement (...) par un tribunal (...),

L'applicazione agli interessati delle disposizioni in causa ignora dunque le stipulazioni dell'articolo 1 del primo protocollo addizionale alla convenzione europea di salvaguardia dei diritti dell'uomo e delle libertà fondamentali.

Queste stipulazioni non sono tuttavia misconosciute a riguardo dei funzionari che hanno presentato delle domande, tra la pubblicazione della legge e quella del decreto che ne ha permesso l'entrata in vigore, in vista di ottenere il beneficio delle disposizioni anteriori. Quindi, dal momento che esiste un interesse generale sufficiente affinché a tali domande possano vedersi applicare le nuove disposizioni, l'II dell'articolo 136 della legge del 30 dicembre 2004 non può essere riguardato come recante offesa sproporzionata ai crediti che detenevano i funzionari in causa. "

21. In seguito a questo parere, ed in altre cause, il Consiglio di stato scartò le nuove disposizioni derivate dall'articolo 136 della legge del 30 dicembre 2004, dal momento che erano intervenute nel corso di un procedimento (vedere, per esempio, 26 settembre 2005, no 255656, Barritault).

IN DIRITTO

I. SULLE VIOLAZIONI ADDOTTE DELL'ARTICOLO 6 § 1 DELLA CONVENZIONE

22. Il richiedente si lamenta della presenza del commissario del governo in deliberazione in camera del consiglio della formazione di giudizio del Consiglio di stato e dell'applicazione retroattiva del nuovo dispositivo introdotto dalla legge del 30 dicembre 2004, senza che sia stato tenuto conto del parere Provin del Consiglio di stato del 27 maggio 2005 e senza che sia stati in grado di dibatterlo dinnanzi al tribunale amministrativo, essendo entrata in vigore la legge dopo la chiusura dell'istruzione. Invoca l'articolo 6 § 1 della Convenzione, così formulato:

"Ogni persona ha diritto affinché la sua causa sia equamente sentita da un tribunale che deciderà delle contestazioni sui suoi diritti ed obblighi di carattere civile "

A. Sul motivo di appello derivato dalla partecipazione del commissario del governo alla deliberazione in camera di consiglio della formazione di giudizio del Consiglio di stato

1. Sull'ammissibilità

23. La Corte constata che questo motivo di appello non è manifestamente mal fondato ai sensi dell'articolo 35 § 3 della Convenzione. La Corte rileva peraltro che questo non incontra nessun

qui décidera (...) des contestations sur ses droits et obligations de caractère civil (...) »

A. Sur le grief tiré de la participation du commissaire du gouvernement au délibéré de la formation de jugement du Conseil d'Etat

1. Sur la recevabilité

23. La Cour constate que ce grief n'est pas manifestement mal fondé au sens de l'article 35 § 3 de la Convention. La Cour relève par ailleurs que celui-ci ne se heurte à aucun autre motif d'irrecevabilité. Il convient donc de le déclarer recevable.

2. Sur le fond

24. Le requérant estime que la présence du commissaire du Gouvernement au délibéré de la formation de jugement du Conseil d'Etat a méconnu les dispositions de l'article 6 de la Convention.

25. Le Gouvernement, au vu de l'arrêt Martinie c. France ([GC], no 58675/00, 12 avril 2006), décide de s'en remettre à la sagesse de la Cour sur ce point.

26. La Cour rappelle que, dans les arrêts Kress c. France ([GC], no 39594/98, §§ 72-76, CEDH 2001-VI) et Martinie (précité, §§ 53-54), elle a conclu à la violation de l'article 6 § 1 de la Convention du fait de la participation et même de la simple présence du commissaire du gouvernement au délibéré de la formation de jugement du Conseil d'Etat. La Cour considère que la présente affaire ne présente pas d'éléments susceptibles de la distinguer de cette jurisprudence.

27. Partant, il y a eu violation de l'article 6 § 1 de la Convention.

II. SUR LE GRIEF TIRÉ DE L'APPLICATION RÉTROACTIVE DE LA LOI DU 30 DÉCEMBRE 2004

1. Sur la recevabilité

a) Thèses des parties

28. Le Gouvernement excipe du non-épuisement des voies de recours internes. Il rappelle que cette règle est fondée sur le principe selon lequel l'Etat défendeur doit, préalablement à la saisine de la Cour, être mis en mesure de pouvoir redresser les violations qui lui sont reprochées. Elle comprend notamment l'obligation d'avoir soulevé dans les formes et délais prescrits par le droit interne, les griefs que l'on entend soumettre par la suite à la Cour (Cardot c. France, 19 mars 1991, § 34, série A no 200).

29. En l'espèce, le Gouvernement ne conteste pas que le requérant remplissait les deux

altro motivo di inammissibilità. Conviene dunque dichiararlo ammissibile.

2. Sul merito

24. Il richiedente stima che la presenza del commissario del Governo alla deliberazione in camera di consiglio della formazione di giudizio del Consiglio di stato ha ignorato le disposizioni dell'articolo 6 della Convenzione.

25. Il Governo, alla vista della sentenza Martinie c. Francia ([GC], no 58675/00, 12 aprile 2006) decide di rimettersi alla saggezza della Corte su questo punto.

26. La Corte ricorda che, nelle sentenze Kress c. Francia ([GC], no 39594/98, §§ 72-76, CEDH 2001-VI) e Martinie (precitata, §§ 53-54) ha concluso alla violazione dell'articolo 6 § 1 della Convenzione a causa della partecipazione ed anche della semplice presenza del commissario del governo alla deliberazione in camera del consiglio della formazione di giudizio del Consiglio di stato. La Corte considera che la presente causa non presenta elementi suscettibili di distinguerla da questa giurisprudenza.

27. Pertanto, c'è stata violazione dell'articolo 6 § 1 della Convenzione.

II. SUL MOTIVO DI APPELLO DERIVATO DALL'APPLICAZIONE RETROATTIVA DELLA LEGGE DEL 30 DICEMBRE 2004

1. Sull'ammissibilità

a) Tesi delle parti

28. Il Governo eccepisce del non-esaurimento delle vie di ricorso interne. Ricorda che questa regola è fondata sul principio secondo cui lo stato convenuto deve, prima dell'immissione nel processo della Corte, essere messo in misura di potere risanare le violazioni che gli vengono rimproverate. Comprende in particolare l'obbligo di aver sollevato nelle forme e nei termini prescritti dal diritto interno, i motivi di appello che si intende sottoporre in seguito alla Corte (Cardot c. Francia, 19 marzo 1991, § 34, serie A no 200).

29. Nello specifico, il Governo non contesta che il richiedente assolveva le due condizioni fissate dal Consiglio di stato nel suo avviso Provin per fare valere una violazione delle disposizioni invocate. Difatti, ha, da una parte, chiesto di beneficiare del pensionamento anticipato nella sua qualità di padre di tre bambini il 7 gennaio 2004, o prima della pubblicazione della legge controversa il 31 dicembre 2004, e, dall'altra parte, ha impegnato un'azione di contenzioso dinnanzi al tribunale amministrativo il 14 aprile 2004, o prima della data di entrata in vigore delle disposizioni, il 12 maggio 2005, in vista di contestare la legalità

conditions fixées par le Conseil d'Etat dans son avis Provin pour faire valoir une violation des dispositions invoquées. En effet, il a, d'une part, demandé à bénéficier du départ anticipé à la retraite en sa qualité de père de trois enfants le 7 janvier 2004, soit avant la publication de la loi litigieuse le 31 décembre 2004, et, d'autre part, il a engagé une action contentieuse devant le tribunal administratif le 14 avril 2004, soit avant la date d'entrée en vigueur des dispositions (le 12 mai 2005), en vue de contester la légalité de la décision du 5 avril 2004 lui refusant le bénéfice du régime antérieurement applicable. Néanmoins, le Conseil d'Etat a déclaré non admis le pourvoi du requérant contre le jugement du tribunal administratif. Le Gouvernement considère que cette action ne pouvait prospérer dès lors qu'il s'agissait de moyens nouveaux. Il rappelle par ailleurs que les moyens tirés de la méconnaissance de la Convention ne sont pas d'ordre public et qu'ils ne peuvent être soulevés d'office par le juge de l'excès de pouvoir. Quant à l'argument du requérant selon lequel il n'aurait pas été en mesure de débattre de l'application du nouveau dispositif devant le juge administratif, celui-ci étant entré en vigueur après la clôture de l'instruction fixée au 30 avril 2005, le Gouvernement rappelle que le requérant disposait de voies juridiques efficaces pour invoquer devant le juge du fond la violation de la Convention et se prévaloir de l'avis Provin. D'une part, il avait la faculté de solliciter la réouverture de l'instruction, aux termes des articles R. 613-3 et R. 613-4 du code de justice administrative ou encore de produire une note en délibéré après la tenue de l'audience le 7 juin 2005.

30. Le requérant conteste cette analyse. Il soutient qu'il ne pouvait formuler un tel grief devant le tribunal administratif dans la mesure où la loi litigieuse est entrée en vigueur après la clôture de l'instruction et que rien ne pouvait indiquer que son recours serait jugé à la lumière d'un nouveau dispositif. Quant à l'argument selon lequel le requérant pouvait demander la réouverture de l'instruction, comme le permettent les dispositions précitées du code de justice administrative, le requérant indique que ces dispositions révèlent qu'il n'existe pas de droit à la réouverture de l'instruction puisque celui-ci relève du pouvoir discrétionnaire du président de la formation de jugement. Il précise au contraire qu'il appartenait aux juges du

della decisione del 5 aprile 2004 che gli rifiutava il beneficio del regime anteriormente applicabile. Tuttavia, il Consiglio di stato ha dichiarato non ammissibile il ricorso del richiedente contro il giudizio del tribunale amministrativo. Il Governo considera che questa azione non poteva avere successo dal momento che si trattava di nuovi mezzi. Ricorda peraltro che i mezzi derivati dall'incomprensione della Convenzione non sono di ordine pubblico e che non possono essere sollevati d' ufficio dal giudice dell'eccesso di potere. In quanto all'argomento del richiedente secondo cui non sarebbe stato in grado di dibattere l'applicazione del nuovo dispositivo dinnanzi al giudice amministrativo, essendo entrato in vigore questa dopo la chiusura dell'istruzione fissata al 30 aprile 2005, il Governo ricorda che il richiedente disponeva di vie giuridiche efficaci per invocare dinnanzi al giudice del merito la violazione della Convenzione ed avvalersi dell'avviso Provin. Da una parte, aveva la facoltà di sollecitare la riapertura dell'istruzione, ai termini degli articoli R. 613-3 e R. 613-4 del codice di giustizia amministrativa o ancora di produrre una nota in deliberazione in camera del consiglio dopo la tenuta dell'udienza il 7 giugno 2005.

30. Il richiedente contesta questa analisi. Sostiene che non poteva formulare tale motivo di appello dinnanzi al tribunale amministrativo nella misura in cui la legge controversa è entrata in vigore dopo la chiusura dell'istruzione e che niente poteva indicare che il suo ricorso sarebbe stato giudicato alla luce di un nuovo dispositivo. In quanto all'argomento secondo cui il richiedente poteva chiedere la riapertura dell'istruzione, come permettono le disposizioni precitate del codice di giustizia amministrativa, il richiedente indica che queste disposizioni rivelano che non esiste alcun diritto alla riapertura dell'istruzione poiché questo dipende dal potere discrezionale del presidente della formazione di giudizio. Precisa al contrario che apparteneva ai giudici del tribunale amministrativo riaprire l'istruzione in seguito all'entrata in vigore della legge o di investire il Consiglio di stato di una questione pregiudiziale. Il richiedente tiene a precisare anche che il solo ricorso che era a sua disposizione era un ricorso in cassazione dinnanzi al Consiglio di stato e che,in mancanza di appello in materia di ricorso per eccesso di potere, si trovava nell'impossibilità tecnica di sollevare altri mezzi se non quelli che ha potuto sollevare dinnanzi ai suoi primi giudici.

b) Valutazione della Corte

31. La Corte ricorda che ai termini dell'articolo 35

tribunal administratif de rouvrir l'instruction à la suite de l'entrée en vigueur de la loi ou de saisir le Conseil d'Etat d'une question préjudicielle. Le requérant tient à préciser également que le seul recours qui était à sa disposition était un pourvoi en cassation devant le Conseil d'Etat et que, faute d'appel en matière de recours pour excès de pouvoir, il se trouvait dans l'impossibilité technique de soulever d'autres moyens que ceux qu'il a pu soulever devant ses premiers juges.

b) Appréciation de la Cour

31. 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. Ainsi, le grief dont on entend saisir la Cour doit d'abord être soulevé, au moins en substance, dans les formes et délais prescrits par le droit interne, devant les juridictions nationales appropriées (Cardot, précité, § 36). La Cour souligne que pour contrôler le respect de la règle de l'épuisement des voies de recours internes, il faut tenir compte des recours prévus en pratique dans le système juridique de l'Etat concerné, ainsi que des circonstances de la cause et de la question de savoir si les requérants ont fait tout ce que l'on pouvait raisonnablement attendre d'eux pour épuiser les voies de recours internes qui s'offraient à eux (voir, parmi d'autres, Merit c. Ukraine, no 66561/01, § 58, 30 mars 2004).

32. En l'espèce, la Cour constate que le requérant, qui n'était au demeurant pas assisté d'un avocat, ne put soulever les griefs en question devant le tribunal administratif dans la mesure où la loi nouvelle entra en vigueur après la clôture de l'instruction. De même, il ne put déposer une note en délibéré dans la mesure où, après l'audience, il ne pouvait savoir que le tribunal ferait application de la loi nouvelle dans son jugement. Ce n'est donc qu'à l'occasion de son pourvoi en cassation, seule voie de droit qui lui était offerte pour contester la décision des juges du fond, que le requérant souleva expressément son grief tiré de la violation de l'article 6 § 1 de la Convention. Or le Conseil d'Etat n'a pas admis le pourvoi en cassation du requérant, sans motiver sa décision.

33. La Cour note que, selon le Gouvernement, la

§ 1 della Convenzione, può essere investita solo dopo l'esaurimento delle vie di ricorso interne. A questo riguardo, sottolinea che ogni richiedente devono aver dato alle giurisdizioni interne l'occasione che l'articolo 35 § 1 ha per finalità di predisporre in principio agli Stati contraenti: evitare o risanare le violazioni addotte contro lui. Così, il motivo di appello di cui si intende investire la Corte ha il dovere di essere sollevato prima, almeno in sostanza, nelle forme e nei termini prescritti dal diritto interno, dinnanzi alle giurisdizioni nazionali adeguate (Cardot, precitata, § 36). La Corte sottolinea che per controllare il rispetto della regola dell'esaurimento delle vie di ricorso interne, bisogna tenere conto dei ricorsi contemplati in pratica nel sistema giuridico dello stato riguardato, così come delle circostanze della causa e della questione di sapere se i richiedenti hanno fatto tutto ciò che si poteva aspettare ragionevolmente di loro per esaurire le vie di ricorso interne che si offrivano a loro (vedere, tra altre, Merit c. Ucraina, no 66561/01, § 58, 30 marzo 2004).

32. Nello specifico, la Corte constata che il richiedente che non era del resto assistito di un avvocato, non poté sollevare i motivi di appello in questione dinnanzi al tribunale amministrativo nella misura in cui la nuova legge entrò in vigore dopo la chiusura dell'istruzione. Parimenti, non poté depositare una nota in delibera in camera del consiglio nella misura in cui, dopo l'udienza, poteva sapere che il tribunale avrebbe applicato la nuova legge al suo giudizio. E' dunque solamente nell'occasione del suo ricorso in cassazione, unica via legale che gli era offerta per contestare la decisione dei giudici del fondo, che il richiedente sollevò espressamente il suo motivo di appello tratto dalla violazione dell'articolo 6 § 1 della Convenzione. Ora il Consiglio di stato non ha ammesso il ricorso in cassazione del richiedente, senza motivare la sua decisione.

33. La Corte nota che, secondo il Governo, la non ammissione del ricorso del richiedente sarebbe stata dovuta all'invocazione di nuovi mezzi dinnanzi al Consiglio di stato. Tuttavia, rileva che si tratta di una supposizione del Governo nella misura in cui il motivo della non ammissione non è precisato nella sentenza. La Corte ricorda anche che non le appartiene speculare sulle ragioni di questa non ammissione (vedere, mutatis mutandis, Petersen c. Germania, (dec.), no 38282/97, 12 gennaio 2006).

34. Constata che il richiedente ha sollevato i motivi di appello presentati alla Corte appena ne

non admission du pourvoi du requérant serait due à l'invocation de moyens nouveaux devant le Conseil d'Etat. Toutefois, elle relève qu'il s'agit d'une supposition du Gouvernement dans la mesure où le motif de non admission n'est pas précisé dans l'arrêt. La Cour rappelle également qu'il ne lui appartient pas de spéculer sur les raisons de cette non admission (voir, mutatis mutandis, Petersen c. Allemagne (déc.), no 38282/97, 12 janvier 2006).

34. Elle constate que le requérant a soulevé les griefs présentés à la Cour dès qu'il en a eu connaissance, soit postérieurement au jugement du tribunal administratif et considère en conséquence que l'exception soulevée par le Gouvernement tirée du non-épuisement des voies de recours internes s'avère non fondée et doit être rejetée.

2. Sur le fond

a) Thèses des parties

35. Le Gouvernement déclare s'en remettre à la sagesse de la Cour.

36. Le requérant estime que si le Conseil d'Etat avait examiné son moyen il lui aurait permis d'obtenir satisfaction au regard de l'avis Provin, consacrant l'inconventionalité du caractère rétroactif de l'article L. 24 du code des pensions, dans l'hypothèse d'une demande formée avant son entrée en vigueur.

b) Appréciation de la Cour

37. La Cour rappelle qu'en principe le pouvoir législatif n'est pas empêché de réglementer en matière civile, par de nouvelles dispositions à portée rétroactive, des droits découlant de lois en vigueur (voir, entre autres, Zielinski et Pradal et Gonzalez et autres c. France [GC], nos 24846/94 et 34165/96 à 34173/96, § 57, CEDH 1999-VII).

38. Toutefois, elle a déjà jugé que le principe de la prééminence du droit et la notion de procès équitable consacrés par l'article 6 s'opposaient, sauf pour d'impérieux motifs d'intérêt général, à l'ingérence du pouvoir législatif dans l'administration de la justice dans le but d'influer sur le dénouement judiciaire du litige. Dans des affaires soulevant des problèmes similaires, elle a relevé que l'intervention du législateur avait eu lieu à un moment où une instance judiciaire à laquelle l'Etat était partie se trouvait pendante. Elle a donc conclu que l'Etat avait porté atteinte aux droits des requérants garantis par l'article 6 en intervenant d'une manière décisive pour orienter en sa faveur l'issue imminente de l'instance à laquelle il était

ha avuto cognizione, o dopo il giudizio del tribunale amministrativo e considera perciò che l'eccezione sollevata dal Governo derivata dal non-esaurimento delle vie di ricorso interne si rivela non fondata e deve essere respinta.

2. Sul merito

a) Tesi delle parti

35. Il Governo dichiara di rimettersi alla saggezza della Corte.

36. Il richiedente stima che se il Consiglio di stato avesse esaminato il suo mezzo gli avrebbe permesso di ottenere soddisfazione allo sguardo del parere Provin, consacrando la non convenzionalità del carattere retroattivo dell'articolo L. 24 del codice delle pensioni, nell'ipotesi di una domanda formata prima della sua entrata in vigore.

b) Valutazione della Corte

37. La Corte ricorda che in principio al potere legislativo non viene impedito di regolamentare in materia civile, con nuove disposizioni a portata retroattiva, dei diritti derivanti da leggi in vigore (vedere, tra altre, Zielinski e Pradal e Gonzalez ed altri c. Francia [GC], i nostri 24846/94 e 34165/96 a 34173/96, § 57, CEDH 1999-VII).

38. Tuttavia, ha giudicato già che il principio della preminenza del diritto e la nozione di processo equo consacrato dall'articolo 6 si opponeva, salvo per imperiosi motivi di interesse generale, all'ingerenza del potere legislativo nell'amministrazione della giustizia allo scopo di influire sulla conclusione giudiziale della controversia. Nelle cause che sollevavano dei problemi simili, ha rilevato che l'intervento del legislatore aveva avuto luogo in un momento in cui un'istanza giudiziale alla quale lo stato era parte si trovava pendente. Ha concluso dunque che lo stato aveva recato offesa ai diritti dei richiedenti garantiti dall'articolo 6 intervenendo in modo decisivo per orientare a suo favore la conclusione imminente dell'istanza alla quale era parte (vedere, in particolare, Zielinski e Pradal e Gonzalez ed altri c. Francia [GC], i nostri 24846/94 e 34165/96 a 34173/96, § 57, CEDH 1999-VII e SCM Scanner dell'ovest lionese ed altri c. Francia, no 12106/03, § 28, 21 giugno 2007).

39. La Corte osserva peraltro che prima dell'entrata in vigore della legge del 30 dicembre 2004, avuto riguardo all' allora articolo L. 24 del codice delle pensioni applicabile e come interpretato dal giudice comunitario ed amministrativo(paragrafi 17 a 19 sopra,) il richiedente poteva aspettarsi legittimamente di

partie (voir, notamment, Zielinski et Pradal et Gonzalez et autres c. France [GC], nos 24846/94 et 34165/96 à 34173/96, § 57, CEDH 1999-VII et SCM Scanner de l'Ouest Lyonnais et autres c. France, no 12106/03, § 28, 21 juin 2007).

39. La Cour observe par ailleurs, qu'avant l'entrée en vigueur de la loi du 30 décembre 2004, eu égard à l'article L. 24 du code des pensions alors applicable et tel qu'interprété par le juge communautaire et administratif (paragraphes 17 à 19 ci-dessus), le requérant pouvait légitimement s'attendre à obtenir son admission à la retraite anticipée. Or, le dispositif nouveau, qui entra en vigueur après que le requérant ait saisi le juge administratif d'un recours tendant à contester le rejet par l'administration de sa demande de mise à la retraite anticipée, modifia la législation applicable au litige en cours. Si le nouvel article L. 24 du code des pensions civiles et militaires exclut expressément de son champ d'application les décisions de justice devenues définitives, il s'applique toutefois aux procédures introduites devant le juge administratif avant son entrée en vigueur. Il a ainsi pour effet d'influer sur l'issue des litiges en cours.

40. Reste à vérifier si la rétroactivité de la loi reposait sur d'impérieux motifs d'intérêt général. La Cour note d'emblée que le Gouvernement ne présente pas d'observations sur ce point et s'en remet à sa sagesse.

41. Elle constate également qu'en l'espèce, l'intervention de la loi du 30 décembre 2004 visait à imposer une nouvelle condition aux fonctionnaires parents de trois enfants qui souhaitaient obtenir leur mise à la retraite anticipée. En effet, la loi nouvelle exige désormais que ceux-ci aient effectivement interrompu leur activité professionnelle pour pouvoir prétendre à cette mise à la retraite anticipée et à la pension y afférente. La Cour considère que le but poursuivi par cette nouvelle disposition vise à réduire le nombre de mises à la retraite anticipée et ainsi à préserver le seul intérêt financier de l'Etat en diminuant le nombre de pensions versées aux fonctionnaires parents de trois enfants. Or, elle rappelle qu'en principe le seul intérêt financier de l'Etat ne permet pas de justifier l'intervention rétroactive d'une loi de validation (voir, mutatis mutandis, Zielinski et Pradal et Gonzalez et autres c. France [GC], nos 24846/94 et 34165/96 à 34173/96, § 59, CEDH 1999-VII).

ottenere la sua ammissione alla pensione anticipata. Ora, il nuovo dispositivo che entrò in vigore dopo che il richiedente aveva investito il giudice amministrativo di un ricorso teso a contestare il rigetto da parte dell'amministrazione della sua domanda di collocamento in pensione anticipata, modificò la legislazione applicabile alla controversia in corso. Se il nuovo articolo L. 24 del codice delle pensioni civili e militari escludeva espressamente dal suo campo di applicazione le decisioni di giustizia diventate definitive, si applicava tuttavia ai procedimenti introdotti dinnanzi al giudice amministrativo anteriore la sua entrata in vigore. Ha così per effetto di influire sulla conclusione delle controversie in corso.

40. Resta da verificare se la retroattività della legge si fondava su degli imperiosi motivi di interesse generale. La Corte nota al primo colpo che il Governo non presenta alcuna osservazione su questo punto e si rimette alla sua saggezza.

41. Constata anche che nello specifico, l'intervento della legge del 30 dicembre 2004 mirava ad imporre una nuova condizione ai funzionari affini dei tre bambini che desideravano ottenere il loro collocamento in pensione anticipata. Difatti, la nuova legge esige oramai che questi abbiano interrotto effettivamente la loro attività professionale per potere pretendere questo collocamento in pensione anticipata ed alla pensione ivi afferente. La Corte considera che lo scopo perseguito da questa nuova disposizione mira a ridurre il numero di collocamento in pensione anticipata e così a preservare il solo interesse finanziario dello stato sminuendo il numero di pensioni versate ai funzionari affini di tre bambini. Ora, ricorda che in principio il solo interesse finanziario dello stato non permette di giustificare l'intervento retroattivo di una legge di convalida (vedere, mutatis mutandis, Zielinski e Pradal e Gonzalez ed altri c. Francia [GC], numeri 24846/94 e 34165/96 a 34173/96, § 59, CEDH 1999-VII).

42. Del resto, la Corte sottolinea che nel suo parere Provin del 27 maggio 2005, il Consiglio di stato aveva giudicato, in modo espresso, che le disposizioni legislative retroattive in questione non si fondavano su degli imperiosi motivi di interesse generale e, per questo fatto, disconoscevano l'articolo 6 § 1 della Convenzione.

43. Per la Corte, l'intervento del legislatore che regolava definitivamente ed in modo retroattivo, il fondo della controversia durante dinnanzi alle giurisdizioni interne, non si fondava dunque su

42. Au demeurant, la Cour souligne que dans son avis Provin du 27 mai 2005, le Conseil d'Etat avait lui-même jugé, de manière expresse, que les dispositions législatives rétroactives en question ne reposaient pas sur d'impérieux motifs d'intérêt général et, de ce fait, méconnaissaient l'article 6 § 1 de la Convention.

43. Pour la Cour, l'intervention du législateur, qui réglait définitivement et de manière rétroactive, le fond du litige pendant devant les juridictions internes, ne reposait donc pas sur d'impérieux motifs d'intérêt général, ainsi que l'exige, notamment, le principe de la prééminence du droit (Zielinski et Pradal et Gonzalez et autres, précité, § 57).

44. Partant, il y a eu violation de l'article 6 § 1 de la Convention.

III. SUR LA VIOLATION ALLÉGUÉE DE L'ARTICLE 6 § 1 COMBINÉ AVEC L'ARTICLE 13 DE LA CONVENTION

45. Le requérant estime que l'adoption de la loi du 30 décembre 2004 a porté atteinte à son droit de recours effectif dans la mesure où cette loi l'a empêché de faire valoir un droit qui lui était pourtant reconnu par le droit interne. Il invoque les articles 6 et 13 de la Convention combinés dont les dispositions pertinentes se lisent comme suit :

Article 13

« Toute personne dont les droits et libertés reconnus dans la présente Convention ont été violés, à droit à l'octroi d'un recours effectif (...). »

46. Ce grief est identique à celui présenté par le requérant sous l'angle de l'article 6 de la Convention pris isolément. Eu égard au constat figurant au paragraphe 42 ci-dessus, la Cour estime qu'il ne s'impose pas de statuer sur le grief en question.

IV. SUR LA VIOLATION ALLÉGUÉE DE L'ARTICLE 1 DU PROTOCOLE No 1

Le requérant se plaint d'une atteinte à ses biens en raison de l'application rétroactive du nouveau dispositif introduit par la loi du 30 décembre 2004. Il invoque l'article 1 du Protocole no 1 dont les dispositions se lisent comme suit :

Article 1 du Protocole no 1

« Toute personne physique ou morale a droit au respect de ses biens. Nul ne peut être privé de sa propriété que pour cause d'utilité publique et dans les conditions prévues par la loi et les principes généraux du droit international.

degli imperiosi motivi di interesse generale, così come esige, in particolare, il principio della preminenza del diritto (Zielinski e Pradal e Gonzalez ed altri, precitata, § 57).

44. Pertanto, c'è stata violazione dell'articolo 6 § 1 della Convenzione.

III. SULLA VIOLAZIONE ADDOTTA DELL'ARTICOLO 6 § 1 IN COMBIANTO DISPOSTO CON L'ARTICOLO 13 DELLA CONVENZIONE

45. Il richiedente stima che l'adozione della legge del 30 dicembre 2004 ha portato attentato al suo diritto di ricorso effettivo nella misura in cui questa legge gli ha impedito di fare valere un diritto che gli era riconosciuto tuttavia dal diritto interno. Invoca gli articoli 6 e 13 della Convenzione combinati le cui disposizioni pertinenti si leggono come segue:

Articolo 13

"Ogni persona i cui i diritti e libertà riconosciuti nella Convenzione sono stati violati, ha diritto alla concessione di un ricorso effettivo. "

46. Questo motivo di appello è identico a quello presentato dal richiedente sotto l'angolo dell'articolo 6 della Convenzione preso isolatamente. Avuto riguardo alla constatazione che figura sopra al paragrafo 42, la Corte stima che non si impone di deliberare sul motivo di appello in questione.

IV. SULLA VIOLAZIONE ADDOTTA DELL'ARTICOLO 1 DEL PROTOCOLLO NO 1

Il richiedente si lamenta di un attentato ai suoi beni in ragione dell'applicazione retroattiva del nuovo dispositivo introdotto dalla legge del 30 dicembre 2004. Invoca l'articolo 1 del Protocollo no 1 le cui disposizioni si leggono come segue:

Articolo 1 del Protocollo no 1

"Ogni persona fisica o giuridica ha diritto al rispetto dei suoi beni. Nessuno può essere privato della sua proprietà se non a causa di utilità pubblica e nelle condizioni previste dalla legge e dai principi generali del diritto internazionale.

Le disposizioni precedenti non recano offesa al diritto che possiedono gli Stati di mettere in vigore le leggi che giudicano necessarie per regolamentare l'uso dei beni conformemente all'interesse generale o per garantire il pagamento delle imposte o di altri contributi o delle multe. "

La Corte constata che questo motivo di appello si confonde largamente col precedente. Avuto riguardo alle circostanze particolari della presente causa, così come al ragionamento che l'ha condotta a constatare una violazione dell'articolo 6

Les dispositions précédentes ne portent pas atteinte au droit que possèdent les Etats de mettre en vigueur les lois qu'ils jugent nécessaires pour réglementer l'usage des biens conformément à l'intérêt général ou pour assurer le paiement des impôts ou d'autres contributions ou des amendes. »
La Cour constate que ce grief se confond largement avec le précédent. Eu égard aux circonstances particulières de la présente affaire, ainsi qu'au raisonnement qui l'a conduite à constater une violation de l'article 6 de la Convention, elle n'estime pas nécessaire d'examiner séparément le grief du requérant sous l'angle de l'article 1 du Protocole no 1.

V. SUR L'APPLICATION DE L'ARTICLE 41 DE LA CONVENTION

47. 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. »

A. Dommage

48. Le requérant demande à voir compenser les préjudices résultant de l'impossibilité dans laquelle il s'est trouvé d'obtenir des juridictions françaises, d'une part, l'annulation de la décision illégale de la caisse de retraite lui refusant le droit de bénéficier d'une retraite anticipée et, d'autre part, d'obtenir la liquidation de sa pension avec effet immédiat.
49. Il indique qu'il aurait dû être en mesure de prendre sa retraite anticipée et à taux plein dès le 1er décembre 2004. Afin d'évaluer son préjudice, en termes de pension de retraite, il compare la pension qu'il aurait dû percevoir en application du dispositif « 15 ans + 3 enfants » et celle qu'il va effectivement percevoir à la date d'ouverture de ses droits à la retraite en juin 2011, à l'âge de 60 ans, en vertu du droit commun. Il distingue ainsi le préjudice certain actuel, sur la période 2004-2011, et le préjudice à venir, à partir de 2011. Pour le premier, il indique qu'à la suite de son refus de placement à la retraite il a été placé en congé longue maladie à partir du 16 novembre 2006 par arrêté du directeur général de l'assistance publique-hôpitaux de Paris et qu'il ne fait pas de doute que ce congé se poursuivra jusqu'à son départ à la retraite en 2011. Dans ces circonstances, conformément aux termes de cet arrêté, le

della Convenzione, non stima necessario esaminare separatamente il motivo di appello del richiedente sotto l'angolo dell'articolo 1 del Protocollo no 1.

V. SULL'APPLICAZIONE DELL'ARTICOLO 41 DELLA CONVENZIONE

47. Ai termini dell'articolo 41 della Convenzione,
"Se la Corte dichiara che c'è stata violazione della Convenzione o dei suoi Protocolli, e se il diritto interno dell'Alta Parte contraente permette di cancellare solo imperfettamente le conseguenze di questa violazione, la Corte accorda alla parte lesa, se c'è luogo, una soddisfazione equa. "

A. Danno

48. Il richiedente chiede di vedersi compensare i danni che risultano dall'impossibilità nella quale si è trovato di ottenere dalle giurisdizioni francesi, da una parte, l'annullamento della decisione illegale della cassa pensioni che gli negava il diritto di beneficiare di una pensione anticipata e, dall'altra parte, di ottenere la liquidazione della sua pensione con effetto immediato.
49. Indica che avrebbe dovuto essere in misura di andare in pensione anticipata ed a tasso pieno fin dal 1 dicembre 2004. Per valutare il suo danno, in termini di pensione, confronta la pensione che avrebbe dovuto percepire in applicazione del dispositivo "15 anni + 3 bambini" e quella che percepirà effettivamente in data di apertura dei suoi diritti alla pensione nel giugno 2011, all'età di 60 anni, in virtù del diritto comune. Distingue così il danno certo reale, sul periodo 2004-2011, ed il danno che verrà, a partire dal 2011. Per il primo, indica che in seguito al suo rifiuto di collocamento in pensione è stato posto in congedo lunga malattia a partire dal 16 novembre 2006 con ordinanza del direttore generale degli assistenza pubblico-ospedalieri di Parigi e che non c'è dubbio che questo congedo proseguirà fino al suo pensionamento nel 2011. In queste circostanze, conformemente ai termini di questa ordinanza, il richiedente ha beneficiato di un pieno trattamento fino al 15 novembre 2007 e da questa data non percepisce più di 1 368 euro (EUR) netti mensili e non si vede versare più alcun premio annuo. Richiede, così in primo luogo, la somma di 7 423,95 EUR che corrispondono alla differenza tra gli importi dei suoi redditi dal 16 novembre 2007 e l'importo della pensione che avrebbe dovuto percepire durante questo stesso periodo. Per il secondo, richiede la somma di 37 178,40 EUR, corrispondente alla differenza che va a concretarsi nel momento del suo pensionamento tra la sua

requérant a bénéficié d'un plein traitement jusqu'au 15 novembre 2007 et depuis cette date il ne perçoit plus que 1 368 euros (EUR) net mensuel et ne se voit plus verser de prime annuelle. Il réclame, ainsi en premier lieu, la somme de 7 423,95 EUR correspondant au différentiel entre le montant de ses revenus depuis le 16 novembre 2007 et le montant de la pension qu'il aurait dû percevoir pendant cette même période. Pour le second, il réclame la somme de 37 178,40 EUR, correspondant au différentiel qui va se concrétiser à son départ en retraite entre sa pension réelle (1 385,73 EUR) et celle qu'il aurait dû percevoir en application du dispositif « 15 ans + 3 enfants » (1 540,75 EUR), en prenant pour référence une espérance de vie de quatre-vingts ans. Le requérant demande en outre que cette dernière somme se voie appliquer une indexation moyenne de 2,5 % par an.

50. Il réclame au titre du préjudice moral qu'il aurait subi, la somme de 30 000 EUR en raison des troubles dans les conditions d'existence consécutifs à l'impossibilité de prendre sa retraite sept ans auparavant. Il a changé de domicile dans l'anticipation d'un départ à la retraite en décembre 2004 et il a dû ensuite faire face à une dépression dont il est patent qu'elle est consécutive à la situation.

51. Le Gouvernement estime que ces prétentions ne sont recevables que dans la mesure où elles sont liées à la violation alléguée. S'agissant de la première somme réclamée au titre du préjudice matériel, il n'est pas démontré que l'arrêt maladie du requérant résulte de la violation alléguée. S'agissant de la seconde somme, toujours au titre du dommage matériel, le Gouvernement relève que le requérant se prévaut d'un préjudice éventuel qu'il est à l'heure actuelle dans l'impossibilité de chiffrer avec précision. Il explique que le requérant peut demander à être admis à la retraite pour invalidité. Dans l'hypothèse d'une radiation des cadres pour invalidité, la pension du requérant serait alors calculée sans décote pour trimestres manquants, par application de l'article 20 du décret no 2003-1306 du 26 décembre 2003. En effet, pour un départ en retraite pour invalidité à l'expiration des droits à congé maladie en novembre 2009, il pourrait percevoir (sur la base des informations qui ont servi à la simulation de pension effectuée et actualisée) une pension rémunérant l'intégralité de ses services d'un montant de l'ordre de 1 478

pensione reale (1 385,73 EUR) e quella che avrebbe dovuto percepire in applicazione del dispositivo "15 anni + 3 bambini" (1 540,75 EUR) prendendo per riferimento una speranza di vita di ottanta anni. Il richiedente chiede inoltre che questa a ultima somma si applichi un'indicizzazione media del 2,5% all' anno.

50. Richiede a titolo del danno morale che avrebbe subito, la somma di 30 000 EUR in ragione dei disagi nelle condizioni di esistenza consecutivi all'impossibilità di andare in pensione sette anni prima. Ha cambiato domicilio in previsione di un pensionamento nel dicembre 2004 e ha dovuto fare poi fronte ad una depressione di cui soffre che è consecutiva alla situazione.

51. Il Governo stima che queste pretese sono ammissibili solamente nella misura in cui sono legate alla violazione addotta. Trattandosi della prima somma richiesta a titolo del danno patrimoniale, non è dimostrato che la costatazione di malattia del richiedente risulti dalla violazione addotta. Trattandosi della seconda somma, sempre a titolo del danno patrimoniale, il Governo rileva che il richiedente si avvale di un danno eventuale che è al momento nell'impossibilità di valutare con precisione. Spiega che il richiedente può chiedere di essere ammesso alla pensione d' invalidità. Nell'ipotesi di una radiazione dalle cornici per invalidità, la pensione del richiedente sarebbe calcolata allora senza detrazione fiscale per i trimestri mancanti, tramite l' applicazione dell'articolo 20 del decreto no 2003-1306 del 26 dicembre 2003. Difatti, per un pensionamento per invalidità alla scadenza dei diritti del congedo per malattia nel novembre 2009, avrebbe potuto percepire (sulla base delle informazione che hanno servite alla simulazione di pensione effettuata ed attualizzata) una pensione che rimunera l'interezza dei suoi servizi di un importo nell'ordine di 1 478 EUR. Potrebbe, tutt'al più, ottenere solo il versamento della differenza tra la pensione che avrebbe potuto percepire nella sua qualità di padre di tre bambini e che valuta a 1 540,65 EUR e la pensione di invalidità che gli sarebbe stata servita e che si può fissare teoricamente a 1 478 EUR. Quindi, la differenza tra questi due importi di pensione per vent' anni ammonterebbe, non a 37 178,40 EUR ma a 14 991 EUR.

52. Trattandosi del danno morale, il richiedente non potrebbe imputare questo danno all'acquisto, nel febbraio 2005, di un bene immobiliare nelle Lande e dello stato depressivo che risulta dei

EUR. Il ne saurait, tout au plus, obtenir que le versement de la différence entre la pension qu'il aurait pu percevoir en sa qualité de père de trois enfants et qu'il chiffre à 1 540,65 EUR et la pension d'invalidité qui lui serait servie et que l'on peut théoriquement fixer à 1 478 EUR. Dès lors, la différence entre ces deux montants de pension pendant vingt ans s'élèverait, non pas à 37 178,40 EUR mais à 14 991 EUR.
52. S'agissant du préjudice moral, le requérant ne saurait imputer ce préjudice à l'achat, en février 2005, d'un bien immobilier dans les Landes et de l'état dépressif résultant des allers-retours entre ce nouveau domicile et son lieu de travail. A supposer même que la réalité de ces préjudices soit établie, le requérant n'apporte aucune précision de nature à en justifier leur montant, évalué de manière forfaitaire. Ces sommes paraissent en outre disproportionnées au vu des circonstances de l'espèce.
53. La Cour rappelle que le principe sous-tendant l'octroi d'une satisfaction équitable est qu'il faut, autant que faire se peut, placer l'intéressé dans une situation équivalente à celle où il se trouverait si la violation de la Convention n'avait pas eu lieu (voir, mutatis mutandis, Kingsley c. Royaume-Uni [GC], no 35605/97, § 40, CEDH 2002-IV, voir aussi Smith et Grady c. Royaume-Uni (satisfaction équitable), nos 33985/96 et 33986/96, § 18, CEDH 2000-IX). Par ailleurs, la condition sine qua non à l'octroi d'une réparation d'un dommage matériel est l'existence d'un lien de causalité entre le préjudice allégué et la violation constatée (Nikolova c. Bulgarie [GC], no 31195/96, § 73, CEDH 1999-II), et il en va de même du dommage moral (Kadiķis c. Lettonie (no 2), no 62393/00, § 67, 4 mai 2006).
54. Concernant le préjudice matériel du requérant, la Cour constate qu'il a continué à percevoir l'intégralité de son traitement jusqu'au 15 novembre 2007, et qu'en conséquence, il ne saurait se prévaloir d'un quelconque préjudice financier jusqu'à cette date.
55. Elle constate également qu'entre novembre 2007 et juin 2011, le requérant reçoit une indemnité de congé pour longue maladie de 1 368 EUR alors que si la loi litigieuse ne lui avait pas été appliquée, il aurait perçu une pension « bonifiée » de 1 540,65 EUR. La Cour alloue donc au requérant le différentiel entre ces deux sommes sur une période de 43 mois, soit la somme de 7 423,95 EUR en réparation du

viaggi tra questo nuovo domicilio ed il suo poso di lavoro. Supponendo anche che la realtà di questi danni sia stabilita, il richiedente non porta nessuna precisione di natura tale da giustificarne il loro importo, valutato in modo forfetario. Queste somme sembrano inoltre sproporzionate alla vista delle circostanze dello specifico.
53. La Corte ricorda che il principio che sottende la concessione di una soddisfazione equa è che occorre, tanto quanto si può fare, porre l'interessato in una situazione equivalente a quella in cui si troverebbe se la violazione della Convenzione non avesse avuto luogo (vedere, mutatis mutandis, Kingsley c. Regno Unito [GC], no 35605/97, § 40, CEDH 2002-IV, vedere anche Smith e Grady c. Regno Unito (soddisfazione equa), numeri 33985/96 e 33986/96, § 18, CEDH 2000-IX). Peraltro, la condizione sine qua non alla concessione di un risarcimento di un danno patrimoniale è l'esistenza di un legame di causalità tra il danno addotto e la violazione constatata (Nikolova c. Bulgaria [GC], no 31195/96, § 73, CEDH 1999-II) ed è lo stesso per il danno morale (Kadiķis c. Lettonia (no 2), no 62393/00, § 67, 4 maggio 2006).
54. Concernente il danno patrimoniale del richiedente, la Corte constata che ha continuato a percepire l'interezza del suo trattamento fino al 15 novembre 2007, e che perciò, non potrebbe avvalersi di un qualsiasi danno finanziario fino a questa data.
55. Constata anche che tra il novembre 2007 e il giugno 2011, il richiedente riceve un'indennità di congedo per lunga malattia di 1 368 EUR mentre se la legge controversa non gli fosse stata applicata, avrebbe percepito una pensione "bonificata" di 1 540,65 EUR. La Corte assegna al richiedente la differenza tra queste due somme per un periodo di 43 mesi dunque, o la somma di 7 423,95 EUR in risarcimento del danno subito durante questo periodo.
56. Per il periodo che va dal suo collocamento in pensione effettiva nel giugno 2011 fino alla fine della vita del richiedente, la Corte constata che l'importo della perdita è necessariamente ipotetico poiché dipende in particolare dalla data di decesso del richiedente. In più, la Corte deve tenere conto del fatto che il richiedente va a percepire una soddisfazione equa di un importo forfetario, mentre avrebbe dovuto ricevere questa parte della pensione tramite versamenti mensili.
Rileva anche che il Governo non contesta la cifra di 1 385,73 EUR avanzata dal richiedente come importo della pensione che riscuoterà dal giugno

préjudice subi pendant cette période.
56. Pour la période allant de sa mise à la retraite effective en juin 2011 jusqu'à la fin de vie du requérant, la Cour constate que le montant de la perte est nécessairement hypothétique puisqu'il dépend notamment de la date de décès du requérant. De plus, la Cour doit tenir compte du fait que le requérant va percevoir une satisfaction équitable d'un montant forfaitaire, alors qu'il aurait dû recevoir cette partie de la pension par des versements mensuels.
Elle relève également que le Gouvernement ne conteste pas le chiffre de 1 385,73 EUR avancé par le requérant comme montant de la pension qu'il touchera dès juin 2011 lors de son départ en retraite, même s'il se prévaut de l'impossibilité de chiffrer avec précision le préjudice subi par le requérant. La Cour alloue au requérant la somme de 28 000 EUR en réparation de son préjudice matériel.
57. La Cour considère également que le requérant a subi un préjudice moral du fait de l'intervention de la loi litigieuse d'une part, et de la participation du commissaire du Gouvernement au délibéré du Conseil d'Etat. Statuant en équité, elle alloue au requérant 2 000 EUR au titre du préjudice moral.

B. Frais et dépens

58. Le requérant demande également 2 392 EUR pour les frais et dépens engagés devant le Conseil d'Etat et 3 588 EUR pour ceux engagés devant la Cour. Il fournit les factures correspondant à ces sommes.
59. Le Gouvernement relève que ces sommes ne sont pas ventilées par rubriques et sont exprimées de manière forfaitaire. Si la Cour devait juger cette demande recevable, le Gouvernement conclut à ce que la somme éventuellement allouée au requérant au titre des frais et dépens n'excède pas la somme de 2 500 EUR.
60. La Cour rappelle que, lorsqu'elle conclut à la violation de la Convention, elle peut accorder au requérant le paiement non seulement des frais et dépens qu'il a engagés devant elle, mais aussi de ceux exposés devant les juridictions internes pour prévenir ou faire corriger par celles-ci ladite violation (voir, par exemple, Martinie c. France [GC] no 58675/00, 12 avril 2006), dès lors que leur nécessité est établie, que les justificatifs requis sont produits et que les sommes réclamées ne sont pas déraisonnables. Elle estime ainsi qu'il convient d'accorder au requérant le remboursement de

2011 all'epoca del suo pensionamento, anche se si avvale dell'impossibilità di valutare con precisione il danno subito dal richiedente. La Corte assegna al richiedente la somma di 28 000 EUR in risarcimento del suo danno patrimoniale.
57. La Corte considera anche che il richiedente ha subito da una parte un danno morale a causa dell'intervento della legge controversa, e della partecipazione del commissario del Governo in deliberazione in camera del consiglio del Consiglio di stato. Deliberando in equità, assegna al richiedente 2 000 EUR a titolo del danno morale.

B. Oneri e spese

58. Il richiedente chiede anche 2 392 EUR per gli oneri e le spese impegnati dinnanzi al Consiglio di stato e 3 588 EUR per quelli impegnati dinnanzi alla Corte. Fornisce le fatture che corrispondono a queste somme.
59. Il Governo rileva che queste somme non sono ripartite in voci e sono espresse in modo forfetario. Se la Corte dovesse giudicare questa domanda ammissibile, il Governo conclude al fatto che la somma eventualmente assegnata al richiedente a titolo degli oneri e delle spese non debba superare la somma di 2 500 EUR.
60. La Corte ricorda che, quando conclude alla violazione della Convenzione, può accordare non solo al richiedente il pagamento degli oneri e delle spese che ha impegnato dinnanzi a lei, ma anche di quelli esposti dinnanzi alle giurisdizioni interne per prevenire o fare correggere da queste suddetta violazione (vedere, per esempio, Martinie c. Francia [GC] no 58675/00, 12 aprile 2006) dal momento che viene stabilita la loro necessità, che vengono prodotti i giustificativi richiesti e che le somme richieste non siano irragionevoli. Stima così che conviene accordare al richiedente il rimborso dei suoi oneri di rappresentanza dinnanzi al Consiglio di stato e dinnanzi alla Corte. Perciò, gli assegna la somma di 5 980 EUR per oneri e spese.

C. Interessi moratori

61. La Corte giudica appropriato ricalcare il tasso degli interessi moratori sul tasso di interesse della facilità di prestito marginale della Banca centrale europea aumentato di tre punti percentuale.

PER QUESTI MOTIVI, LA CORTE, ALL'UNANIMITÀ,

1. Dichiara la richiesta ammissibile;
2. Stabilisce che c'è stata violazione dell'articolo 6 § 1 della Convenzione in quanto al motivo di appello derivato dalla partecipazione del commissario del governo alla deliberazione in

ses frais de représentation devant le Conseil d'Etat et devant la Cour. En conséquence, elle lui alloue la somme de 5 980 EUR pour frais et dépens.

C. Intérêts moratoires

61. La Cour juge approprié de calquer 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. Déclare la requête recevable ;
2. Dit qu'il y a eu violation de l'article 6 § 1 de la Convention quant au grief tiré de la participation du commissaire du gouvernement au délibéré du Conseil d'Etat ;
3. Dit qu'il y a eu violation de l'article 6 § 1 de la Convention quant au grief tiré de l'application rétroactive de la loi du 30 décembre 2004 ;
4. Dit qu'il n'est pas nécessaire d'examiner les griefs tirés des articles 13 de la Convention et 1 du Protocole no 1 ;
5. Dit

a) que l'Etat défendeur doit verser au requérant, dans les trois mois à compter du jour où l'arrêt sera devenu définitif conformément à l'article 44 § 2 de la Convention, 37 423,95 EUR (trente sept mille quatre cent vingt trois euros et quatre-vingt quinze centimes) tous préjudices confondus, outre 5 980 EUR (cinq mille neuf cent quatre-vingt euros) au titre des frais et dépens, plus tout montant pouvant être dû à titre d'impôt par le requérant ;

b) qu'à compter de l'expiration dudit délai et jusqu'au versement, ces montants seront à majorer d'un intérêt simple à un taux égal à celui de la facilité de prêt marginal de la Banque centrale européenne applicable pendant cette période, augmenté de trois points de pourcentage ;

6. Rejette la demande de satisfaction équitable pour le surplus.

Fait en français, puis communiqué par écrit le 11 février 2010, en application de l'article 77 §§ 2 et 3 du règlement.

Claudia Westerdiek Peer Lorenzen
Greffière Président

camera di consiglio del Consiglio di stato;
3. Stabilisce che c'è stata violazione dell'articolo 6 § 1 della Convenzione in quanto al motivo di appello derivato dall'applicazione retroattiva della legge del 30 dicembre 2004;
4. Stabilisce che non è necessario esaminare i motivi di appello derivati dagli articoli 13 della Convenzione e 1 del Protocollo no 1;
5. Stabilisce

a) che lo stato convenuto deve versare al richiedente, nei tre mesi a contare del giorno in cui la sentenza sarà diventata definitiva conformemente all'articolo 44 § 2 della Convenzione, 37 423,95 EUR (trenta settemila quattro cento venti tre euro ed novantacinque centesimi) ogni danno compreso, oltre 5 980 EUR (cinquemila nove cento ottanta euro) a titolo degli oneri e spese, più ogni importo che può essere dovuto a titolo di imposta dal richiedente;

b) che a contare dalla scadenza di suddetto termine e fino al versamento, questi importi saranno da aumentare di un interesse semplice ad un tasso uguale a quello della facilità di prestito marginale della Banca centrale europea applicabile durante questo periodo, aumentato di tre punti percentuale;

6. Respinge la domanda di soddisfazione equa per il surplus.

Fatto in francese, poi comunicato per iscritto l' 11 febbraio 2010, in applicazione dell'articolo 77 §§ 2 e 3 dell'ordinamento.

Claudia Westerdiek Peer Lorenzen
Cancelliera Presidente

B. PRONUNCE RESE NEI CONFRONTI DI ALTRI PAESI

Retroattività della legge "civile"

Art. 6 § 1 della Convenzione (equo processo)

In materia tributaria

Sentenza del 25 novembre 2010, sez. V., causa LILLY FRANCE (n. 2) c. Francia (in particolare, par. 24-58)

En l'affaire Lilly France c. France,

La Cour européenne des droits de l'homme (cinquième section), siégeant en une chambre composée de :

Peer Lorenzen, *président,*
Rait Maruste,
Mark Villiger,
Isabelle Berro-Lefèvre,
Mirjana Lazarova Trajkovska,
Ganna Yudkivska, *juges,*
Jean-Marie Delarue, *juge ad hoc,*

et de Stephen Phillips, *greffier adjoint de section*,

Après en avoir délibéré en chambre du conseil le 2 novembre 2010,

Rend l'arrêt que voici, adopté à cette date :

PROCÉDURE

1. A l'origine de l'affaire se trouve une requête (n° 20429/07) dirigée contre la République française et dont la société par actions simplifiées unipersonnelle Lilly France, (« la requérante »), a saisi la Cour le 4 mai 2007 en vertu de l'article 34 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales (« la Convention »).

2. La requérante est représentée par Me B. Geneste, avocat à Neuilly-sur-Seine. Le gouvernement français (« le Gouvernement ») a été représenté par son agent, Mme E. Belliard, directrice des affaires juridiques au ministère des Affaires étrangères.

3. La requérante allègue une violation de l'article 6 de la Convention au motif que la loi de validation adoptée en cours d'instance ne reposait pas, selon elle, sur d'impérieux motifs d'intérêt général.

4. Le 9 février 2009, le président de la cinquième section a décidé de communiquer la requête au Gouvernement. Comme le permet l'article 29 § 3 de la Convention, il a en outre été décidé que la chambre se prononcerait en même temps sur la recevabilité et le fond.

EN FAIT

I. LES CIRCONSTANCES DE L'ESPÈCE

5. La requérante, la société par actions simplifiées unipersonnelle (SASU) Lilly France, est un laboratoire pharmaceutique domicilié à Suresnes.

A. La genèse de l'affaire

6. En application du code de la sécurité sociale (voir la partie « droit et pratique internes pertinents »), les laboratoires pharmaceutiques, tel que celui de la requérante, sont redevables d'une taxe sur les dépenses qu'ils exposent au titre de l'information et de la prospection médicale.

7. Le 5 juillet 2000, la requérante fit l'objet d'un contrôle par deux agents de l'Union de recouvrement des cotisations de sécurité sociale et

d'allocations familiales (URSSAF), C. et G., destiné à vérifier l'exactitude de la déclaration faite par la requérante au titre de la taxe précitée. Ce contrôle aboutit à un redressement au principal de plus de 29 millions de francs (FRF) accompagné de pénalités de retard de 10 % soit un total de 32 201 364 FRF (4 909 066 euros (EUR)) notifié à la requérante le 23 août 2001 par l'Agence centrale des organismes de sécurité sociale (ACOSS) qui avait estimé que certaines dépenses auraient été exclues à tort de l'assiette de contribution.

B. La procédure devant les juridictions de sécurité sociale

8. La requérante contesta ce redressement par voie gracieuse devant le président du conseil d'administration de l'ACOSS le 20 septembre 2001. Celui-ci ne répondit pas, faisant ainsi naître une décision implicite de rejet à compter du 21 novembre 2001.

9. Le 17 janvier 2002, la requérante saisit le tribunal des affaires de sécurité sociale des Hauts-de-Seine d'un recours contre cette décision de rejet. Dans ses conclusions, elle souleva l'irrégularité des procès-verbaux dressés par les contrôleurs et la nullité du redressement subséquent au motif tiré, notamment, de l'incompétence des agents de contrôle, C. et G., leurs agréments n'ayant, selon elle, pas été régulièrement délivrés. Elle fit valoir à cet égard que deux recours en annulation de ces agréments avaient été récemment introduits devant le tribunal administratif de Paris (voir ci-dessous, paragraphe 16) et demanda au tribunal de surseoir à statuer en attendant les décisions administratives.

10. Par un jugement du 10 juin 2003, le tribunal des affaires de sécurité sociale (TASS) refusa de surseoir à statuer en invoquant le caractère non suspensif des recours administratifs. Sur le fond, il constata que les agréments litigieux avaient été produits par l'ACOSS et précisa qu'il ne lui appartenait pas d'apprécier la légalité de l'arrêté ministériel en vertu duquel les contrôleurs avaient été agréés. Il rejeta le recours de la requérante.

11. Celle-ci interjeta appel de ce jugement. En cours d'instance, le 18 décembre 2003, le législateur adopta la loi de financement de la sécurité sociale pour 2004 dont l'article 73 prévoyait que le contrôle effectué par les agents de l'URSSAF en 2000 était réputé régulier en tant qu'il serait contesté par le moyen tiré de l'illégalité de l'agrément des agents ayant procédé aux opérations de contrôle.

12. Par un arrêt du 11 janvier 2005, la cour d'appel de Versailles considéra qu'il n'était pas nécessaire de se prononcer sur l'illégalité alléguée des agréments dans la mesure où les pouvoirs publics, par l'adoption de la loi du 18 décembre 2003, avaient souhaité mettre un terme à cette contestation « afin de sécuriser les recettes sociales et d'éviter l'engorgement des juridictions ». Elle estima en conséquence que la régularité du contrôle ne pouvait plus être contestée sur ce point.

13. Répondant à l'argumentation de la requérante quant à l'incompatibilité entre l'intervention de la loi de validation et l'article 6 § 1 de la Convention, la cour d'appel estima qu'en l'espèce l'intérêt général, qui s'attachait à sécuriser les recettes sociales, n'était pas seulement d'ordre financier. En effet, selon elle, la loi de validation avait pour but de faire obstacle à une remise en cause intempestive de la régularité des agréments des agents de contrôle, parfois très anciens, et dont la légalité n'avait jamais été mise en doute. Elle précisa que cette loi n'avait pas vocation à s'appliquer aux seuls laboratoires pharmaceutiques, mais également à

d'autres employeurs redevables de cotisations sociales et à des travailleurs indépendants.

14. Sur le fond, la cour d'appel prononça la décharge d'une partie du redressement (environ 45 000 EUR) et condamna la requérante à verser plus de 4 862 000 EUR à l'ACOSS.

15. La Cour de cassation fut saisie par la requérante. Dans un arrêt du 8 novembre 2006, elle estima que l'intervention du législateur obéissait à d'impérieux motifs d'intérêt général dans la mesure où cette intervention, sans régler le fond du litige, ni priver la requérante du droit de contester le bien-fondé du redressement, était destinée à éviter le développement d'un contentieux de nature à mettre en péril le recouvrement des cotisations de sécurité sociale et, par suite, la pérennité du système de protection sociale. Sur ce point, elle confirma l'arrêt rendu par la cour d'appel.

C. La procédure administrative en annulation des agréments

16. Par deux jugements en date du 9 janvier 2006, le tribunal administratif de Paris statua sur les recours en annulation des deux décisions portant agrément de C. et de G. présentés par la société requérante. Il en prononça l'annulation au motif que le préfet de région qui en était l'auteur était incompétent pour les délivrer.

17. La cour administrative d'appel de Paris annula ces deux jugements le 26 juin 2008. Elle considéra que la requérante ne justifiait pas d'un intérêt lui donnant qualité pour demander au juge administratif l'annulation, pour excès de pouvoir, des décisions d'agrément.

18. La requérante forma un pourvoi en cassation devant le Conseil d'Etat. Dans ses conclusions, le commissaire du Gouvernement s'exprima ainsi :

> « (...) comme nous l'avons déjà dit, [les entreprises contrôlées] peuvent contester la régularité du contrôle, et donc de l'habilitation donnée aux contrôleurs, à l'occasion de l'action tendant à la décharge des sommes mises à leur charge. Ce dont la société requérante ne s'est d'ailleurs pas privée. Si cette contestation a été tenue en échec par la loi de validation, cette circonstance ne doit pas davantage rétroagir sur l'intérêt pour agir contre les décisions d'agrément. C'est en effet le propre des lois de validation de faire échec à certaines prétentions et la contestation de leurs effets validants doit être portée devant le juge saisi de l'action, par l'invocation de normes supérieures. »

19. Par deux arrêts du 11 décembre 2009, le Conseil d'Etat confirma la position de la cour administrative d'appel et dénia à la requérante la qualité pour agir devant les juridictions administratives afin de demander l'annulation pour excès de pouvoir des décisions d'agrément, au motif que ces décisions n'avaient pas, par elles-mêmes, d'effet sur la situation de la requérante.

D. La procédure administrative en responsabilité de l'Etat du fait des lois

20. Le 17 décembre 2007, la requérante présenta une demande d'indemnisation à l'ACOSS en faisant valoir que l'intervention, en cours d'instance devant les juridictions de sécurité sociale, d'une loi de validation l'empêchant de faire valoir l'incompétence des contrôleurs, était contraire aux engagements internationaux de la France et notamment à l'article 6 § 1 de la Convention. L'absence de réponse de l'ACOSS fit naître une décision implicite de rejet que la requérante déféra au tribunal administratif de

Versailles le 22 avril 2008. Depuis, l'Etat français déposa un mémoire en défense devant le tribunal.

21. Cette requête est actuellement pendante devant le tribunal administratif.

II. LE DROIT ET LA PRATIQUE INTERNES PERTINENTS

22. Les dispositions pertinentes du code de la sécurité sociale, applicables à l'époque des faits, se lisent comme suit :

Article L. 243-6

« La demande de remboursement des cotisations de sécurité sociale et d'allocations familiales indûment versées se prescrit par trois ans à compter de la date à laquelle lesdites cotisations ont été acquittées (...) »

Article L. 243-7

« Le contrôle de l'application des dispositions du présent code par les employeurs, personnes privées ou publiques, et par les travailleurs indépendants est confié aux organismes chargés du recouvrement des cotisations du régime général. Les agents chargés du contrôle sont assermentés et agréés dans des conditions définies par arrêté du ministre chargé de la sécurité sociale. Ces agents ont qualité pour dresser en cas d'infraction auxdites dispositions des procès-verbaux faisant foi jusqu'à preuve du contraire (...) »

Article L. 245-1

« Il est institué au profit de la caisse nationale de l'assurance maladie des travailleurs salariés une contribution des entreprises assurant l'exploitation en France (...) d'une ou plusieurs spécialités pharmaceutiques donnant lieu à remboursement par les caisses d'assurance maladie (...) »

Article L. 245-2

« L'assiette de la contribution est égale au total des charges comptabilisées au cours du dernier exercice clos au titre des frais de prospection et d'information des praticiens afférents à l'exploitation en France des spécialités pharmaceutiques remboursables ou des médicaments agréés à l'usage des collectivités (...) »

La loi n° 2003-1199 du 18 décembre 2003 portant financement de la sécurité sociale pour 2004 dispose :

Article 73

« Sous réserve des décisions de justice passées en force de chose jugée, les procès-verbaux mentionnés aux articles L. 243-7 du code de la sécurité sociale (...) sont réputés réguliers en tant qu'ils seraient contestés par le moyen tiré de l'illégalité de l'agrément du ou des agents ayant procédé aux opérations de contrôle ou par le moyen tiré de l'incompétence de leur auteur. »

Le 2 décembre 2003, le Conseil constitutionnel a été saisi d'un recours contre la loi du 18 décembre 2003. Dans sa décision n° 2003-486 DC du 11 décembre 2003, le Conseil a rejeté les griefs tirés des articles 17, 18, 54 et 55 de la loi déférée, et déclaré contraires à la Constitution les articles 6, 13, 35, 39 et 77. Concernant l'article 13, dont l'objet était de valider à compter du 1er janvier 1995, sous réserve des décisions de justice passées en force de chose jugée, les actions de recouvrement de la contribution due par des entreprises pharmaceutiques, il s'est prononcé en ces termes :

« (...) Si le législateur avait la faculté d'user de son pouvoir de prendre des dispositions rétroactives afin de valider, à la suite de l'intervention de cette décision et dans le respect de cette dernière, des actes de recouvrement, il ne pouvait le faire qu'en considération d'un motif d'intérêt général suffisant ; qu'eu égard au montant des recouvrements concernés, les conditions générales de l'équilibre financier de la sécurité sociale ne pouvaient être affectées de façon significative en l'absence de validation ; qu'à défaut d'autre motif d'intérêt général de nature à justifier celle-ci,

l'article 13 de la loi de financement doit être regardé comme contraire à la Constitution. »

Enfin, il a estimé n'y avoir lieu de soulever d'office aucune autre question de conformité à la Constitution.

23. La jurisprudence nationale relative à l'action en responsabilité du fait des lois :

Par un arrêt « La Fleurette » du 14 février 1938, le Conseil d'Etat a introduit pour la première fois un régime de responsabilité du fait des lois (voir notamment la partie droit interne pertinent dans l'affaire *Maurice c. France* (déc.), n° 11810/03, 6 juillet 2004). La haute juridiction administrative a récemment fait application de ce régime de responsabilité par un arrêt du 8 février 2007 dans l'affaire *Gardedieu* concernant une loi de validation rétroactive et a condamné l'Etat à indemniser le requérant. Les passages pertinents de cet arrêt se lisent comme suit :

> « Considérant que la responsabilité de l'Etat du fait des lois est susceptible d'être engagée, d'une part, sur le fondement de l'égalité des citoyens devant les charges publiques, pour assurer la réparation de préjudices nés de l'adoption d'une loi à la condition que cette loi n'ait pas entendu exclure toute indemnisation et que le préjudice dont il est demandé réparation, revêtant un caractère grave et spécial, ne puisse, dès lors, être regardé comme une charge incombant normalement aux intéressés, d'autre part, en raison des obligations qui sont les siennes pour assurer le respect des conventions internationales par les autorités publiques, pour réparer l'ensemble des préjudices qui résultent de l'intervention d'une loi adoptée en méconnaissance des engagements internationaux de la France (...).
>
> Considérant que, pour écarter le moyen tiré de ce que [la disposition litigieuse] était incompatible avec [l]es stipulations [de l'article 6 § 1 de la Convention], la cour a jugé que la validation litigieuse, qui avait eu pour objet de préserver l'équilibre financier de la caisse autonome de retraite des chirurgiens dentistes, était intervenue dans un but d'intérêt général suffisant ; qu'en statuant ainsi, alors que l'Etat ne peut, sans méconnaître ces stipulations, porter atteinte au droit de toute personne à un procès équitable en prenant, au cours d'un procès, des mesures législatives à portée rétroactive dont la conséquence est la validation des décisions objet du procès, sauf lorsque l'intervention de ces mesures est justifiée par d'impérieux motifs d'intérêt général, la cour administrative d'appel a commis une erreur de droit ; que, dès lors, et sans qu'il soit besoin d'examiner les autres moyens du pourvoi, M. A est fondé à demander l'annulation (...) de l'arrêt attaqué (...).
>
> Considérant (...) que [l]es dispositions [litigieuses] sont, dès lors, incompatibles avec les stipulations citées plus haut du § 1 de l'article 6 de la Convention (...) et que, par suite, leur intervention est susceptible d'engager la responsabilité de l'Etat ; que, d'autre part, la validation litigieuse est directement à l'origine du rejet des conclusions de [l'intéressé] tendant à être déchargé des cotisations qui lui étaient réclamées sur le fondement d'un décret jugé illégal par le Conseil d'Etat ; qu'il suit de là que le requérant est fondé à demander la condamnation de l'Etat à en réparer les conséquences dommageables (...) »

EN DROIT

I. SUR LA VIOLATION ALLÉGUÉE DE L'ARTICLE 6 DE LA CONVENTION

24. La requérante estime que l'adoption de l'article 73 de la loi de financement de la sécurité sociale pour 2004 du 18 décembre 2003 constitue une rupture du principe d'égalité des armes. Elle invoque l'article 6 § 1 de la Convention, ainsi libellé dans ses dispositions pertinentes :

« Toute personne a droit à ce que sa cause soit entendue équitablement (...) par un tribunal (...), qui décidera (...) des contestations sur ses droits et obligations de caractère civil (...) »

A. Sur la recevabilité

1. Thèses des parties

25. Le Gouvernement excipe du non-épuisement des voies de recours internes en l'espèce. Il fait en effet valoir qu'au regard de la jurisprudence *Gardedieu* (voir la partie « droit et pratique internes pertinents »), la requérante dispose d'une voie de recours effective et efficace pour obtenir réparation du préjudice éventuellement subi par l'intervention rétroactive de la loi du 18 décembre 2003. Il précise que la requérante a intenté ce recours le 22 avril 2008, soit près d'un an après avoir saisi la Cour, mais qu'à l'heure actuelle, les juridictions administratives n'ont pas encore statué sur cette demande. Or, le Gouvernement rappelle qu'en vertu du principe de subsidiarité, il appartient aux juridictions internes d'examiner les premières un grief tiré de la violation d'un droit protégé par la Convention et, le cas échéant, de redresser cette violation avant que la Cour ne soit saisie.

26. La requérante considère pour sa part que l'exception d'irrecevabilité présentée par le Gouvernement est infondée. Elle souligne d'emblée une contradiction entre les observations du Gouvernement devant la Cour et celles déposées devant le tribunal administratif de Versailles. En effet, dans les premières, le Gouvernement soutient que le recours ouvert par cette jurisprudence constitue une voie de recours effective et efficace que la requérante aurait dû épuiser, alors que dans les secondes observations, le Gouvernement invite le tribunal administratif de Paris à rejeter la demande d'indemnisation au motif qu'un tel recours serait « manifestement dépourvu de toute chance de succès » et réclame au demeurant la condamnation de la requérante pour procédure dilatoire et abusive.

27. La requérante soutient également qu'il existe une différence fondamentale entre l'affaire *Gardedieu* et la présente requête puisque dans la première le requérant n'avait pas soulevé le grief tiré de l'inconventionnalité de la loi litigieuse devant le juge judiciaire et ce n'est qu'après l'intervention de la Cour de cassation qu'il a présenté un recours indemnitaire en faisant valoir cette inconventionnalité. Or, dans la présente affaire, la requérante a soulevé l'incompatibilité entre la loi du 18 décembre 2003 et l'article 6 de la Convention devant les juridictions judiciaires et elle a obtenu une réponse définitive sur ce point de la part de la Cour de cassation, réponse qu'elle estime en contradiction avec les exigences de l'article 6 de la Convention.

28. Elle souligne au demeurant que cette jurisprudence du Conseil d'Etat est isolée, que sa portée ne peut, à l'heure actuelle, être clairement définie et précise que si une telle voie de recours devait être considérée comme efficace par la Cour, cette solution serait incompatible avec la notion de « délai raisonnable » contenue dans l'article 6 de la Convention.

2. Appréciation de la Cour

29. La Cour rappelle que, selon sa jurisprudence, l'article 35 de la Convention « ne prescrit 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 ; il incombe à l'Etat défendeur de démontrer que ces exigences se trouvent réunies » (voir

notamment *Vernillo c. France*, 20 février 1991, § 27, série A n° 198, et *Civet c. France* [GC], n° 29340/95, CEDH 1999-VI). De plus, « la règle de l'épuisement des voies de recours internes ne s'accommode pas d'une application automatique et ne revêt pas un caractère absolu : en en contrôlant le respect, il faut avoir égard aux circonstances de la cause. Cela signifie notamment que la Cour doit tenir compte de manière réaliste du contexte juridique et politique dans lequel les recours s'inscrivent ainsi que de la situation personnelle des requérants » (*Menteş et autres c. Turquie*, 28 novembre 1997, § 58, *Recueil des arrêts et décisions* 1997-VIII). De surcroît, un requérant qui a utilisé une voie de droit apparemment effective et suffisante ne saurait se voir reprocher de ne pas avoir essayé d'en utiliser d'autres qui étaient disponibles mais ne présentaient guère plus de chances de succès » (*Aquilina c. Malte* [GC], n° 25642/94, § 39, CEDH 1999-III).

30. En l'espèce, la Cour relève que, contrairement à l'affaire *Gardedieu*, la requérante a soulevé le grief tiré de l'incompatibilité entre les dispositions rétroactives de la loi du 18 décembre 2003 et l'article 6 de la Convention devant les juridictions de sécurité sociale chargées de trancher cette question pour déterminer la loi applicable au litige qui leur était soumis. Elle observe d'ailleurs que, dans son arrêt du 8 novembre 2006, la Cour de cassation a expressément écarté l'argument de la requérante sur ce point, en jugeant que l'intervention du législateur obéissait à d'impérieux motifs d'intérêt général et n'était donc pas contraire à la Convention. La Cour considère donc qu'en soumettant son grief aux juridictions judiciaires la requérante a fait usage d'une voie de recours effective et suffisante dès lors qu'elle a mis la Cour de cassation en mesure de se prononcer et, éventuellement, de réparer la violation alléguée.

31. Quant à l'argument du Gouvernement selon lequel la requérante aurait également dû épuiser le recours en responsabilité de l'Etat du fait des lois, la Cour constate qu'il existe une différence notable entre la présente espèce et l'affaire *Gardedieu*. En effet, dans cette dernière, le grief tiré de l'inconventionnalité de la législation litigieuse avait été soumis pour la première fois aux juridictions nationales dans le cadre de la procédure en responsabilité de l'Etat du fait des lois, tandis qu'en l'espèce, ce grief a été préalablement soumis et rejeté par les juridictions judiciaires, aussi bien en appel qu'en cassation. Or, selon la Cour, l'on ne saurait exiger de la requérante que, outre la procédure au fond, elle épuise d'autres voies de recours telle que l'action en responsabilité de l'Etat du fait des lois (voir *Maurice*, précitée). En effet, en introduisant une procédure pour contester le redressement litigieux devant les juridictions judiciaires, la requérante a utilisé une voie de droit directe, effective et suffisante compte tenu des griefs exposés (voir *supra*, paragraphe 30). Dès lors, l'épuisement d'une seconde voie de droit ne saurait être exigé.

32. Il convient par conséquent de rejeter l'exception d'irrecevabilité présentée par le Gouvernement.

33. La Cour constate par ailleurs que ce grief n'est pas manifestement mal fondé au sens de l'article 35 § 3 de la Convention et qu'il ne se heurte à aucun autre motif d'irrecevabilité. Il convient donc de le déclarer recevable.

B. Sur le fond

1. Thèses des parties

a) La requérante

34. La requérante entend démontrer que l'adoption de la loi litigieuse, alors que la procédure était pendante devant la cour d'appel a indiscutablement eu pour effet de modifier l'issue du procès qui l'opposait à l'ACOSS et donc à l'Etat et ce, même si aucun autre agrément n'avait préalablement été annulé. Elle souligne à cet égard qu'elle n'a pas pu chercher à tirer profit d'un « effet d'aubaine » car elle a été la première à ester en justice pour contester la validité de ces agréments. Dès lors, le Gouvernement ne saurait tirer argument du fait qu'aucun d'entre eux n'avait été préalablement invalidé.

35. Sur la portée de la mesure litigieuse, la requérante insiste sur le fait que la cour administrative d'appel de Paris, dans ses deux jugements du 26 juin 2008, n'a pas remis en cause le fond de la décision rendue par le tribunal administratif dans la mesure où elle a considéré que la requérante ne justifiait pas d'un intérêt à agir et a rejeté ses prétentions pour des motifs de forme. Elle rappelle toutefois qu'en vertu d'une jurisprudence constante, les irrégularités, qu'elles soient matérielles ou procédurales, et qui affectent un contrôle doivent automatiquement entraîner la nullité du redressement qui s'ensuit et donc la décharge des impositions supplémentaires mises à la charge de la requérante.

36. Elle fait également valoir que la nécessité pour la Cour de cassation de faire application de la loi nouvelle démontre que le moyen tiré de la nullité du redressement opéré était fondé. Dans le cas contraire, la Cour de cassation aurait rejeté ses prétentions sans avoir à trancher la question de l'applicabilité de la loi nouvelle aux faits de l'espèce.

37. Concernant l'importance des enjeux, la requérante renvoie à l'affaire *Chiesi SA c. France* (n° 954/05, 16 janvier 2007), portant sur la rétroactivité d'une autre disposition de la loi du 18 décembre 2003 et dans laquelle la Cour a considéré que les mesures prises par l'Etat français pour sécuriser la légalité de certains arrêtés étaient disproportionnées au regard de l'objectif visé.

38. Elle en conclut que la disposition litigieuse ne reposait pas sur d'« impérieux motifs d'intérêt général » et qu'elle se heurte à l'article 6 de la Convention.

b) Le Gouvernement

39. Le Gouvernement entend faire valoir qu'au moment de l'adoption de la loi du 18 décembre 2003, aucune décision de justice définitive et défavorable à l'Etat n'avait encore été prononcée et que cette loi n'avait donc pas pour objectif de mettre un terme à une jurisprudence contraire. Il précise que le nombre de recours introduits par les laboratoires pharmaceutiques mettant en cause les procédures d'agrément des contrôleurs de l'URSSAF lui faisaient craindre d'éventuelles annulations d'agréments par les juridictions nationales, ce qui risquait de fragiliser le recouvrement des recettes de sécurité sociale. Pour éviter d'en arriver à une telle situation, et compte tenu des enjeux en cause, le Gouvernement a préféré faire adopter une mesure de validation.

40. Concernant les effets de cette mesure, il indique qu'elle a une portée limitée dès lors qu'elle ne vise qu'à réparer un vice de procédure et qu'elle

ne prive pas la requérante de la possibilité de contester le bien-fondé du redressement. Il précise également que cette mesure n'a pas empêché la requérante de bénéficier d'une décharge partielle des impositions en appel et qu'elle a eu la possibilité de contester les agréments délivrés aux deux contrôleurs devant les juridictions administratives. Il considère que la loi de 2003 a, en définitive, permis le recouvrement de recettes légalement dues et destinées à la sécurité sociale en privant la requérante d'un « effet d'aubaine » dû à un éventuel vice de procédure.

41. Le Gouvernement souligne le fait qu'à ce jour aucun agrément délivré à un contrôleur de l'URSSAF n'a été annulé. En effet, les deux jugements rendus le 9 janvier 2006 par le tribunal administratif de Paris, ayant invalidé les agréments en cause dans la présente affaire, ont été ensuite censurés par la cour administrative d'appel. Dès lors, la portée de l'annulation d'un tel agrément en droit français ne peut être déterminée avec précision.

42. En ce qui concerne l'importance des enjeux, il souligne d'emblée la difficulté d'évaluer avec précision les montants concernés dans la mesure où les conséquences de l'annulation d'un agrément ne peuvent être clairement établies. Il précise cependant qu'entre 2000 et 2003, années sur lesquelles le redressement de la requérante a porté, le montant total des redressements notifiés par l'ACOSS sur toute la France s'élevait à 2,73 milliards d'euros et que le contentieux des redressements contestés par les laboratoires pharmaceutiques comme celui de la requérante, pour incompétence des agents de contrôle, pour la seule région parisienne, s'élève à 131 millions d'euros. Selon le Gouvernement, l'URSSAF évaluerait le risque des pertes financières pour la seule région parisienne à 400 millions d'euros en raison d'un « effet d'aubaine » dont auraient pu profiter d'autres requérants si l'article 73 de la loi du 18 décembre 2003 n'était pas intervenu pour dissiper les doutes pesant sur la régularité des agréments des agents de l'URSSAF.

43. Le Gouvernement fait valoir que la mesure litigieuse avait pour but de sécuriser les actions en recouvrement des recettes de sécurité sociale et qu'elle visait donc à assurer la pérennité du système de protection sociale. Il souligne à ce sujet que la procédure d'agrément des agents chargés du contrôle a été modifiée à compter du 1er janvier 2004 afin de supprimer le risque de nouveaux contentieux sur le même fondement.

44. Il précise également que la loi de validation avait pour objectif d'éviter la multiplication des procédures en annulation des agréments devant les juridictions administratives et en contestation des redressements devant les juridictions judiciaires.

45. Il en conclut que l'intervention en cours d'instance de l'article 73 de la loi du 18 décembre 2003 était justifiée par d'impérieux motifs d'intérêt général et conforme aux exigences de l'article 6 de la Convention.

2. *Appréciation de la Cour*

46. La Cour réaffirme que si, en principe, le pouvoir législatif n'est pas empêché de réglementer en matière civile, par de nouvelles dispositions à portée rétroactive, des droits découlant de lois en vigueur, le principe de la prééminence du droit et la notion de procès équitable consacrés par l'article 6 s'opposent, sauf pour d'impérieux motifs d'intérêt général, à l'ingérence du pouvoir législatif dans l'administration de la justice dans le but d'influer sur le dénouement judiciaire du litige (*Raffineries grecques*

Stran et Stratis Andreadis c. Grèce, 9 décembre 1994, § 49, série A n° 301-B, et *Zielinski et Pradal et Gonzalez et autres c. France* [GC], n°s 24846/94 et 34165/96 à 34173/96, § 57, CEDH 1999-VII).

47. La Cour est amenée à se prononcer en l'espèce sur la question de savoir si l'intervention de la loi du 18 décembre 2003 a porté atteinte au caractère équitable de la procédure, et à l'égalité des armes, en modifiant, en cours d'instance, l'issue de celle-ci. A cet égard, elle observe, à l'instar du Gouvernement, que la solution de la procédure engagée devant les juridictions judiciaires était difficilement prévisible en 2002, au moment de son introduction par la requérante. En effet, comme les deux parties le font valoir, la requérante était l'une des premières sociétés pharmaceutiques, sinon la première, à se prévaloir de l'incompétence des contrôleurs de l'URSSAF et aucune décision juridictionnelle n'était venue trancher cette question auparavant. Elle constate que la seule décision judiciaire antérieure à la loi litigieuse est le jugement rendu par le TASS dans la présente affaire le 10 juin 2003 et qui se déclare incompétent pour apprécier la légalité de l'arrêté ministériel portant agrément des contrôleurs.

48. Toutefois, la Cour observe qu'en l'espèce les juridictions judiciaires n'ont pas apporté de réponse à la requérante sur le point de savoir si les agréments litigieux avaient été valablement délivrés. En effet, comme rappelé précédemment, le TASS s'est déclaré incompétent pour connaître de cette question et la cour d'appel, ainsi que la Cour de cassation, faisant toutes deux application de la loi du 18 décembre 2003, n'ont pas eu à statuer sur ce point. Quant aux juridictions administratives, également saisies d'un recours en annulation des deux décisions d'agrément, la Cour observe que seul le tribunal administratif a statué sur leur validité et qu'il en a prononcé l'annulation au motif que le préfet, qui en était l'auteur, était incompétent pour les délivrer. Ce jugement a ensuite été invalidé par la cour administrative d'appel et le Conseil d'Etat qui ont estimé que la requérante n'avait pas la qualité pour agir devant les juridictions administratives pour demander l'annulation des décisions d'agrément dans la mesure où ils ont considéré que ces décisions n'avaient pas d'effets sur sa situation.

49. La Cour rappelle qu'il ne lui appartient pas de se substituer aux juridictions internes quant aux chances de succès des actions engagées par la requérante. Elle se borne à constater que l'intervention de la loi litigieuse a fait obstacle à ce que la cour d'appel et la Cour de cassation puissent se prononcer sur la validité des agréments de G. et C., donc sur la régularité du contrôle qu'ils ont effectué et, par voie de conséquence sur la validité du redressement infligé à la requérante alors que le Gouvernement reconnaît dans ses observations qu'un doute persistait avant l'entrée en vigueur de la loi, sur la régularité de ces agréments. Partant, la Cour considère que cette intervention, destinée à sécuriser l'issue de la procédure, constitue bien une ingérence du pouvoir législatif dans l'administration de la justice.

50. Reste à examiner si une telle ingérence repose sur d'impérieux motifs d'intérêt général.

51. La Cour rappelle qu'en principe le seul intérêt financier de l'Etat ne permet pas de justifier l'intervention rétroactive d'une loi de validation (voir, *mutatis mutandis*, *Zielinski et Pradal et Gonzalez et autres*, précité, § 59, et *Joubert c. France*, n° 30345/05, § 60, 23 juillet 2009). Elle observe que le chiffre de 400 millions d'euros de pertes avancé par le Gouvernement repose sur une évaluation faite par l'URSSAF du montant des recettes de

sécurité sociale qui auraient pu être contestées devant les juridictions de la région parisienne si l'article 73 de la loi du 18 décembre 2003 n'avait pas été adopté. Le Gouvernement ne fournit aucun renseignement quant au mode de calcul de ce chiffre qui est nécessairement hypothétique dans la mesure où il repose sur une évaluation aléatoire des conséquences résultant des procédures qui auraient pu être introduites. En effet, comme il l'a souligné, aucun redressement de cotisation n'a été remis en cause avant l'intervention de la loi litigieuse en raison de l'incompétence des agents de l'URSSAF, ce qui rend virtuel le chiffre qu'il avance.

52. De surcroît, la Cour relève que, d'après le Gouvernement, la procédure d'agrément a été modifiée par la loi du 18 décembre 2003 afin d'éviter l'introduction en justice de demandes similaires à celles de la requérante. Ainsi, seuls les redressements notifiés aux laboratoires pharmaceutiques avant 2004 sont susceptibles de faire l'objet d'une procédure en annulation pour défaut d'agrément des contrôleurs. La Cour constate également qu'en vertu de l'article L. 243-6 du code de la sécurité sociale, les actions en remboursement des cotisations de sécurité sociale indûment versées, telles que celle introduite par la requérante, se prescrivent par trois ans à compter de la date à laquelle lesdites cotisations ont été acquittées.

53. Partant, la Cour ne saurait tenir compte des sommes avancées par le Gouvernement, justifiées pour l'essentiel par un « effet d'aubaine » dont pourraient profiter d'autres requérants.

54. Par ailleurs, la Cour note que le montant des redressements réellement contestés devant les juridictions nationales en raison de l'illégalité des agréments des agents de contrôle s'élève, selon le Gouvernement, à 131 millions d'euros pour la seule région parisienne. Toutefois, elle considère que cette somme ne saurait remettre en cause, à elle seule, la pérennité du système de sécurité sociale comme le soutient le Gouvernement et qu'elle n'autorise donc pas le législateur à intervenir en cours de procédure afin d'en sécuriser l'issue (voir, *mutatis mutandis*, *Chiesi SA*, précité, § 38).

55. Quant à l'argument du Gouvernement selon lequel la loi du 18 décembre 2003 visait à éviter la multiplication des contentieux, la Cour considère que cette augmentation restait purement hypothétique au moment de l'adoption de la loi contestée (voir, *mutatis mutandis*, *Joubert*, précité, §§ 61 et 62).

56. Aucun des autres arguments présentés par le Gouvernement ne convainc la Cour de la légitimité de l'ingérence.

57. De l'avis de la Cour, l'intervention rétroactive de l'article 73 de la loi du 18 décembre 2003 ne reposait pas sur d'impérieux motifs d'intérêt général.

58. Partant, il y a eu violation de l'article 6 de la Convention.

II. SUR L'APPLICATION DE L'ARTICLE 41 DE LA CONVENTION

59. 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. »

A. Dommage

60. La requérante réclame la réparation de son préjudice matériel correspondant au montant du redressement dont elle a dû s'acquitter, à savoir 4 862 912 EUR, ainsi que la somme de 721 979 EUR correspondant au montant des intérêts au taux légal qui ont couru sur cette somme depuis son paiement, soit un total de 5 584 891 EUR. Elle souligne également que son préjudice moral est important, mais se borne à réclamer le versement d'un euro symbolique à titre de réparation pour ce préjudice.

61. Le Gouvernement considère que ces sommes sont manifestement excessives et sans rapport avec la violation constatée. Il souligne qu'en l'espèce le bien-fondé du redressement subi par la requérante est incontestable et qu'il a été confirmé par des décisions de justice devenues définitives. Il rappelle que dans l'arrêt *Joubert c. France*, rendu récemment et qui concernait la validation législative d'un défaut de compétence territoriale du service ayant procédé au contrôle fiscal des requérants, la Cour a considéré que le constat de violation constituait en soi une satisfaction équitable suffisante. Il ne s'oppose pas à ce que la requérante soit indemnisée de son préjudice moral à hauteur d'un euro symbolique.

62. La Cour relève que la seule base à retenir pour l'octroi d'une satisfaction équitable réside en l'espèce dans le fait que la requérante n'a pu jouir des garanties de l'article 6 § 1 de la Convention. A cet égard, la Cour rappelle qu'elle ne saurait spéculer sur ce qu'eût été l'issue du procès dans le cas contraire, qui plus est lorsque, comme en l'espèce, la requérante n'a bénéficié d'aucune décision interne définitive rendue en sa faveur (*SCM Scanner de l'Ouest Lyonnais et autres c. France*, n° 12106/03, § 38, 21 juin 2007). Elle constate, comme l'a souligné le Gouvernement, qu'en l'espèce les sommes réclamées à la requérante étaient dues et qu'elles n'ont été contestées que sur la base d'un vice de forme.

63. Compte tenu de ce qui précède, la Cour rejette les prétentions de la requérante relatives à l'indemnisation de son préjudice matériel. Quant au dommage moral, la Cour l'estime suffisamment réparé par le constat de violation auquel elle est parvenue.

B. Frais et dépens

64. La requérante demande également 114 084 EUR pour les frais et dépens engagés devant les juridictions internes, judiciaires et administratives. Elle fournit à cet égard les factures correspondant à ces sommes. Elle demande également la somme de 7 516 EUR pour les frais engagés devant la Cour.

65. Le Gouvernement considère que ces frais apparaissent comme disproportionnés et souligne qu'aucune précision n'est fournie quant à la répartition des sommes indiquées par la requérante. Il estime qu'une somme globale de 10 000 EUR allouée au titre des frais et dépens serait suffisante.

66. Selon la jurisprudence de la Cour, un requérant ne peut obtenir le remboursement de ses frais et dépens que dans la mesure où se trouvent établis leur réalité, leur nécessité et le caractère raisonnable de leur taux. En l'espèce et compte tenu des documents en sa possession et des critères susmentionnés, la Cour estime raisonnable la somme de 10 000 EUR tous frais confondus et l'accorde à la requérante.

C. Intérêts moratoires

67. La Cour juge approprié de calquer 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 présentée par le Gouvernement ;

2. *Déclare* la requête recevable ;

3. *Dit* qu'il y a eu violation de l'article 6 de la Convention ;

4. *Dit* que le constat de violation constitue une réparation suffisante du préjudice moral de la requérante ;

5. *Dit*

   a) que l'Etat défendeur doit verser à la requérante, dans les trois mois à compter du jour où l'arrêt sera devenu définitif conformément à l'article 44 § 2 de la Convention, 10 000 EUR (dix mille euros) pour frais et dépens, plus tout montant pouvant être dû à titre d'impôt par la requérante ;

   b) qu'à compter de l'expiration dudit délai et jusqu'au versement, ces montants seront à majorer d'un intérêt simple à un taux égal à celui de la facilité de prêt marginal de la Banque centrale européenne applicable pendant cette période, augmenté de trois points de pourcentage ;

6. *Rejette* la demande de satisfaction équitable pour le surplus.

Fait en français, puis communiqué par écrit le 25 novembre 2010, en application de l'article 77 §§ 2 et 3 du règlement.

Stephen Phillips
Greffier adjoint

Peer Lorenzen
Président

B. PRONUNCE RESE NEI CONFRONTI DI ALTRI PAESI

Irretroattività della legge penale

Art. 7 della Convenzione (*nullum crimen, nulla poena sine lege*)

Sentenza del 27 settembre 1995, Camera, causa G. c. Francia (in particolare, par. 21-27)

In the case of G. v. France [1],

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A [2], as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr Thór VILHJÁLMSSON,
Mr F. MATSCHER,
Mr L.-E. PETTITI,
Mr A. SPIELMANN,
Mrs E. PALM,
Mr A.N. LOIZOU,
Mr B. REPIK,
Mr U. LOHMUS,

and also of Mr H. PETZOLD, *Registrar*,

Having deliberated in private on 27 April and 31 August 1995,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 9 September 1994, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 15312/89) against the French Republic lodged with the Commission under Article 25 (art. 25) by a French national, Mr G., on 19 July 1989.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby France recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 7 para. 1 (art. 7-1) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30).

3. The Chamber to be constituted included ex officio Mr L.-E. Pettiti, the elected judge of French nationality (Article 43 of the Convention) (art.

[1] The case is numbered 29/1994/476/557. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

[2] Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 24 September 1994, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr F. Matscher, Mr A. Spielmann, Mrs E. Palm, Mr A.N. Loizou, Mr B. Repik and Mr U. Lohmus, (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the French Government ("the Government"), the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence the Registrar received the Government's memorial on 30 January 1995 and the applicant's memorial on 3 February. On 8 February the applicant informed the Registrar that he would not be attending the hearing and that he would no longer be participating in the proceedings (see paragraph 2 above). On 28 February the President acceded to the applicant's request that his identity not be disclosed. On 8 March the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

5. On 24 March 1995 the Commission produced the file on the proceedings before it, as requested by the Registrar on the President's instructions.

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 25 April 1995. The Court had held a preparatory meeting beforehand. There appeared before the Court:

(a) for the Government

Ms M. PICARD, magistrat, on secondment to the
Legal Affairs Department, Ministry of
Foreign Affairs, *Agent*,

Mrs M. DUBROCARD, magistrat, on secondment to the
Legal Affairs Department, Ministry of
Foreign Affairs,

Mr G. BITTI, special adviser, European
and International Affairs Department,
Ministry of Justice, *Counsel*;

(b) for the Commission

Mr B. MARXER, *Delegate*.

The Court heard addresses by Mr Marxer and Ms Picard.

AS TO THE FACTS

I. CIRCUMSTANCES OF THE CASE

7. Mr G., a driving test examiner, was charged on 14 December 1980 with accepting bribes. It was alleged that he had issued driving licences in exchange for payment of a sum of money (Article 177 of the Criminal Code, see paragraph 12 below).

In the course of the investigation and following additional submissions from the prosecuting authority, the investigating judge charged him with "corruption in the form of soliciting sexual favours" and indecent assault with violence or coercion (see paragraph 13 below) on the person of P., a driving test candidate. The investigating judge based the second charge on Article 333 of the Criminal Code as amended by the Law of 23 December 1980 (see paragraph 14 below). It was specifically alleged that G. had, on 14 November 1980, constrained a young woman who suffered from a slight mental handicap to submit to acts of buggery. At the material time such acts were classified as indecent assault rather than rape.

8. On 18 November 1982 the Rennes Criminal Court sentenced him to five years' imprisonment, two of which were suspended, for accepting bribes as a citizen responsible for a public service and indecent assault with violence or coercion by a person in authority. In so doing, the court was applying the Law of 23 December 1980 (see paragraph 14 below).

The Rennes Court of Appeal upheld that decision in a judgment of 14 November 1983.

On 26 February 1985 the latter judgment was quashed by the Court of Cassation on the ground that no reply had been given to the pleas of nullity. The case was remitted to the Angers Court of Appeal.

9. In a judgment of 22 January 1987 that court rejected the pleas of nullity. It dismissed the charge of corruption in the form of soliciting sexual favours, but found the applicant guilty of accepting bribes and of indecent assault with coercion and abuse of authority. It reduced his sentence to three years' imprisonment by virtue of Law no. 80-1041 of 23 December 1980, whose entry into force postdated the commission of the offences in question (see paragraph 14 below).

10. The applicant lodged a further appeal on points of law with the Court of Cassation. The fourth and last ground of this appeal was formulated as follows:

> "Violation of Article 7 of the Declaration of the Rights of Man and the Citizen, of Articles 4, 332 and 333 of the Criminal Code as applicable to the alleged offences and Article 593 of the Code of Criminal Procedure, failure to state reasons and lack of a legal basis; In so far as the impugned judgment found the defendant guilty of indecent assault on the person of P. on 14 November 1980;
>
> ...
>
> Before the entry into force of Law no. 80-1041 of 23 December 1980, under the Criminal Code the offence of indecent assault with coercion was not committed where no violence had been practised on the person who had been the object of that coercion; no one may be convicted in respect of acts which the law did not regard as an offence before they were carried out and the alleged indecent assault with coercion of which the appellant is accused did not, at the material time, constitute any criminal offence; nor did the mental deficiency of the `victim' constitute an aggravating circumstance. The acts in question could not therefore be punished under this head. By ruling as it did, the Court of Appeal violated the principle that no act may be classified as a punishable offence unless the law makes prior provision to that effect."

11. On 25 January 1989 the Court of Cassation dismissed the appeal. It explained its rejection of the above-mentioned ground in the following terms:

> "The finding of guilt on the count [of accepting bribes] justified the sentence imposed; in accordance with Article 598 of the Code of Criminal Procedure [see

paragraph 15 below] it is therefore unnecessary to rule on the fourth ground of appeal put forward by the appellant."

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Corruption of public servants

12. Article 177 1° of the Criminal Code is worded as follows:

"Anyone who has solicited or accepted offers or promises, solicited or received gifts or presents shall be liable to a term of imprisonment of from two to ten years and a fine equal to double the value of the promises accepted or the articles received or requested, such fine not being less than FRF 1,500, where he has done so

1° as a person holding elected office, being a public servant in the administrative or judicial branch of the civil service, a member of the armed forces or having equivalent status, the agent or representative of a public administrative authority or of an administrative authority placed under the control of the public authorities or a citizen responsible for a public service, in return for performing or refraining from performing one of his duties or one of the tasks attaching to his post, whether fair or not, but not covered by his salary."

B. Indecent assault

1. Provisions applicable at the material time

13. The relevant provisions of the Criminal Code were as follows:

Article 331

"Any indecent assault committed or attempted without violence on the person of a child of either sex under the age of fifteen years shall be punished by between five and ten years' imprisonment.

The same penalty shall be imposed in respect of indecent assault by any relative in the ascending line carried out on the person of a minor, even if the victim is aged over fifteen years provided that he or she is unmarried.

Without prejudice to the more severe penalties laid down in the foregoing paragraphs or in Articles 332 and 333 of the present Code, whosoever shall commit an indecent or unnatural act with a person of the same sex aged less than twenty-one years shall be punished by between six months' and three years' imprisonment and a fine of between FRF 60 and FRF 15,000."

Article 332

"Whosoever shall commit the crime of rape shall be sentenced to between ten and twenty years' imprisonment.

If the offence has been committed on the person of a child not having fully attained fifteen years of age, the offender shall receive the maximum penalty available.

Whosoever shall commit or attempt to commit indecent assault with violence on individuals of either sex shall be sentenced to between five and ten years' imprisonment.

If the crime has been committed on the person of a child not having fully attained fifteen years of age, the offender shall be sentenced to between ten and twenty years' imprisonment."

Article 333

"If the offenders are relatives in the ascending line of the person on whom the indecent assault was carried out, if they belong to the class of those who have authority over that person, if they are his or her schoolteachers or hired servants, or hired servants of the above-mentioned persons, if they are officials or ministers of a religion, or if the offender, whoever he may be, was assisted in his offence by one or more persons, the penalty shall be between ten and twenty years' imprisonment in the case provided for in the first paragraph of Article 331 and life imprisonment in the cases provided for in the preceding Article."

As there was no statutory definition of the notions of rape and indecent assault, the case-law delimited the scope of those terms. Thus coercion or non-physical violence has been treated as equivalent to physical violence. Consequently the offences were constituted where they had been committed without the victim's consent (see judgments of the Criminal Division of the Court of Cassation of 5 July 1838, Bulletin no. 191; of 27 September 1860, Bulletin no. 219; of 25 June 1857, Bulletin no. 240; of 27 December 1883, Bulletin no. 295; and of 17 November 1960, Bulletin no. 528).

2. The later provisions

14. Articles 332 and 333 of the Criminal Code were amended by Law no. 80-1041 of 23 December 1980, which entered into force on 24 December 1980. They now read as follows:

Article 332

"Any act of sexual penetration, of whatever nature, committed on the person of another by violence, coercion or by taking the victim unawares shall constitute rape. Rape shall be punished by between five and ten years' imprisonment. However, rape shall be punished by between ten and twenty years' imprisonment where it has been committed either on a person who was especially vulnerable owing to pregnancy, sickness, infirmity or physical or mental deficiency, or on a person under the age of fifteen years, or with the threatened use of a weapon, or by two or more assailants or accomplices, or by a legitimate, natural or adoptive ascendant of the victim or by a person in a position of authority over the victim or by a person who has abused the authority conferred by his duties."

Article 333

"Any other indecent assault committed or attempted with violence, coercion or by taking the victim unawares on a person other than a minor under the age of fifteen years shall be punished by between three and five years' imprisonment and a fine of between FRF 6,000 and FRF 60,000 or by one of these penalties alone.

However, indecent assault as defined in the first paragraph shall be punished by between five years' and ten years' imprisonment and a fine of between FRF 12,000 and FRF 120,000 or one of these penalties alone where it was committed or attempted either against a person who was particularly vulnerable owing to sickness, infirmity or physical or mental deficiency or pregnancy, or with the threatened use of a weapon, or by a legitimate, natural or adoptive ascendant of the victim or by a person in a position of authority over the victim, or by two or more assailants or accomplices, or by a person who has abused the authority conferred on him by his duties."

The new law downgraded the offence of indecent assault from serious offence (crime) to less serious offence (délit).

C. The non-imposition of consecutive sentences

15. Article 5 of the Criminal Code provides that "in the event of conviction for several serious offences and less serious offences, only the heaviest penalty available for one of the individual offences shall be imposed". This principle that sentences are not to be imposed consecutively is part of the basis for the doctrine of justified penalty laid down in Article 598 of the Code of Criminal Procedure, according to which:

"Where the penalty imposed is the same as that which would be imposed under the law that applies to the offence, any application to have the judgment quashed on the basis that there has been an error in the citation of the relevant provision shall fail."

Thus the Court of Cassation will declare the operative part of a judgment imposing a sentence to be justified where the sentence imposed is identical to that which the trial court would have ordered if the error of classification had not been committed. Where the appellant has been convicted of several

offences, the court will not examine the ground based on the error and directed against one of the offences if the penalty imposed is justified by the other offences (see judgments of the Criminal Division of the Court of Cassation of 25 September 1890, Bulletin no. 196; of 30 October 1925, Recueil Dalloz 1926, p. 6; of 25 March 1927, Recueil Dalloz 1927, p. 287; of 7 November 1931, Recueil Dalloz 1931, p. 559).

PROCEEDINGS BEFORE THE COMMISSION

16. Mr G. applied to the Commission on 19 July 1989 (application no. 15312/89). He complained that his conviction for an act which, at the time of its commission, did not constitute an offence under the law in force infringed Article 7 (art. 7) of the Convention. He further maintained that his right to a fair trial guaranteed under Article 6 para. 1 (art. 6-1) of the Convention had been infringed in that the Court of Cassation, relying on the doctrine of "justified penalty", had dismissed the submission based on the violation of the principle that no act may be classified as a punishable offence unless the law makes prior provision to that effect.

17. On 5 May 1993 the Commission declared the first complaint admissible and the second inadmissible. In its report of 29 June 1994 (Article 31) (art. 31), the Commission expressed the unanimous opinion that there had been no violation of Article 7 (art. 7). The full text of the Commission's opinion is reproduced as an annex to this judgment (1)[3].

FINAL SUBMISSIONS TO THE COURT

18. In their memorial the Government requested the Court

> "to hold, as did the Commission in its report of 29 June 1994, that the complaint based on a violation of Article 7 para. 1 (art. 7-1) of the Convention is unfounded since the sentence imposed on the applicant did not breach the principle that only the law can define a crime and prescribe a penalty".

AS TO THE LAW

I. SCOPE OF THE CASE

19. Mr G. requested the Court to reopen examination of the application from the point of view of the complaint based on Article 6 para. 1 (art. 6-1) of the Convention. The Government replied that the Commission had declared the complaint in question inadmissible (see paragraph 17 above).

20. Under the Convention the compass of a case brought before the Court is delimited by the Commission's decision on admissibility (see, among other authorities, the Powell and Rayner v. the United Kingdom judgment of 21 February 1990, Series A no. 172, pp. 13-14, para. 29, and the Helmers v. Sweden judgment of 29 October 1991, Series A no. 212-A, p. 13, para. 25). The Commission found the above-mentioned complaint inadmissible. The Court accordingly lacks jurisdiction to take cognisance of it. In any event a decision by the Commission finding a complaint inadmissible is final and is not open to appeal.

[3] Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 325-B of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

II. ALLEGED VIOLATION OF ARTICLE 7 PARA. 1 (art. 7 1) OF THE CONVENTION

21. The applicant complained that he had been convicted of an act that, when it was perpetrated, had not constituted an offence under the law in force. The prison sentence imposed on him pursuant to the Law of 23 December 1980, which postdated the act in question, had therefore violated Article 7 para. 1 (art. 7-1) of the Convention. That provision (art. 7-1) reads as follows:

> "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

Neither the Government nor the Commission accepted the applicant's contention.

22. In the Government's view, the criminal courts that dealt with the case had had recourse to the "in mitius" principle, namely that a criminal provision which is less severe than the previously applicable provision is to be applied retrospectively. This principle was not enshrined in Article 7 (art. 7) of the Convention, but it was to be found in Article 15 of the United Nations Covenant on Civil and Political Rights, according to which: "If subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby." In a decision of 19 and 20 January 1981 (decision 80-127 DC, Rec. 15), the Conseil constitutionnel clarified the basis for that principle, citing Article 8 of the Declaration of the Rights of Man and the Citizen of 1789, which states that "the law should impose only such penalties as are absolutely and evidently necessary". The Conseil constitutionnel considered that "not to apply to offences committed at a time when the earlier law was in force new, less severe provisions amounts to allowing the courts to impose penalties prescribed by the earlier provisions when such penalties are, according to the view of the legislature itself, no longer necessary".

Thus, as regards the definition of the offence, the acts of which the applicant had been accused had been classified as indecent assault with coercion in accordance with the definition laid down in the former law as consistently construed by the courts. Under the Law of 23 December 1980 the acts in question would have constituted rape. As far as imposition of sanctions was concerned, under the law applicable at the material time the applicant should have been committed for trial in the Assize Court as the offence of which he was accused was classified as serious (crime) and he would therefore have risked a life sentence, in view of the aggravating circumstance of abuse of a position of authority. Mr G. had benefited from the fact that the new law downgraded the offence to a less serious offence (délit) and prescribed lighter penalties. As the most lenient provisions of both the new law and the former law had been applied to him, he had no grounds for complaint.

23. The Commission took the view firstly that the provision setting out the criminal offence of which the applicant was accused satisfied the requirements of accessibility and foreseeability of the criminal law and, secondly, that the applicant's conviction and sentence was not in breach of the principle that no act may be classified as a punishable offence unless the law makes prior provision to that effect.

24. According to the Court's case-law, Article 7 para. 1 (art. 7-1) of the Convention embodies generally the principle that only the law can define a crime and prescribe a penalty and prohibits in particular the retrospective application of the criminal law where it is to an accused's disadvantage (see the Kokkinakis v. Greece judgment of 25 May 1993, Series A no. 260-A, p. 22, para. 52).

25. In the present case the Court, like the Commission, is of the opinion that the offences of which the applicant was accused fell within the scope of the former Articles 332 and 333 of the Criminal Code, which satisfied the requirements of foreseeability and accessibility (see, mutatis mutandis, the following judgments: Müller and Others v. Switzerland of 24 May 1988, Series A no. 133, p. 20, para. 29, and Salabiaku v. France of 7 October 1988, Series A no. 141-A, pp. 16-17, para. 29). There was consistent case-law from the Court of Cassation, which was published and therefore accessible, on the notions of violence and abuse of authority. As regards the notion of violence, the new provisions in the new Articles 332 and 333 of the Criminal Code merely confirmed this case-law.

26. The Court notes that the acts of which the applicant was accused also fell within the scope of the new legislation. On the basis of the principle that the more lenient law should apply both as regards the definition of the offence and the sanctions imposed, the national courts applied the new Article 333 of the Criminal Code for the imposition of sanctions as that provision downgraded the offence of which Mr G. was accused from serious offence (crime) to less serious offence (délit) (see paragraphs 13 and 14 above). Its application, admittedly retrospective, therefore operated in the applicant's favour.

27. In conclusion, there has been no violation of Article 7 para. 1 (art. 7-1) of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that it lacks jurisdiction to examine the complaint based on Article 6 para. 1 (art. 6-1) of the Convention;

2. Holds that there has been no violation of Article 7 para. 1 (art. 7-1) of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 27 September 1995.

Rolv RYSSDAL

President

Herbert PETZOLD

Registrar

Sentenza del 22 novembre 1995, Camera, causa C.R. c. Regno Unito (in particolare, par. 30-44)

In the case of C.R. v. the United Kingdom [1],

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A [2], as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr F. GÖLCÜKLÜ,
Mr C. RUSSO,
Mr J. DE MEYER,
Mr S.K. MARTENS,
Mr F. BIGI,
Sir John FREELAND,
Mr P. JAMBREK,
Mr U. LOHMUS,

and also of Mr H. PETZOLD, *Registrar*,

Having deliberated in private on 24 June and 27 October 1995,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 9 September 1994, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 20190/92) against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission under Article 25 (art. 25) by Mr C.R., a British citizen, on 31 March 1992.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 7 (art. 7) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicant stated that he wished to take

[1] The case is numbered 48/1994/495/577. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

[2] Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

part in the proceedings and designated the lawyer who would represent him (Rule 30).

3. On 24 September 1994 the President of the Court decided, under Rule 21 para. 6 and in the interests of the proper administration of justice, that a single Chamber should be constituted to consider both the instant case and the case of S.W. v. the United Kingdom [3].

4. The Chamber to be constituted for this purpose included ex officio Sir John Freeland, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 24 September 1994, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr F. Gölcüklü, Mr R. Macdonald, Mr C. Russo, Mr J. De Meyer, Mr S.K. Martens, Mr F. Bigi and Mr U. Lohmus (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). Subsequently, Mr P. Jambrek, substitute judge, replaced Mr Macdonald, who was unable to take part in the further consideration of the case (Rules 22 para. 1 and 24 para. 1).

5. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the United Kingdom Government ("the Government"), the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicant's memorial on 5 April 1995 and the Government's memorial on 6 April. On 17 May 1995 the Secretary to the Commission informed the Registrar that the Delegate did not wish to reply in writing.

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 20 June 1995. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Ms S. DICKSON, Foreign and Commonwealth Office, *Agent*,
Mr A. MOSES, QC, *Counsel*,
Mr R. HEATON, Home Office,
Mr J. TOON, Home Office, *Advisers*;

(b) for the Commission

Mr J. MUCHA, *Delegate*;

(c) for the applicant

Mr R. HILL, Barrister-at-law, *Counsel*,
Mr A.C. GUTHRIE, *Assistant*.

The Court heard addresses by Mr Mucha, Mr Hill and Mr Moses and also replies to questions put by some of its members individually.

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

7. The applicant is a British citizen, born in 1952, and lives in Leicester.

[3] Case no. 47/1994/494/576.

8. The applicant married his wife on 11 August 1984. They had one son, who was born in 1985. On 11 November 1987 the couple were separated for a period of about two weeks before becoming reconciled.

9. On 21 October 1989, as a result of further matrimonial difficulties, his wife left the matrimonial home with their son and returned to live with her parents. She had by this time already consulted solicitors regarding her matrimonial affairs and had left a letter for the applicant in which she informed him that she intended to petition for divorce. However no legal proceedings had been taken by her before the occurrence of the incident which gave rise to criminal proceedings. The applicant had on 23 October 1989 spoken to his wife by telephone indicating that it was his intention also to "see about a divorce".

10. Shortly before 9 p.m. on 12 November 1989, twenty-two days after his wife had returned to live with her parents, and while the parents were out, the applicant forced his way into the parents' house and attempted to have sexual intercourse with the wife against her will. In the course of that attempt he assaulted her, in particular by squeezing her neck with both hands.

11. The applicant was charged with attempted rape and assault occasioning actual bodily harm. At his trial before the Leicester Crown Court on 30 July 1990 it was submitted that the charge of rape was one which was not known to the law by reason of the fact that the applicant was the husband of the alleged victim. He relied on a statement by Sir Matthew Hale CJ in his History of the Pleas of the Crown published in 1736:

> "But the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."

12. In his judgment ([1991] 1 All England Law Reports 747) Mr Justice Owen noted that it was a statement made in general terms at a time when marriage was indissoluble. Hale CJ had been expounding the common law as it seemed to him at that particular time and was doing it in a book and not with reference to a particular set of circumstances presented to him in a prosecution. The bald statement had been reproduced in the first edition of Archbold on Criminal Pleadings, Evidence and Practice (1822, p. 259) in the following terms: "A husband also cannot be guilty of rape upon his wife."

Mr Justice Owen further examined a series of court decisions (R. v. Clarence [1888] 22 Queen's Bench Division 23, [1886-90] All England Law Reports 113; R. v. Clarke [1949] 2 All England Law Reports 448; R. v. Miller [1954] 2 All England Law Reports 529; R. v. Reid [1972] 2 All England Law Reports 1350; R. v. O'Brien [1974] 3 All England Law Reports 663; R. v. Steele [1976] 65 Criminal Appeal Reports 22; R. v. Roberts [1986] Criminal Law Reports 188; see paragraphs 19-22 below), recognising that a wife's consent to marital intercourse was impliedly given by her at the time of marriage and that the consent could be revoked on certain conditions. He added:

> "I am asked to accept that there is a presumption or an implied consent by the wife to sexual intercourse with her husband; with that, I do not find it difficult to agree. However, I find it hard to ... believe that it ever was the common law that a husband was in effect

> entitled to beat his wife into submission to sexual intercourse ... If it was, it is a very sad commentary on the law and a very sad commentary upon the judges in whose breasts the law is said to reside. However, I will nevertheless accept that there is such an implicit consent as to sexual intercourse which requires my consideration as to whether this accused may be convicted for rape."

On the question of what circumstances would suffice in law to revoke the consent, Mr Justice Owen noted that it may be brought to an end, firstly, by a court order or equivalent. Secondly, he observed, it was apparent from the Court of Appeal's judgment in the case of R. v. Steele ([1976] 65 Criminal Appeal Reports 22) that the implied consent could be withdrawn by agreement between the parties. Such an agreement could clearly be implicit; there was nothing in the case-law to suggest the contrary. Thirdly, he was of the view that the common law recognised that a withdrawal of either party from cohabitation, accompanied by a clear indication that consent to sexual intercourse has been terminated, would amount to a revocation of the implicit consent. He concluded that both the second and third exceptions to the matrimonial immunity against prosecution for rape applied in the case.

Following the judge's ruling, the applicant pleaded guilty to attempted rape and assault occasioning actual bodily harm, and was sentenced to three years' imprisonment.

13. The applicant appealed to the Court of Appeal, Criminal Division, on the ground that Mr Justice Owen had made a wrong decision in law in ruling that a man may rape his wife when the consent to intercourse which his wife gave on entering marriage had been revoked neither by a court order nor by agreement between the parties.

14. On 14 March 1991 the Court of Appeal, Criminal Division (Lord Lane CJ, Sir Stephen Brown P, Watkins, Neill and Russell LJJ), unanimously dismissed the appeal ([1991] 2 All England Law Reports 257). Lord Lane noted that the general proposition of Sir Matthew Hale in his History of the Pleas of the Crown (1736) (see paragraph 11 above) that a man could not commit rape upon his wife was generally accepted as a correct statement of the common law at that epoch. Further, Lord Lane made an analysis of previous court decisions, from which it appears that in R. v. Clarence (1888), the first reported case of this nature, some judges of the Court for Crown Cases Reserved had objected to the principle. In the next reported case, R. v. Clarke (1949), the trial court had departed from the principle by holding that the husband's immunity was lost in the event of a court order directing that the wife was no longer bound to cohabit with him. Almost every court decision thereafter had made increasingly important exceptions to the marital immunity (see paragraph 22 below). The Court of Appeal had accepted in R. v. Steele (1976) that the implied consent to intercourse could be terminated by agreement. This was confirmed by the Court of Appeal in R. v. Roberts (1986), where it held that the lack of a non-molestation clause in a deed of separation, concluded on expiry of a non-molestation order, did not revive the consent to intercourse.

Lord Lane added the following observations:

> "Ever since the decision of Byrne J in R. v. Clarke in 1949, courts have been paying lip-service to Hale CJ's proposition, whilst at the same time increasing the number of

exceptions, the number of situations to which it does not apply. This is a legitimate use of the flexibility of the common law which can and should adapt itself to changing social attitudes.

There comes a time when the changes are so great that it is no longer enough to create further exceptions restricting the effect of the proposition, a time when the proposition itself requires examination to see whether its terms are in accord with what is generally regarded today as acceptable behaviour.

...

It seems to us that where the common law rule no longer even remotely represents what is the true position of a wife in present-day society, the duty of the court is to take steps to alter the rule if it can legitimately do so in the light of any relevant parliamentary enactment. That in the end comes down to a consideration of the word 'unlawful' in the 1976 Act."

Lord Lane then critically examined the different strands of interpretation of section 1 (1) (a) of the 1976 Act in the case-law, including the argument that the term "unlawful" (see paragraph 17 below) excluded intercourse within marriage from the definition of rape. He concluded:

"... [W]e do not consider that we are inhibited by the 1976 Act from declaring that the husband's immunity as expounded by Hale CJ no longer exists. We take the view that the time has now arrived when the law should declare that a rapist remains a rapist subject to the criminal law, irrespective of his relationship with his victim."

15. The Court of Appeal granted the applicant leave to appeal to the House of Lords, which unanimously upheld the Court of Appeal's judgment on 23 October 1991 ([1991] 4 All England Law Reports 481). Lord Keith of Kinkel, joined by Lord Brandon of Oakbrook, Lord Griffiths, Lord Ackner and Lord Lowry, gave, inter alia, the following reasons:

"For over 150 years after the publication of Hale's work there appeared to have been no reported case in which judicial consideration was given to his proposition. The first such case was R. v. Clarence [1888] 22 Queen's Bench Division 23, [1886-90] All England Law Reports 133 ... It may be taken that the proposition was generally regarded as an accurate statement of the common law of England. The common law is, however, capable of evolving in the light of changing social, economic and cultural developments. Hale's proposition reflected the state of affairs in these respects at the time it was enunciated. Since then the status of women, and particularly of married women, has changed out of all recognition in various ways which are very familiar and upon which it is unnecessary to go into detail. Apart from property matters and the availability of matrimonial remedies, one of the most important changes is that marriage is in modern times regarded as a partnership of equals, and no longer one in which the wife was the subservient chattel of the husband. Hale's proposition involves that by marriage a wife gives her irrevocable consent to sexual intercourse with her husband under all circumstances and irrespective of the state of her health or how she happens to be feeling at the time. In modern times any reasonable person must regard that conception as quite unacceptable.

...

The position then is that that part of Hale's proposition which asserts that a wife cannot retract the consent to sexual intercourse which she gives on marriage has been departed from in a series of decided cases. On grounds of principle there is no good reason why the whole proposition should not be held inapplicable in modern times. The only question is whether section 1 (1) of the 1976 Act presents an insuperable obstacle to that sensible course. The argument is that 'unlawful' in that subsection means outside the bond of marriage.

... The fact is that it is clearly unlawful to have sexual intercourse with any woman without her consent, and that the use of the word in the subsection adds nothing. In my opinion there are no rational grounds for putting the suggested gloss on the word, and it should be treated as being mere surplusage in this enactment ...

I am therefore of the opinion that section 1 (1) of the 1976 Act presents no obstacle to this House declaring that in modern times the supposed marital exception in rape forms no

part of the law of England. The Court of Appeal, Criminal Division, took a similar view [in the present case]. Towards the end of the judgment of that court Lord Lane CJ said ...:

'The remaining and no less difficult question is whether, despite that view, this is an area where the court should step aside to leave the matter to the parliamentary process. This is not the creation of a new offence, it is the removal of a common law fiction which has become anachronistic and offensive and we consider that it is our duty having reached that conclusion to act upon it.'

I respectfully agree."

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The offence of rape

16. The offence of rape, at common law, was traditionally defined as unlawful sexual intercourse with a woman without her consent by force, fear or fraud. By section 1 of the Sexual Offences Act 1956, "it is a felony for a man to rape a woman".

17. Section 1 (1) of the Sexual Offences (Amendment) Act 1976 provides, in so far as it is material, as follows:

"For the purposes of section 1 of the Sexual Offences Act 1956 (which relates to rape) a man commits rape if -

(a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it ..."

18. On 3 November 1994 the Criminal Justice and Public Order Act 1994 replaced the above provisions by inserting new subsections to section 1 of the Sexual Offences Act 1956, one of the effects of which was to remove the word "unlawful":

"1. (1) It is an offence for a man to rape a woman or another man.

(2) A man commits rape if – (a) he has sexual intercourse with a person ... who at the time of the intercourse does not consent to it ..."

B. Marital immunity

19. Until the proceedings in the applicant's case the English courts, on the few occasions when they were confronted with the issue whether directly or indirectly, had always recognised at least some form of immunity attaching to a husband from any charge of rape or attempted rape by reason of a notional or fictional consent to intercourse deemed to have been given by the wife on marriage. The proposition of Sir Matthew Hale quoted above (see paragraph 11) has been upheld until recently, for example in the case of R. v. Kowalski ([1987] 86 Criminal Appeal Reports 339), which concerned the question whether or not a wife had impliedly consented to acts which if performed against her consent would amount to an indecent assault. Mr Justice Ian Kennedy, giving the judgment of the court, stated, obiter:

"It is clear, well-settled and ancient law that a man cannot, as actor, be guilty of rape upon his wife."

And he went on to say that that principle was

"dependent upon the implied consent to sexual intercourse which arises from the married state and which continues until that consent is put aside by decree nisi, by a separation order or, in certain circumstances, by a separation agreement".

In another example, Lord Justice O'Connor in the R. v. Roberts case ([1986] Criminal Law Reports 188) held:

"The status of marriage involves that the woman has given her consent to her husband having intercourse with her during the subsistence of the marriage ... she cannot unilaterally withdraw it."

20. However, on 5 November 1990, Mr Justice Simon Brown held in R. v. C. ([1991] 1 All England Law Reports 755) that the whole concept of marital exemption in rape was misconceived:

"Were it not for the deeply unsatisfactory consequence of reaching any other conclusion on the point, I would shrink, if sadly, from adopting this radical view of the true position in law. But adopt it I do. Logically, I regard it as the only defensible stance, certainly now as the law has developed and arrived in the late twentieth century. In my judgment, the position in law today is, as already declared in Scotland, that there is no marital exemption to the law of rape. That is the ruling I give."

On the other hand, on 20 November 1990, in R. v. J. ([1991] 1 All England Law Reports 759) Mr Justice Rougier upheld the general common law rule, considering that the effect of section 1 (1) (a) of the 1976 Act was that the marital exemption embodied in Hale's proposition was preserved, subject to those exceptions established by cases decided before the Act was passed. He further stated:

"... there is an important general principle to be considered here, and that is that the law, especially the criminal law, should be clear so that a man may know where he stands in relation to it. I am not being so fanciful as to suppose that this defendant carefully considered the authorities and took Counsel's advice before behaving as alleged, but the basic principle extends a long way beyond the bounds of this case and should operate to prevent a man being convicted by means of decisions of the law ex post facto."

On 15 January 1991, Mr Justice Swinton Thomas in R. v. S. followed Rougier J, though he considered that it was open to judges to define further exceptions.

Both Rougier and Swinton Thomas JJ stated that they regretted that section 1 (1) (a) of the 1976 Act precluded them from taking the same line as Simon Brown J in R. v. C.

21. In its Working Paper 116 "Rape within Marriage" completed on 17 September 1990, the Law Commission stated:

"2.8 It is generally accepted that, subject to exceptions (considered ... below), a husband cannot be convicted of raping his wife ... Indeed there seems to be no recorded prosecution before 1949 of a husband for raping his wife ...

...

2.11 The immunity has given rise to a substantial body of law about the particular cases in which the exemption does not apply. The limits of this law are difficult to state with certainty. Much of it rests on first instance decisions which have never been comprehensively reviewed at appellate level ..."

22. The Law Commission identified the following exceptions to a husband's immunity:

- where a court order has been made, in particular:

(a) where an order of the court has been made which provides that a wife should no longer be bound to cohabit with her husband (R. v. Clarke [1949] 33 Criminal Appeal Reports 216);

(b) where there has been a decree of judicial separation or a decree nisi of divorce on the ground that "between the pronouncement of decree nisi and the obtaining of a decree absolute a marriage subsists as a mere technicality" (R. v. O'Brien [1974] 3 All England Law Reports 663);

(c) where a court has issued an injunction restraining the husband from molesting the wife or the husband has given an undertaking to the court that he will not molest her (R. v. Steele [1976] 65 Criminal Appeal Reports 22);

(d) in the case of R. v. Roberts ([1986] Criminal Law Reports 188), the Court of Appeal found that where a non-molestation order of two months had been made in favour of the wife her deemed consent to intercourse did not revive on expiry of the order;

- where no court order has been made:

(e) Mr Justice Lynskey observed, obiter, in R. v. Miller ([1954] 2 Queen's Bench Division 282) that a wife's consent would be revoked by an agreement to separate, particularly if it contained a non-molestation clause;

(f) Lord Justice Geoffrey Lane stated, obiter, in R. v. Steele that a separation agreement with a non-cohabitation clause would have that effect.

23. The Law Commission noted that it was stated in R. v. Miller and endorsed by the Court of Appeal in R. v. Steele that lodging a petition for divorce would not be sufficient.

It referred also to the ruling by Mr Justice Owen in the present case where an implied agreement to separate was considered sufficient to revoke the immunity and that, even in the absence of agreement, the withdrawal from cohabitation by either party, accompanied by a clear indication that consent to sexual intercourse had been terminated, would operate to exclude the immunity. It found this view difficult to reconcile with the approach in Steele that filing a divorce petition was "clearly" not sufficient. The ruling in the present case appeared substantially to extend what had previously been thought to be the law, although it emphasised that factual separation, and not mere revocation of consent to intercourse, was necessary to remove the immunity.

24. The Law Commission pointed out that its inquiry was unusual in one important respect. It was usual practice, when considering the reform of common law rules, to consider the grounds expressed in the cases or other authorities for the current state of the law, in order to analyse whether those grounds were well-founded. However, that step was of little assistance here, partly because there was little case-law on the subject but principally because there was little dispute that the reason set out in the authorities for the state of the law could not be supported (paragraph 4.1 of the Working Paper). The basis of the law was that intercourse against the wife's actual will was excluded from the law of rape by the fictional deemed consent to intercourse perceived by Sir Matthew Hale in his dictum. This notion was not only quite artificial but, certainly in the modern context, was also quite anomalous. Indeed, it was difficult to find any current authority or commentator who thought that it was even remotely supportable. The artificial and anomalous nature of the marital immunity could be seen if it was reviewed against the current law on the legal effects of marriage (paragraph 4.2).

The concept of deemed consent was artificial because the legal consequences of marriage were not the result of the parties' mutual agreement. Although the parties should have legal capacity to enter into the marriage contract and should observe the necessary formalities, they were not free to decide the terms of the contract; marriage was rather a status from which flow certain rights or obligations, the contents of which were determined by the law from time to time. This point had been emphasised by Mr Justice Hawkins in R. v. Clarence (1888) when he said: "The intercourse which takes place between husband and wife after marriage is not by virtue of any special consent on her part, but is mere submission to an obligation imposed on her by law" (paragraph 4.3).

In this connection, the Law Commission stressed that "[t]he rights and duties arising from marriage have, however, changed over the years as the law has adapted to changing social conditions and values. The more modern view of marriage is that it is a partnership of equals" (paragraph 4.4). It then gave examples of such changes in the law and added:

> "4.11 This gradual recognition of mutual rights and obligations within marriage, described in paragraphs 4.3-4.10 above, in our view demonstrates clearly that, whatever other arguments there may be in favour of the immunity, it cannot be claimed to be in any way justified by the nature of, or by the law governing, modern marriage."

25. The Law Commission made, inter alia, the provisional proposal that "the present marital immunity be abolished in all cases" (paragraph 5.2 of the Working Paper).

PROCEEDINGS BEFORE THE COMMISSION

26. In his application of 31 March 1992 (no. 20190/92) to the Commission, the applicant complained that, in breach of Article 7 (art. 7) of the Convention, he was convicted in respect of conduct, namely the attempted rape upon his wife, which at the relevant time did not, so he submitted, constitute a criminal offence.

27. The Commission declared the application admissible on 14 January 1994. In its report of 27 June 1994 (Article 31) (art. 31), the Commission expressed the opinion that there had been no violation of Article 7 para. 1 (art. 7-1) of the Convention (fourteen votes to three). The full text of the Commission's opinion and of the three separate opinions contained in the report is reproduced as an annex to this judgment [4].

FINAL SUBMISSIONS MADE TO THE COURT

28. At the hearing on 20 June 1995 the Government, as they had done in their memorial, invited the Court to hold that there had been no violation of Article 7 (art. 7) of the Convention.

29. On the same occasion the applicant reiterated the request to the Court stated in his memorial to find that there had been a breach of Article 7 (art. 7) and to award him just satisfaction under Article 50 (art. 50) of the Convention.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 7 (art. 7) OF THE CONVENTION

30. The applicant complained that his conviction and sentence for attempted rape of his wife constituted retrospective punishment in breach of Article 7 (art. 7) of the Convention, which reads:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

[4] Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 335-C of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

2. This Article (art. 7) shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

31. The Government and the Commission disagreed with the above contention.

A. General principles

32. The guarantee enshrined in Article 7 (art. 7), which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 (art. 15) in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment.

33. Accordingly, as the Court held in its Kokkinakis v. Greece judgment of 25 May 1993 (Series A no. 260-A, p. 22, para. 52), Article 7 (art. 7) is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage: it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (nullum crimen, nulla poena sine lege) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. From these principles it follows that an offence must be clearly defined in the law. In its aforementioned judgment the Court added that this requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable. The Court thus indicated that when speaking of "law" Article 7 (art. 7) alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises written as well as unwritten law and implies qualitative requirements, notably those of accessibility and foreseeability (see, as a recent authority, the Tolstoy Miloslavsky v. the United Kingdom judgment of 13 July 1995, Series A no. 316-B, pp. 71-72, para. 37).

34. However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the United Kingdom, as in the other Convention States, the progressive development of the criminal law through judicial law-making is a well entrenched and necessary part of legal tradition. Article 7 (art. 7) of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.

B. Application of the foregoing principles

35. The applicant maintained that the general common law principle that a husband could not be found guilty of rape upon his wife, albeit subject to certain limitations, was still effective on 12 November 1989, when he

committed the acts which gave rise to the charge of attempted rape paragraph 10 above). A succession of court decisions before and also after that date, for instance on 20 November 1990 in R. v. J. (see paragraph 20 above), had affirmed the general principle of immunity. It was clearly beyond doubt that as at 12 November 1989 no change in the law had been effected, although one was being mooted. The removal of the immunity by the Court of Appeal on 14 March 1991 and the House of Lords on 23 October 1991 occurred by way of direct reversal, not clarification, of the law.

When the House of Commons debated the Bill for the Sexual Offences (Amendment) Act 1976 (see paragraph 17 above), different views on the marital immunity were expressed. On the advice of the Minister of State to await a report of the Criminal Law Revision Committee, an amendment that would have abolished the immunity was withdrawn and never voted upon. In its report, which was not presented until 1984, the Criminal Law Revision Committee recommended that the immunity should be maintained and that a new exception should be created.

In 1988, when considering certain amendments to the 1976 Act, Parliament had the opportunity to take out the word "unlawful" in section 1 (1) (a) (see paragraph 17 above) or to introduce a new provision on marital intercourse, but took no action in this respect.

On 17 September 1990 the Law Commission provisionally recommended that the immunity rule be abolished (see paragraphs 24 and 25 above). However, the debate was pre-empted by the Court of Appeal's and the House of Lords' rulings in the applicant's case (see paragraphs 14 and 15 above). In the applicant's submission, these rulings altered the law retrospectively, which would not have been the case had the Law Commission's proposal been implemented by Parliament. Consequently, he concluded, when Parliament in 1994 removed the word "unlawful" from section 1 of the 1976 Act (see paragraph 18 above), it did not merely restate the law as it had been in 1976.

36. The applicant further argued that in examining his complaint under Article 7 para. 1 (art. 7-1) of the Convention, the Court should not consider his conduct in relation to any of the exceptions to the immunity rule. The issue was never resolved by the national courts, as the sole ground on which the applicant's conviction rested was in fact the removal of the common law fiction by the Court of Appeal and the House of Lords.

37. Should a foreseeability test akin to that under Article 10 para. 2 (art. 10-2) apply in the instant case, the applicant was of the opinion that it had not been satisfied. Although the Court of Appeal and the House of Lords did not create a new offence or change the basic ingredients of the offence of rape, they were extending an existing offence to include conduct which until then was excluded by the common law. They could not be said to have adapted the law to a new kind of conduct but rather to a change of social attitudes. To extend the criminal law, solely on such a basis, to conduct which was previously lawful was precisely what Article 7 (art. 7) of the Convention was designed to prevent. Moreover, the applicant stressed, it was impossible to specify with precision when the change in question had occurred. In November 1989, change by judicial interpretation was not foreseen by the Law Commission, which considered that a parliamentary enactment would be necessary.

38. The Government and the Commission were of the view that by November 1989 there was significant doubt as to the validity of the alleged marital immunity for rape. This was an area where the law had been subject to progressive development and there were strong indications that still wider interpretation by the courts of the inroads on the immunity was probable. In particular, given the recognition of women's equality of status with men in marriage and outside it and of their autonomy over their own bodies, the adaptation of the ingredients of the offence of rape was reasonably foreseeable, with appropriate legal advice, to the applicant. He was not convicted of conduct which did not constitute a criminal offence at the time when it was committed.

In addition, the Government pointed out, on the basis of agreed facts Mr Justice Owen had found that there was an implied agreement between the applicant and his wife to separation and to withdrawal of the consent to intercourse. The circumstances in his case were thus covered by the exceptions to the immunity rule already stated by the English courts.

39. The Court notes that the applicant's conviction for attempted rape was based on the statutory offence of rape in section 1 of the 1956 Act, as further defined in section 1 (1) of the 1976 Act (see paragraphs 16 and 17 above). The applicant does not dispute that the conduct for which he was convicted would have constituted attempted rape within the meaning of the statutory definition of rape as applicable at the time, had the victim not been his wife. His complaint under Article 7 (art. 7) of the Convention relates solely to the fact that he could not avail himself of the marital immunity under common law because, so he submitted, it had been retrospectively abolished.

40. It is to be observed that a crucial issue in the judgment of the Court of Appeal (summarised at paragraph 14 above) related to the definition of rape in section 1 (1) (a) of the 1976 Act: "unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it". The question was whether "removal" of the marital immunity would conflict with the statutory definition of rape, in particular whether it would be prevented by the word "unlawful". The Court of Appeal carefully examined various strands of interpretation of the provision in the case-law, including the argument that the term "unlawful" excluded intercourse within marriage from the definition of rape. In this connection, the Court recalls that it is in the first place for the national authorities, notably the courts, to interpret and apply national law (see, for instance, the Kemmache v. France (no. 3) judgment of 24 November 1994, Series A no. 296-C, pp. 86-87, para. 37). It sees no reason to disagree with the Court of Appeal's conclusion, which was subsequently upheld by the House of Lords (see paragraph 15 above), that the word "unlawful" in the definition of rape was merely surplusage and did not inhibit them from "removing a common law fiction which had become anachronistic and offensive" and from declaring that "a rapist remains a rapist subject to the criminal law, irrespective of his relationship with his victim" (see paragraph 14 above).

41. The decisions of the Court of Appeal and then the House of Lords did no more than continue a perceptible line of case-law development dismantling the immunity of a husband from prosecution for rape upon his wife (for a description of this development, see paragraphs 14 and 20-25 above). There was no doubt

under the law as it stood on 12 November 1989 that a husband who forcibly had sexual intercourse with his wife could, in various circumstances, be found guilty of rape. Moreover, there was an evident evolution, which was consistent with the very essence of the offence, of the criminal law through judicial interpretation towards treating such conduct generally as within the scope of the offence of rape. This evolution had reached a stage where judicial recognition of the absence of immunity had become a reasonably foreseeable development of the law (see paragraph 34 above).

42. The essentially debasing character of rape is so manifest that the result of the decisions of the Court of Appeal and the House of Lords - that the applicant could be convicted of attempted rape, irrespective of his relationship with the victim - cannot be said to be at variance with the object and purpose of Article 7 (art. 7) of the Convention, namely to ensure that no one should be subjected to arbitrary prosecution, conviction or punishment (see paragraph 32 above). What is more, the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity not only with a civilised concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom.

43. Having reached this conclusion, the Court does not find it necessary to enquire into whether the facts in the applicant's case were covered by the exceptions to the immunity rule already made by the English courts before 12 November 1989.

44. In short, the Court, like the Government and the Commission, finds that the national courts' decisions that the applicant could not invoke immunity to escape conviction and sentence for attempted rape upon his wife did not give rise to a violation of his rights under Article 7 para. 1 (art. 7-1) of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

Holds that there has been no violation of Article 7 para. 1 (art. 7-1) of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 22 November 1995.

Herbert PETZOLD	Rolv RYSSDAL
Registrar	President

Sentenza del 22 novembre 1995, Camera, causa S.W. c. Regno Unito (in particolare, par. 32-47)

In the case of S.W. v. the United Kingdom,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A [1], as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr F. GÖLCÜKLÜ,
Mr C. RUSSO,
Mr J. DE MEYEr,
Mr S.K. MARTENS,
Mr F. BIGI,
Sir John FREELAND,
Mr P. JAMBREK,
Mr U. LOHMUS,

and also of Mr H. PETZOLD, *Registrar*,

Having deliberated in private on 24 June and 27 October 1995,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 9 September 1994, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 20166/92) against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission under Article 25 (art. 25) by Mr S.W., a British citizen, on 29 March 1992.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 7 (art. 7) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings and designated the lawyers who would represent him (Rule 30).

3. On 24 September 1994 the President of the Court decided, under Rule 21 para. 6 and in the interests of the proper administration of justice, that a single Chamber should be constituted to consider both the instant case and the case of C.R. v. the United Kingdom.

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[1] Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

4. The Chamber to be constituted for this purpose included ex officio Sir John Freeland, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 24 September 1994, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr F. Gölcüklü, Mr R. Macdonald, Mr C. Russo, Mr J. De Meyer, Mr S.K. Martens, Mr F. Bigi and Mr U. Lohmus (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). Subsequently, Mr P. Jambrek, substitute judge, replaced Mr Macdonald, who was unable to take part in the further consideration of the case (Rules 22 para. 1 and 24 para. 1).

5. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the United Kingdom Government ("the Government"), the applicant's lawyers and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicant's memorial on 3 April 1995 and the Government's memorial on 6 April. On 17 May 1995 the Secretary to the Commission informed the Registrar that the Delegate did not wish to reply in writing.

6. On 2 June 1995 the Commission produced various documents, as requested by the Registrar on the President's instructions.

7. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 20 June 1995. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Ms S. DICKSON, Foreign and Commonwealth Office,	*Agent*,
Mr A. MOSES, QC,	*Counsel*,
Mr R. HEATON, Home Office,	
Mr J. TOON, Home Office,	*Advisers*;

(b) for the Commission

Mr J. MUCHA,	*Delegate*;

(c) for the applicant

Mr A. TYRELL, QC,	
Mr R. HILL, Barrister-at-law,	*Counsel*,
Mr S. GROVES, Solicitor,	*Adviser*.

The Court heard addresses by Mr Mucha, Mr Tyrell, Mr Hill and Mr Moses.

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

A. Events leading to charges being brought against the applicant

8. The applicant is a British citizen. His relationship with his wife, whom he married in 1987, was turbulent and came under great strain in 1990 when he became unemployed. In the early evening of 18 September

1990, she told him that for some weeks she had been thinking of leaving him and that she regarded the marriage as over. Prior to that date they had been sleeping separately - according to the applicant, for one night, or according to his wife, for five nights. The applicant did not accept that his wife meant what she said and they had a row following which he ejected her from the house, bruising her arm. She went to her next door neighbours and called the police, who subsequently visited and spoke to both the applicant and his wife separately. Later the same evening she re-entered the house and the applicant had sexual intercourse with her. Shortly afterwards she left the house, having first tried to take their child with her. She went to the neighbours crying and distressed, complaining to them and to the police, whom she telephoned, that she had been raped at knife-point.

9. On 19 September 1990 the applicant was charged with rape, under section 1 (1) of the Sexual Offences Act 1956; threatening to kill, contrary to section 16 of the Offences against the Person Act 1861; and assault occasioning actual bodily harm, in breach of section 47 of the latter Act.

B. Crown Court judgment of 30 July 1990 and Court of Appeal judgment of 14 March 1991 in the case of R. v. R.

10. On 30 July 1990 the defendant in another case, R. v. R., had been sentenced to three years' imprisonment by the Crown Court for attempted rape and assault occasioning actual bodily harm against his wife. The trial judge, Mr Justice Owen, had rejected the defendant's submission that he could not be convicted in light of a common law principle stated by Sir Matthew Hale CJ in his History of the Pleas of the Crown published in 1736:

> "But the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."

In his judgment ([1991] 1 All England Law Reports, 747) Mr Justice Owen noted that it was a statement made in general terms at a time when marriage was indissoluble. Hale CJ had been expounding the common law as it seemed to him at that particular time and was doing it in a book and not with reference to a particular set of circumstances presented to him in a prosecution. The bald statement had been reproduced in the first edition of Archbold on Criminal Pleadings, Evidence and Practice (1822, p. 259) in the following terms: "A husband also cannot be guilty of rape upon his wife."

Mr Justice Owen further examined a series of court decisions (R. v. Clarence [1888] 22 Queen's Bench Division 23, [1886-90] All England Law Reports 113; R. v. Clarke [1949] 2 All England Law Reports 448; R. v. Miller [1954] 2 All England Law Reports 529; R. v. Reid [1972] 2 All England Law Reports 1350; R. v. O'Brien [1974] 3 All England Law Reports 663; R. v. Steele [1976] 65 Criminal Appeal Reports 22; R. v. Roberts [1986] Criminal Law Reports 188; see paragraphs 22-25 below), recognising that a wife's consent to marital intercourse was impliedly given by her at the time of marriage and that the consent could be revoked on certain conditions. He added:

> "I am asked to accept that there is a presumption or an implied consent by the wife to sexual intercourse with her husband; with that, I do not find it difficult to agree.

However, I find it hard to ... believe that it ever was the common law that a husband was in effect entitled to beat his wife into submission to sexual intercourse ...

If it was, it is a very sad commentary on the law and a very sad commentary upon the judges in whose breasts the law is said to reside. However, I will nevertheless accept that there is such an implicit consent as to sexual intercourse which requires my consideration as to whether this accused may be convicted for rape."

On the question of what circumstances would suffice in law to revoke the consent, Mr Justice Owen noted that it may be brought to an end, firstly, by a court order or equivalent. Secondly, he observed, it was apparent from the Court of Appeal's judgment in the case of R. v. Steele ([1976] 65 Criminal Appeal Reports 22) that the implied consent could be withdrawn by agreement between the parties. Such an agreement could clearly be implicit; there was nothing in the case-law to suggest the contrary. Thirdly, he was of the view that the common law recognised that a withdrawal of either party from cohabitation, accompanied by a clear indication that consent to sexual intercourse has been terminated, would amount to a revocation of the implicit consent. He concluded that both the second and third exceptions to the matrimonial immunity against prosecution for rape applied in the case.

11. An appeal to the Court of Appeal, Criminal Division, was dismissed on 14 March 1991 ([1991] 2 All England Law Reports 257). Lord Lane noted that the general proposition of Sir Matthew Hale in his History of the Pleas of the Crown (1736) (see paragraph 10 above) that a man could not commit rape upon his wife was generally accepted as a correct statement of the common law at that epoch. Further, Lord Lane made an analysis of previous court decisions, from which it appears that in R. v. Clarence (1888), the first reported case of this nature, some judges of the Court for Crown Cases Reserved had objected to the principle. In the next reported case, R. v. Clarke (1949), the trial court had departed from the principle by holding that the husband's immunity was lost in the event of a court order directing that the wife was no longer bound to cohabit with him. Almost every court decision thereafter had made increasingly important exceptions to the marital immunity (see paragraph 24 below). The Court of Appeal had accepted in R. v. Steele (1976) that the implied consent to intercourse could be terminated by agreement. This was confirmed by the Court of Appeal in R. v. Roberts (1986), where it held that the lack of a non-molestation clause in a deed of separation, concluded on expiry of a non-molestation order, did not revive the consent to intercourse.

Lord Lane added the following observations:

"Ever since the decision of Byrne J in R. v. Clarke in 1949, courts have been paying lip-service to Hale CJ's proposition, whilst at the same time increasing the number of exceptions, the number of situations to which it does not apply. This is a legitimate use of the flexibility of the common law which can and should adapt itself to changing social attitudes.

There comes a time when the changes are so great that it is no longer enough to create further exceptions restricting the effect of the proposition, a time when the proposition itself requires examination to see whether its terms are in accord with what is generally regarded today as acceptable behaviour.

...

It seems to us that where the common law rule no longer even remotely represents what is the true position of a wife in present-day society, the duty of the court is to take steps to alter the rule if it can legitimately do so in the light of any relevant

parliamentary enactment. That in the end comes down to a consideration of the word 'unlawful' in the 1976 Act."

Lord Lane then critically examined the different strands of interpretation of section 1 (1) (a) of the 1976 Act (see paragraph 20 below) in the case-law, including the argument that the term "unlawful" excluded intercourse within marriage from the definition of rape. He concluded:

"... [W]e do not consider that we are inhibited by the 1976 Act from declaring that the husband's immunity as expounded by Hale CJ no longer exists. We take the view that the time has now arrived when the law should declare that a rapist remains a rapist subject to the criminal law, irrespective of his relationship with his victim.

The remaining and no less difficult question is whether, despite that view, this is an area where the court should step aside to leave the matter to the parliamentary process. This is not the creation of a new offence, it is the removal of a common law fiction which has become anachronistic and offensive and we consider that it is our duty having reached that conclusion to act upon it.

Had our decision been otherwise and had we been of the opinion that Hale CJ's proposition was still effective, we would nevertheless have ruled that where, as in the instant case, a wife withdraws from cohabitation in such a way as to make it clear to the husband that so far as she is concerned the marriage is at an end, the husband's immunity is lost."

12. On 23 October 1991, on a further appeal by the appellant in the above case, the House of Lords upheld the Court of Appeal's judgment, declaring, inter alia, that the general principle that a husband cannot rape his wife no longer formed part of the law of England and Wales. It stressed that the common law was capable of evolving in the light of changing social, economic and cultural developments. Whilst Sir Matthew Hale's proposition had reflected the state of affairs at the time it was enunciated, the status of women, and particularly of married women, had changed out of all recognition in various ways. Apart from property matters and the availability of matrimonial remedies, one of the most important changes had been that marriage was in modern times regarded as a partnership of equals, and no longer one in which the wife must be the subservient chattel of the husband (R. v. R. [1991] 4 All England Law Reports 481).

13. On 31 March 1992 the above appellant R. brought an application (no. 20190/92) to the Commission. The Commission referred his application (C.R. v. the United Kingdom) to the Court on the same date as the present case (see paragraphs 1 and 3 above).

C. The trial of the applicant in the present case

14. At the commencement of his trial on 16 April 1991, the applicant submitted that there was no case to answer on the rape charge. In the first place, he argued that the trial judge, Mr Justice Rose, should follow the Court of Appeal's approach in the case of R. v. Steele ([1976] 65 Criminal Appeal Reports 22) and should not consider himself bound by the 14 March 1991 judgment of that court in R. v. R. in so far as it purported to change the principle that a husband could not be found guilty of rape upon his wife. Secondly, he maintained that the retrospective effect of the change in the law effected by R. v. R. should be pronounced incompatible with Article 7 (art. 7) of the Convention. He referred, inter alia, to the judgment by the Court of Justice of the European Communities in R. v. Kent Kirk (European Court Reports [1984] 2689), dealing with a penal provision in relation to fishing, which was allegedly imposed retroactively.

15. With regard to the applicant's first submission, Mr Justice Rose held on 18 April 1991 that he considered himself bound by the Court of Appeal's judgment in R. v. R. He was not persuaded that there was a conflict between the ratios of that decision and the judgment in R. v. Steele. Moreover, the decision in R. v. R. was not reached in ignorance of R. v. Steele but had regard to the latter.

With regard to the applicant's second submission, Mr Justice Rose observed:

> "... I shall assume for the purpose of the present argument that the effect of Kirk is via the Treaty of Rome and the decision of the [Court of Justice of the European Communities] to render Article 7 para. 1 (art. 7-1) part of English law. However, it seems to me that the effect of Article 7 para. 2 (art. 7-2) is to prevent reliance by the defendant on Article 7 para. 1 (art. 7-1).
>
> Furthermore, ... a succession of cases ... in which the [Court of Justice] ... has developed the principle of protection of fundamental rights in cases concerning economic and financial matters ... it seems to me in so far as they touch upon the matter at all, and it is accepted that they do not deal with criminal offences of the kind with which I am concerned, no doubt preserve the fundamental right of a woman not to have non-consensual sexual intercourse forced upon her.
>
> Furthermore, the nature of the common law, developing as it does from judicial decision to judicial decision, but being deemed to be always that which it is currently declared to be, is such that if Article 7 (art. 7) is part of English law, Article 7 para. 2 (art. 7-2) is not incompatible with that common law approach. Non-consensual sexual intercourse is in English law, as no doubt it is in the legal systems of many civilised nations, ... a criminal offence. In so far as there was by the end of the 19th Century in English law ... a matrimonial exception, that matrimonial exception has, particularly over the last 30 or 40 years, been whittled away by judicial decision to the extent that ... it no longer exists. It seems to me that to say that in these circumstances this defendant is in the terms of Article 7 para. 1 (art. 7-1) at risk of conviction in relation to conduct 'which did not constitute a criminal offence under national or international law at the time when it was committed' is or would be an abuse of language. Accordingly, [counsel for the applicant's] second submission fails ... Having regard to the conclusions which I have reached ... there is, in my judgment, a case to answer."

16. On 19 April 1991 the applicant was found guilty by the jury of all three offences (see paragraph 9 above). He was sentenced to a total of five years' imprisonment: five years for rape, two years for making a threat to kill and three months for the offence of assault occasioning actual bodily harm - the sentences of two years and three months were expressed to run consecutively to each other but concurrently with the five-year sentence.

17. The applicant lodged an appeal against conviction and sentence in which he repeated the submissions set out in paragraph 14 above.

18. In view of the House of Lords' ruling of 23 October 1991 in R. v. R. (see paragraph 12 above) the applicant was advised by his lawyers on 3 January 1992 that his appeal against conviction offered no prospect of success. He therefore withdrew his appeal against conviction on 15 January 1992. His appeal against sentence was dismissed by the Court of Appeal on 30 July 1992.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The offence of rape

19. The offence of rape, at common law, was traditionally defined as unlawful sexual intercourse with a woman without her consent by force,

fear or fraud. By section 1 of the Sexual Offences Act 1956, "it is a felony for a man to rape a woman".

20. Section 1 (1) of the Sexual Offences (Amendment) Act 1976 provides, in so far as it is material, as follows:

> "For the purposes of section 1 of the Sexual Offences Act 1956 (which relates to rape) a man commits rape if
>
> - (a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it ..."

21. On 3 November 1994 the Criminal Justice and Public Order Act 1994 replaced the above provisions by inserting new subsections to section 1 of the Sexual Offences Act 1956, one of the effects of which was to remove the word "unlawful":

> "1. (1) It is an offence for a man to rape a woman or another man.
>
> (2) A man commits rape if - (a) he has sexual intercourse with a person ... who at the time of the intercourse does not consent to it ..."

B. Marital immunity

22. Until the case of R. v. R. the English courts, on the few occasions when they were confronted with the issue whether directly or indirectly, had always recognised at least some form of immunity attaching to a husband from any charge of rape or attempted rape by reason of a notional or fictional consent to intercourse deemed to have been given by the wife on marriage. The proposition of Sir Matthew Hale quoted above (see paragraph 10) has been reaffirmed until recently, for example in the case of R. v. Kowalski ([1987] 86 Criminal Appeal Reports 339), which concerned the question whether or not a wife had impliedly consented to acts which if performed against her consent would amount to an indecent assault. Mr Justice Ian Kennedy, giving the judgment of the court, stated, obiter:

> "It is clear, well-settled and ancient law that a man cannot, as actor, be guilty of rape upon his wife."

And he went on to say that that principle was

> "dependent upon the implied consent to sexual intercourse which arises from the married state and which continues until that consent is put aside by decree nisi, by a separation order or, in certain circumstances, by a separation agreement".

In another example, Lord Justice O'Connor in the R. v. Roberts case ([1986] Criminal Law Reports 188) held:

> "The status of marriage involves that the woman has given her consent to her husband having intercourse with her during the subsistence of the marriage ... she cannot unilaterally withdraw it."

23. However, on 5 November 1990, Mr Justice Simon Brown held in R. v. C. ([1991] 1 All England Law Reports 755) that the whole concept of marital exemption in rape was misconceived:

> "Were it not for the deeply unsatisfactory consequence of reaching any other conclusion on the point, I would shrink, if sadly, from adopting this radical view of the true position in law. But adopt it I do. Logically, I regard it as the only defensible stance, certainly now as the law has developed and arrived in the late twentieth century. In my judgment, the position in law today is, as already declared in Scotland, that there is no marital exemption to the law of rape. That is the ruling I give."

On the other hand, on 20 November 1990, in R. v. J. ([1991] 1 All England Law Reports 759) Mr Justice Rougier upheld the general common

law rule, considering that the effect of section 1 (1) (a) of the 1976 Act was that the marital exemption embodied in Hale's proposition was preserved, subject to those exceptions established by cases decided before the Act was passed. He further stated:

> "... there is an important general principle to be considered here, and that is that the law, especially the criminal law, should be clear so that a man may know where he stands in relation to it. I am not being so fanciful as to suppose that this defendant carefully considered the authorities and took Counsel's advice before behaving as alleged, but the basic principle extends a long way beyond the bounds of this case and should operate to prevent a man being convicted by means of decisions of the law ex post facto."

On 15 January 1991, Mr Justice Swinton Thomas in R. v. S. followed Rougier J, though he considered that it was open to judges to define further exceptions. Both Rougier and Swinton Thomas JJ stated that they regretted that section 1 (1) (a) of the 1976 Act precluded them from taking the same line as Simon Brown J in R. v. C.

24. In its Working Paper 116 "Rape within Marriage" completed on 17 September 1990, the Law Commission stated:

> "2.8 It is generally accepted that, subject to exceptions (considered ... below), a husband cannot be convicted of raping his wife ... Indeed there seems to be no recorded prosecution before 1949 of a husband for raping his wife ...
>
> ...
>
> 2.11 The immunity has given rise to a substantial body of law about the particular cases in which the exemption does not apply. The limits of this law are difficult to state with certainty. Much of it rests on first instance decisions which have never been comprehensively reviewed at appellate level ..."

The Law Commission identified the following exceptions to a husband's immunity:

- where a court order has been made, in particular:

(a) where an order of the court has been made which provides that a wife should no longer be bound to cohabit with her husband (R. v. Clarke [1949] 33 Criminal Appeal Reports 216);

(b) where there has been a decree of judicial separation or a decree nisi of divorce on the ground that "between the pronouncement of decree nisi and the obtaining of a decree absolute a marriage subsists as a mere technicality" (R. v. O'Brien [1974] 3 All England Law Reports 663);

(c) where a court has issued an injunction restraining the husband from molesting the wife or the husband has given an undertaking to the court that he will not molest her (R. v. Steele [1976] 65 Criminal Appeal Reports 22);

(d) in the case of R. v. Roberts ([1986] Criminal Law Reports 188), the Court of Appeal found that where a non-molestation order of two months had been made in favour of the wife her deemed consent to intercourse did not revive on expiry of the order;

- where no court order has been made:

(e) Mr Justice Lynskey observed, obiter, in R. v. Miller ([1954] 2 Queen's Bench Division 282) that a wife's consent would be revoked by an agreement to separate, particularly if it contained a non-molestation clause;

(f) Lord Justice Geoffrey Lane stated, obiter, in R. v. Steele that a separation agreement with a non-cohabitation clause would have that effect.

25. The Law Commission noted that it was stated in R. v. Miller and endorsed by the Court of Appeal in R. v. Steele that lodging a petition for divorce would not be sufficient.

It referred also to the ruling by Mr Justice Owen in the case of R. v. R. where an implied agreement to separate was considered sufficient to revoke the immunity and that, even in the absence of agreement, the withdrawal from cohabitation by either party, accompanied by a clear indication that consent to sexual intercourse had been terminated, would operate to exclude the immunity. It found this view difficult to reconcile with the approach in Steele that filing a divorce petition was "clearly" not sufficient. The ruling in R. v. R. appeared substantially to extend what had previously been thought to be the law, although it emphasised that factual separation, and not mere revocation of consent to intercourse, was necessary to remove the immunity.

26. The Law Commission pointed out that its inquiry was unusual in one important respect. It was usual practice, when considering the reform of common law rules, to consider the grounds expressed in the cases or other authorities for the current state of the law, in order to analyse whether those grounds were well-founded. However, that step was of little assistance here, not only because there was little case-law on the subject but also, and in particular, because there was little dispute that the reason set out in the authorities for the state of the law could not be supported (paragraph 4.1 of the Working Paper). The basis of the law was that intercourse against the wife's actual will was excluded from the law of rape by the fictional deemed consent to intercourse perceived by Sir Mathew Hale in his dictum. This notion was not only quite artificial but, certainly in the modern context, was also quite anomalous. Indeed, it was difficult to find any current authority or commentator who thought that it was even remotely supportable. The artificial and anomalous nature of the marital immunity could be seen if it was reviewed against the current law on the legal effects of marriage (paragraph 4.2).

The concept of deemed consent was artificial because the legal consequences of marriage were not the result of the parties' mutual agreement. Although the parties should have legal capacity to enter into the marriage contract and should observe the necessary formalities, they were not free to decide the terms of the contract; marriage was rather a status from which flow certain rights or obligations, the contents of which were determined by the law from time to time. This point had been emphasised by Mr Justice Hawkins in R. v. Clarence (1888) when he said: "The intercourse which takes place between husband and wife after marriage is not by virtue of any special consent on her part, but is mere submission to an obligation imposed on her by law " (paragraph 4.3).

In this connection, the Law Commission stressed that "[t]he rights and duties arising from marriage have, however, changed over the years as the law has adapted to changing social conditions and values. The more modern view of marriage is that it is a partnership of equals" (paragraph 4.4). It then gave examples of such changes in the law and added:

> "4.11 This gradual recognition of mutual rights and obligations within marriage, described in paragraphs 4.3-4.10 above, in our view demonstrates clearly that, whatever other arguments there may be in favour of the immunity, it cannot be

> claimed to be in any way justified by the nature of, or by the law governing, modern marriage."

27. The Law Commission made, inter alia, the provisional proposal that "the present marital immunity be abolished in all cases" (paragraph 5.2 of the Working Paper).

PROCEEDINGS BEFORE THE COMMISSION

28. In his application of 29 March 1992 (no. 20166/92) to the Commission, the applicant complained that, in breach of Article 7 (art. 7) of the Convention, he was convicted in respect of conduct, namely the rape upon his wife, which at the relevant time did not, so he submitted, constitute a criminal offence.

29. The Commission declared the application admissible on 14 January 1994. In its report of 27 June 1994 (Article 31) (art. 31), the Commission expressed the opinion that there had been no violation of Article 7 para. 1 (art. 7-1) of the Convention (eleven votes to six). 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 [2].

FINAL SUBMISSIONS MADE TO THE COURT

30. At the hearing on 20 June 1995 the Government, as they had done in their memorial, invited the Court to find that there had been no violation of Article 7 (art. 7) of the Convention.

31. On the same occasion the applicant reiterated the request to the Court stated in his memorial to find that there had been a breach of Article 7 (art. 7) and to award him just satisfaction under Article 50 (art. 50) of the Convention.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 7 (art. 7) OF THE CONVENTION

32. The applicant complained that his conviction and sentence for rape of his wife constituted retrospective punishment in breach of Article 7 (art. 7) of the Convention, which reads:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
>
> 2. This Article (art. 7) shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

33. The Government and the Commission disagreed with the above contention.

A. General principles

34. The guarantee enshrined in Article 7 (art. 7), which is an essential element of the rule of law, occupies a prominent place in the Convention

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[2] Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 335-B of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 (art. 15) in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment.

35. Accordingly, as the Court held in its Kokkinakis v. Greece judgment of 25 May 1993 (Series A no. 260-A, p. 22, para. 52), Article 7 (art. 7) is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage: it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (nullum crimen, nulla poena sine lege) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. From these principles it follows that an offence must be clearly defined in the law. In its aforementioned judgment the Court added that this requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable. The Court thus indicated that when speaking of "law" Article 7 (art. 7) alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises written as well as unwritten law and implies qualitative requirements, notably those of accessibility and foreseeability (see, as a recent authority, the Tolstoy Miloslavsky v. the United Kingdom judgment of 13 July 1995, Series A no. 316-B, pp. 71-72, para. 37).

36. However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the United Kingdom, as in the other Convention States, the progressive development of the criminal law through judicial law-making is a well entrenched and necessary part of legal tradition. Article 7 (art. 7) of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.

B. Application of the foregoing principles

37. The applicant maintained that the general common law principle that a husband could not be found guilty of rape upon his wife, albeit subject to certain limitations, was still effective on 18 September 1990, when he committed the acts which gave rise to the rape charge (see paragraph 8 above). A succession of court decisions before and also after that date, for instance on 20 November 1990 in R. v. J. (see paragraph 23 above), had affirmed the general principle of immunity. It was clearly beyond doubt that as at 18 September 1990 no change in the law had been effected, although one was being mooted.

When the House of Commons debated the Bill for the Sexual Offences (Amendment) Act 1976 (see paragraph 20 above), different views on the marital immunity were expressed. On the advice of the Minister of State to await a report of the Criminal Law Revision Committee, an amendment that would have abolished the immunity was withdrawn and never voted upon.

In its report, which was not presented until 1984, the Criminal Law Revision Committee recommended that the immunity should be maintained and that a new exception should be created.

In 1988, when considering certain amendments to the 1976 Act, Parliament had the opportunity to take out the word "unlawful" in section 1 (1) (a) (see paragraph 20 above) or to introduce a new provision on marital intercourse, but took no action in this respect.

On 17 September 1990 the Law Commission provisionally recommended that the immunity rule be abolished (see paragraphs 26-27 above). However, the debate was pre-empted by the Court of Appeal's and the House of Lords' rulings in the case of R. v. R. (see paragraphs 11 and 12 above). In the applicant's submission, these rulings altered the law retrospectively, which would not have been the case had the Law Commission's proposal been implemented by Parliament. Consequently, he concluded, when Parliament in 1994 removed the word "unlawful" from section 1 of the 1976 Act (see paragraph 21 above), it did not merely restate the law as it had been in 1976.

38. The applicant further argued that in examining his complaint under Article 7 para. 1 (art. 7-1) of the Convention, the Court should not consider his conduct in relation to any of the exceptions to the immunity rule. Such exceptions were never contemplated in the national proceedings, Mr Justice Rose having taken his decision in reliance on the Court of Appeal's ruling of 14 March 1991 in R. v. R. to the effect that the immunity no longer existed. Mr Justice Owen's decision of 30 July 1990 in R. v. R., adding implied agreement to terminate consent to intercourse to the list of exceptions, had not been reported by 18 September 1990 and was not a binding authority. In any event, the facts in the present case suggest that no such agreement existed.

39. Should a foreseeability test akin to that under Article 10 para. 2 (art. 10-2) apply in the instant case, the applicant was of the opinion that it had not been satisfied. Although the Court of Appeal and the House of Lords did not create a new offence or change the basic ingredients of the offence of rape, they were extending an existing offence to include conduct which until then was excluded by the common law. They could not be said to have adapted the law to a new kind of conduct but rather to a change of social attitudes. To extend the criminal law, solely on such a basis, to conduct which was previously lawful was precisely what Article 7 (art. 7) of the Convention was designed to prevent. Moreover, the applicant stressed, it was impossible to specify with precision when the change in question had occurred. In September 1990, change by judicial interpretation was not foreseen by the Law Commission, which considered that a parliamentary enactment would be necessary.

40. The Government and the Commission were of the view that by September 1990 there was significant doubt as to the validity of the alleged marital immunity for rape. This was an area where the law had been subject to progressive development and there were strong indications that still wider interpretation by the courts of the inroads on the immunity was probable. In particular, given the recognition of women's equality of status with men in marriage and outside it and of their autonomy over their own bodies, the adaptation of the ingredients of the offence of rape was reasonably

foreseeable, with appropriate legal advice, to the applicant. He was not convicted of conduct which did not constitute a criminal offence at the time when it was committed.

41. The Court notes that the applicant's conviction for rape was based on the statutory offence of rape in section 1 of the 1956 Act, as further defined in section 1 (1) of the 1976 Act (see paragraphs 19 and 20 above). The applicant does not dispute that the conduct for which he was convicted would have constituted rape within the meaning of the statutory definition of rape as applicable at the time, had the victim not been his wife. His complaint under Article 7 (art. 7) of the Convention relates solely to the fact that in deciding on 18 April 1991 that the applicant had a case to answer on the rape charge, Mr Justice Rose followed the Court of Appeal's ruling of 14 March 1991 in the case of R. v. R. which declared that the immunity no longer existed.

42. It is to be observed that a crucial issue in the judgment of the Court of Appeal in R. v. R. (summarised at paragraph 11 above) related to the definition of rape in section 1 (1) (a) of the 1976 Act: "unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it". The question was whether "removal" of the marital immunity would conflict with the statutory definition of rape, in particular whether it would be prevented by the word "unlawful". The Court of Appeal carefully examined various strands of interpretation of the provision in the case-law, including the argument that the term "unlawful" excluded intercourse within marriage from the definition of rape. In this connection, the Court recalls that it is in the first place for the national authorities, notably the courts, to interpret and apply national law (see, for instance, the Kemmache v. France (no. 3) judgment of 24 November 1994, Series A no. 296-C, pp. 86-87, para. 37). It sees no reason to disagree with the Court of Appeal's conclusion, which was subsequently upheld by the House of Lords (see paragraph 12 above), that the word "unlawful" in the definition of rape was merely surplusage and did not inhibit them from "removing a common law fiction which had become anachronistic and offensive" and from declaring that "a rapist remains a rapist subject to the criminal law, irrespective of his relationship with his victim" (see paragraph 11 above).

43. The decisions of the Court of Appeal and then the House of Lords did no more than continue a perceptible line of case-law development dismantling the immunity of a husband from prosecution for rape upon his wife (for a description of this development, see paragraphs 11 and 23-27 above). There was no doubt under the law as it stood on 18 September 1990 that a husband who forcibly had sexual intercourse with his wife could, in various circumstances, be found guilty of rape. Moreover, there was an evident evolution, which was consistent with the very essence of the offence, of the criminal law through judicial interpretation towards treating such conduct generally as within the scope of the offence of rape. This evolution had reached a stage where judicial recognition of the absence of immunity had become a reasonably foreseeable development of the law (see paragraph 36 above).

44. The essentially debasing character of rape is so manifest that the result of the decisions of the Court of Appeal and the House of Lords - that the applicant could be convicted of attempted rape, irrespective of his relationship with the victim - cannot be said to be at variance with the object

and purpose of Article 7 (art. 7) of the Convention, namely to ensure that no one should be subjected to arbitrary prosecution, conviction or punishment (see paragraph 34 above). What is more, the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity not only with a civilised concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom.

45. Consequently, by following the Court of Appeal's ruling in R. v. R. in the applicant's case, Mr Justice Rose did not render a decision permitting a finding of guilt incompatible with Article 7 (art. 7) of the Convention.

46. Having reached this conclusion, the Court does not find it necessary to enquire into whether the facts in the applicant's case were covered by the exceptions to the immunity rule already made by the English courts before 18 September 1990.

47. In short, the Court, like the Government and the Commission, finds that the Crown Court's decision that the applicant could not invoke immunity to escape conviction and sentence for rape upon his wife did not give rise to a violation of his rights under Article 7 para. 1 (art. 7-1) of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

Holds that there has been no violation of Article 7 para. 1 (art. 7-1) of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 22 November 1995.

Rolv RYSSDAL
President

Herbert PETZOLD
Registrar

Estratto (par. 142-151) della sentenza del 22 giugno 2000, sez. II, causa COËME c. Belgio

II. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

142. Mr Coëme and Mr Hermanus submitted that application of the new law on limitation of prosecution had breached Article 7 of the Convention, which provides:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
>
> 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

143. The applicants asserted that the principle of the immediate application of the new law on limitation of prosecution and Parliament's express intention required the Court of Cassation to find that the proceedings against them had become time-barred on 22 February 1996, that is five years after the event which had caused time to begin to run again on 22 February 1991. But in its judgment of 5 April 1996 the Court of Cassation had ruled that time had begun to run again and extended a limitation period which had already lapsed, this being illegal given that an initial five-year period had begun to run on 30 November 1989 in Mr Coëme's case and on 29 February 1988 in Mr Hermanus's case. In addition, it had restarted the limitation period a second time, although this was not permissible under Article 22 of the Code of Criminal Investigation, taking into consideration the date of 10 June 1992. The applicants argued on that basis that the Court of Cassation had effectively applied Article 25 of the Law of 24 December 1993 retrospectively. That had breached Article 7 of the Convention, in that determination of the period during which an offence could be punished was certainly as much a part of the concept of "penalty" as the measure imposed pursuant to the law as a punishment. Article 7, they argued, enshrined the principle of the foreseeability of the elements of an offence and the relevant penalty, which included the foreseeability of prosecution.

144. The Government rejected these allegations. They submitted that the extensive interpretation of Article 7 made by the applicants was not compatible with its text. Article 7 admittedly prohibited retrospectiveness, but that prohibition concerned only charges and penalties and was not

therefore applicable to procedural rules, and in particular to limitation. Following the applicants' interpretation would create a serious obstacle making it difficult for States to introduce the necessary changes to criminal procedures and to take account of the courts' excessive caseloads. In the alternative, the Government submitted that, even if Article 7 had to be considered to apply also to limitation of criminal proceedings, its only scope would be to prevent limitation becoming an issue again once prosecution had become time-barred. It was only in such a case that there would be retrospectiveness, in that the new law would have to "go back in time" from the date of its entry into force in order to be able to annul a time-bar. But nothing like that had taken place in the present case. On 31 December 1993, when the new law had come into force, the proceedings had not yet become time-barred according to the rules formerly applicable and the Court of Cassation had applied from the time of the offences in issue the new limitation period laid down by the Law of 24 December 1993. The Government noted that limitation concerned not the offences but only prosecution. It was part of the procedural rules immediately affected by a new law in all proceedings then in progress.

145. The Court reiterates that, according to its case-law, Article 7 embodies, *inter alia*, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*). While it prohibits in particular extending the scope of existing offences to acts which previously were not criminal offences, it also lays down the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. It follows that offences and the relevant penalties must be clearly defined by law. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable.

When speaking of "law" Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises statute law as well as case-law and implies qualitative requirements, including those of accessibility and foreseeability (see the Cantoni v. France judgment of 15 November 1996, *Reports* 1996-V, p. 1627, § 29; and the S.W. and C.R. v. the United Kingdom judgments of 22 November 1995, Series A nos. 335-B and 335-C, pp. 41-42, § 35, and pp. 68-69, § 33, respectively). The Court must therefore verify that at the time when an accused person performed the act which led to his being prosecuted and convicted there was in force a legal provision which made that act punishable, and that the punishment imposed did not exceed the limits fixed by that provision (see Murphy v. the United Kingdom, application no. 4681/70, Commission decision of 3 and 4 October 1972, Collection 43, p. 1). Since the term "penalty" is autonomous in scope, to

render the protection afforded by Article 7 effective the Court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a "penalty" within the meaning of this provision (see the Welch v. the United Kingdom judgment of 9 February 1995, Series A no. 307-A, p. 13, § 27). While the text of the Convention is the starting-point for such an assessment, the Court may have cause to base its findings on other sources, such as the *travaux préparatoires*. Having regard to the aim of the Convention, which is to protect rights that are practical and effective, it may also take into consideration the need to preserve a balance between the general interest and the fundamental rights of individuals and the notions currently prevailing in democratic States (see, among other authorities, the Airey v. Ireland judgment of 9 October 1979, Series A no. 32, pp. 14-15, § 26, and the Guzzardi v. Italy judgment of 6 November 1980, Series A no. 39, pp. 34-35, § 95).

146. Limitation may be defined as the statutory right of an offender not to be prosecuted or tried after the lapse of a certain period of time since the offence was committed. Limitation periods, which are a common feature of the domestic legal systems of the Contracting States, serve several purposes, which include ensuring legal certainty and finality and preventing infringements of the rights of defendants, which might be impaired if courts were required to decide on the basis of evidence which might have become incomplete because of the passage of time (see the Stubbings and Others v. the United Kingdom judgment of 22 October 1996, *Reports* 1996-IV, pp. 1502-03, § 51).

147. The Court notes that in its judgment of 5 April 1996 the Court of Cassation found Mr Coëme and Mr Hermanus guilty, among other offences, of forgery and uttering forgeries, classified as crimes (*crimes*) by the Criminal Code. However, by accepting that there were extenuating circumstances it treated these acts, like the other offences it found to have been made out, as less serious indictable offences (*délits*). In Belgian law the classification of an offence is determined not according to the penalty applicable but according to the penalty actually applied. The date of the judgment must therefore be the standpoint for determining what period must elapse before prosecution becomes time-barred. That being so, the Court of Cassation had regard to the limitation period for less serious indictable offences. Subsequently, applying the provisions of the Law of 24 December 1993 immediately, and after noting that the offences found to have been made out were not time-barred on the date of its entry into force, it held that the correct limitation period was five years from the time of the offences, which period could be extended, where the case arose, by a new five-year period counting from a measure causing time to begin to run again lawfully taken before expiry of the first five-year period (see paragraph 57 above).

148. The Court notes that the solution adopted by the Court of Cassation was based on its case-law to the effect that laws modifying the rules on limitation were thenceforth to be regarded in Belgium as legislation on matters of jurisdiction and procedure. It accordingly followed the generally recognised principle that, save where expressly provided to the contrary, procedural rules apply immediately to proceedings that are under way (see the Brualla Gómez de la Torre judgment cited above, p. 2956, § 35).

149. The extension of the limitation period brought about by the Law of 24 December 1993 and the immediate application of that statute by the Court of Cassation did, admittedly, prolong the period of time during which prosecutions could be brought in respect of the offences concerned, and they therefore detrimentally affected the applicants' situation, in particular by frustrating their expectations. However, this does not entail an infringement of the rights guaranteed by Article 7, since that provision cannot be interpreted as prohibiting an extension of limitation periods through the immediate application of a procedural law where the relevant offences have never become subject to limitation.

The question whether Article 7 would be breached if a legal provision were to restore the possibility of punishing offenders for acts which were no longer punishable because they had already become subject to limitation is not pertinent to the present case and the Court is accordingly not required to examine it, even though, as Mr Hermanus maintained, the Court of Cassation, in the proceedings against him, held that time had been caused to run again by a measure which did not have that effect on the date when it was taken.

150. The Court notes that the applicants, who could not have been unaware that the conduct they were accused of might make them liable to prosecution, were convicted of offences in respect of which prosecution never became subject to limitation. The acts concerned constituted criminal offences at the time when they were committed and the penalties imposed were not heavier than those applicable at the material time. Nor did the applicants suffer, on account of the Law of 24 December 1993, greater detriment than they would have faced at the time when the offences were committed (see, *mutatis mutandis*, the Welch judgment cited above, p. 14, § 34).

151. Consequently, the applicants' rights under Article 7 of the Convention were not infringed.

Estratto (par. 22-37) della sentenza del 27 febbraio 2001, sez. I, causa ECHER e ZEYREK c. Turchia

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

22. The applicants complained that the application of section 5 of the Prevention of Terrorism Act (Law no. 3713 of 12 April 1991 – "the 1991 Act") to acts committed by them in 1988 and 1989 constituted retrospective punishment in breach of Article 7 of the Convention, which reads:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
>
> 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

A. Arguments before the Court

1. The Government

23. The Government pointed out that the applicants were charged with assisting and giving shelter to an illegal organisation, an offence which was defined in Article 169 of the Turkish Criminal Code and was of a continuing nature. They maintained that during their interrogation at the Şırnak central gendarmerie command the applicants both admitted that they had been helping militants of the PKK since 1988 and 1989.

24. In this respect, the Government highlighted the statements given by the applicant Mehmet Zeyrek who confessed that he had given a battery to a PKK militant in August 1993. They also referred to the evidence given by İkram Yamaner, a former PKK militant, who had testified before the Şırnak Magistrates' Court and the Diyarbakır National Security Court as well as during his confrontation with the applicants at the Şırnak central gendarmerie command that the applicants had been involved in the PKK while he was a member of the latter organisation between April 1990 and July 1992.

25. The Government asserted therefore that the years 1988 and 1989 set out in the Principal Public Prosecutor's indictment should be considered the dates of commencement of the incriminated acts. In their view, the courts had applied section 5 of the 1991 Act to acts which began in 1988 and 1989 and continued until 1993. On that account, the Government asked the Court to reject the applicants' allegation concerning the retrospective application of the 1991 Act and to hold that there has been no violation of Article 7 of the Convention.

2. The applicants

26. The applicants contested the Government's assertion that the years 1988 and 1989 should be taken to be the dates of commencement of the offences. They alleged that the Principal Public Prosecutor at the Diyarbakır National Security Court had charged them only with acts committed between 1988 and 1989 since he could not find any evidence indicating

their involvement in the organisation between 1989 and the date of their arrest on 2 September 1993. Had the Principal Public Prosecutor charged them with acts committed between 1988 and 1993 he would have indicated this in the bill of indictment and would not have written therein "between 1988 and 1989" as the dates of the offences. In support of their allegations, the applicants submitted four bills of indictment issued by the Principal Public Prosecutor at the Diyarbakır National Security Court, all of which clearly indicated the dates of the offences. The applicants cited by way of example the indictments filed against Nihat Eren (indictment no. 1996/1198), Abit Usluğ and Others (indictment no. 1996/587), Abdullah Kaya and Others (indictment no. 1998/95) and Mehmet Nuri Günana and Mahmut Can (indictment no. 1996/1199) who, like the applicants, were charged with terrorist-type offences.

27. The applicants pointed out that the National Security Court had clearly indicated in its judgment that they had been convicted of offences committed during 1988 and 1989. In this respect, the applicants referred to Article 150 of the Turkish Code of Criminal Procedure which provides that the jurisdiction of the courts is limited by the crimes set forth in the indictment. They contended that the Government cannot extend the indictment so as to cover the period between 1989 and 1993 since they were not engaged in any criminal activity during that period.

The applicants further argued that the Government cannot rely on the statements they had made during their detention in custody with a view to extending the period of their activities as they had retracted those statements in the course of the proceedings before the National Security Court.

28. In sum, the applicants requested the Court to hold that imposition of a prison sentence in application of the 1991 Act to their acts committed in 1988 and 1989 contravened Article 7 of the Convention.

B. The Court's assessment

1. General principles

29. The Court recalls that the guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment (see *S.W.* and *C.R. v. the United Kingdom*, judgments of 22 November 1995, Series A nos. 335-B and 335-C, pp. 41-42, § 35, and pp. 68-69, § 33, respectively).

30. According to the Court's case-law, Article 7 of the Convention generally embodies the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and prohibits in particular the retrospective application of the criminal law where it is to an accused's detriment (see *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A no. 260-A, p. 22, § 52).

2. Application of the foregoing principles

31. The Court considers that the principle of *nulla poena sine lege* is the only relevant consideration in this case since the applicants maintain that a

heavier penalty was imposed on them than the one that was applicable at the time the offence was committed.

32. The Court observes that in the instant case the conviction of the applicants and the imposition of a prison sentence on them on account of the commission of the offences defined in Article 169 of the Turkish Criminal Code are not in dispute. The only question to be determined is whether the 1991 Act was applied to offences committed before the Act came into force so that it constituted an *ex post facto* criminal penalty in breach of Article 7 § 1 of the Convention.

33. The Court notes that the Government maintain that the offence with which the applicants were charged is to be considered a continuing offence under Article 169 of the Turkish Criminal Code (see paragraph 19 above). On that understanding, the Court observes that, by definition, a "continuing offence" is a type of crime committed over a period of time. In its view, when an accused is charged with a continuing offence, the principle of legal certainty requires that the acts which go to make up that offence, and which entail his criminal liability, be clearly set out in the bill of indictment (see, *mutatis mutandis, Pélissier and Sassi v. France* [GC], no. 25444/94, § 51, ECHR 1999-II). Furthermore, the decision rendered by the domestic court must also make it clear that the accused's conviction and sentence result from a finding that the ingredients of a continuing offence have been made out by the prosecution.

34. In this connection, the Court observes that the Principal Public Prosecutor, in his indictment filed with the National Security Court, charged the applicants with offences committed "between 1988 and 1989". Furthermore, in its judgment of 12 May 1994 the National Security Court indicated that the applicants had been convicted on account of acts committed "in 1988 and 1989". Nowhere in its reasoned judgment did the National Security Court state that it had found the applicants guilty of any offences committed subsequent to 1989. For the European Court, it would appear to emerge from these considerations that the applicants stood trial in respect of offences allegedly committed by them in or between 1988 and 1989. Accordingly, and contrary to what was suggested by the Government, the Court considers that the years 1988 and 1989 cannot be taken to be the commencement dates of the offences at issue.

35. The Court further notes that, in seeking to substantiate the applicants' involvement in the PKK up until August 1993, the Government relied on their confession statements made in custody at the Şırnak central gendarmerie command. Furthermore, with reference to the evidence given by a former PKK militant, the Government emphasised that the applicants had continued their activities even after 1989.

However, in the Court's opinion, the introduction of such evidence of a continuing offence is inconsistent with the very terms of the indictment, which related to the years 1988 and 1989 only. It can reasonably be considered that the applicants prepared their defence in response to the charges defined in the bill of indictment and against the background of the sanction which they risked incurring if found guilty as charged. Furthermore, it does not appear from the National Security Court's judgment that any offences which they may have committed after 1989 constituted the basis of their conviction. Indeed, the focus of the trial court's

decision would appear to have been on their activities carried out between 1988 and 1989. The Court must also take into account that, as regards other accused charged with continuing offences under the 1991 Act, the bills of indictment were carefully framed in order to indicate the dates of the incriminated acts (see paragraph 26 above).

36. In these circumstances, the Court concludes that the applicants were subjected to the imposition of a heavier sentence under the 1991 Act than the sentence to which they were exposed at the time of the commission of the offence of which they were convicted.

37. Accordingly, there has been a violation of Article 7 § 1 of the Convention.

Estratto (par. 27-39) della sentenza del 21 gennaio 2003, sez. IV, causa VEEBER c. Estonia

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

27. The applicant complained that his conviction of offences committed in 1993 and 1994 under criminal legislation which had come into force on 13 January 1995 infringed the guarantee against the retrospective application of criminal law set forth in Article 7 § 1 of the Convention, which provides:

> "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

A. Arguments of the parties

28. The applicant submitted that his acts prior to 13 January 1995 did not qualify as criminal under the law in force at that time. He pointed out that, as worded prior to that date, Article 148-1 of the Criminal Code made the existence of a previous administrative penalty for a similar offence a precondition for a criminal conviction for the acts defined therein. However, no such penalty had been imposed on him. Therefore, his conviction of those acts under the law of 13 January 1995 violated the *nullum crimen sine lege* principle.

29. The Government submitted that the applicant had been given a clear indication in the bill of indictment, which had been approved on 11 November 1996, of the acts of which he was accused as well as their legal qualification. The indictment contained the dates of the incriminated acts and the reasons for qualifying those acts as a continuing offence.

The Government further referred to the application and interpretation of Article 148-1 § 7 of the Criminal Code by the domestic courts in the applicant's case and the practice of the Supreme Court, according to which Article 148-1 was applicable to acts of intentional and continuing tax evasion even before the amendment if the criminal activity had continued after it came into force. The domestic courts had given sufficiently detailed reasons for their decision to qualify the acts committed by the applicant as a continuing offence and to rely on all of them as the basis for convicting him.

The courts had applied the criminal law in the same way in a number of criminal cases. All the relevant judgments were published and accessible to the public. Therefore, the application and interpretation of Article 148-1 did not go beyond what could be reasonably foreseen by the applicant.

It was further argued that the qualification by the domestic courts of the applicant's tax evasion during the period from 1993 to 1995 as an ongoing crime had no effect on the nature and gravity of the sanction – a suspended sentence – and entailed no tangible negative consequences for him.

The Government pointed out that tax evasion had also been defined as a crime in the earlier versions of Article 148-1 of the Criminal Code.

B. The Court's assessment

30. The Court reiterates that the guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment (see *S.W. v. the United Kingdom* and *C.R. v. the United Kingdom*, judgments of 22 November 1995 (Series A nos. 335-B and 335-C, p. 41, § 34, and p. 68, § 32, respectively).

31. According to the Court's case-law, Article 7 of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage: it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment. From these principles it follows that an offence must be clearly defined in the law. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable (see *S.W.* and *C.R.*, cited above, pp. 41-42, § 35, and pp. 68-69, § 33, respectively; see also *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A no. 260-A, p. 22, § 52).

32. Turning to the facts of the present case, the Court notes that the applicant was convicted under Article 148-1 § 7 of the Criminal Code, as worded since 13 January 1995, of tax offences which were committed in the period from 1993 to 1996.

It observes that the application of the criminal law of 13 January 1995 to subsequent acts is not at issue in the instance case. The question to be determined is whether the extension of the law to acts committed prior to that date infringed the guarantee set forth in Article 7 of the Convention.

33. In this connection the Court reiterates that it is not its task to rule on the applicant's criminal responsibility, that being primarily a matter for the assessment of the domestic courts, but to consider, from the standpoint of Article 7 § 1 of the Convention, whether the applicant's acts, at the time when they were committed, constituted offences defined with sufficient accessibility and foreseeability by the national law (see *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, § 51, ECHR 2001-II).

34. It notes that under Article 148-1 of the Criminal Code tax evasion was also an offence prior to 13 January 1995, in particular in 1993 and 1994, when the applicant committed some of the acts of which he was accused. However, a prerequisite for a criminal conviction under the law in force at that time was that the person concerned had previously been found liable for a similar offence and subjected to an administrative penalty.

The version of Article 148-1 of the Criminal Code which came into effect on 13 January 1995 maintained the requirement for a previous administrative penalty, but added a condition concerning intent. The two

conditions were alternative, not cumulative, thus making a person criminally liable if one of the conditions was satisfied. Thus, in finding the applicant guilty under that Article, the domestic courts held that the fact that no administrative penalty had previously been imposed on him was not a bar to his conviction.

However, the courts included in their findings under the 1995 legislation acts that had been committed during the preceding two years, holding that they were part of continuing criminal activity which had lasted until 1996.

35. The Court observes that, by definition, a "continuing offence" is a type of crime committed over a period of time (see *Ecer and Zeyrek v. Turkey*, nos. 29295/95 and 29363/95, § 33, ECHR 2001-II). It notes that the applicant was charged with and convicted of the intentional, continuous and large-scale concealment of taxable amounts and of submitting false information to the tax authorities on the companies' expenditure over a period of time. While the starting-point of the applicant's activity pre-dated the entry into effect of the provision under which he was convicted, the activity was considered as resulting in a persisting criminal state which continued after the critical date.

36. The Court observes that, according to the text of Article 148-1 of the Criminal Code before its amendment in 1995, a person could be held criminally liable for tax evasion only "if an administrative penalty ha[d] been imposed on him or her for a similar offence". The condition was thus an element of the offence of tax evasion without which a criminal conviction could not follow.

It further observes that a considerable number of the acts of which the applicant was convicted took place exclusively within the period prior to January 1995 (see paragraphs 14 and 18 above). The sentence imposed on the applicant – a suspended term of three years and six months' imprisonment – took into account acts committed both before and after January 1995. Contrary to the Government's submission, it cannot be stated with any certainty that the domestic courts' approach had no effect on the severity of the punishment or did not entail tangible negative consequences for the applicant.

37. The Court notes the Government's argument that the jurisprudence of the Supreme Court on the application and interpretation of the 1995 version of Article 148-1 of the Criminal Code made the risk of criminal punishment foreseeable to the applicant. It observes, however, that the decisions of the Supreme Court referred to by the Government were handed down in April 1997 and January 1998, whereas the applicant's complaint concerns acts committed during the period from 1993 to 1994. At that time, considering the terms of the criminal law in force during that period, the applicant could not have foreseen that he would face criminal conviction at the first discovery of his activity.

38. In these circumstances, the Court finds that the domestic courts applied the 1995 amendment to the law retrospectively to behaviour which did not previously constitute a criminal offence.

39. It follows that there has been a violation of Article 7 § 1 of the Convention.

Estratto (par. 21-42) della sentenza del 10 febbraio 2004, sez. IV, causa PUHK c. Estonia

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 7 § 1 OF THE CONVENTION

1.1. The applicant's conviction under the law of 13 January 1995

21. The applicant complained that his conviction under the criminal law in force as of 13 January 1995 of acts committed prior to that date infringed the guarantee against retrospective application of criminal law set forth in Article 7 § 1 of the Convention, which provides:

> "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

A. Arguments of the parties

22. The applicant submitted that before 13 January 1995 a criminal conviction could be imposed only if a person had been previously subjected to an administrative punishment for a similar offence. However, he had no such previous punishment. The application of the concept of a continuing offence could not override the prohibition of the retroactive application of criminal law.

23. The Government maintained that the bill of indictment set clearly out the acts with which the applicant was charged as well as their legal characterisation. That applicant's conviction under Article 148-1 § 7 of the Criminal Code was in accordance with the provisions of the criminal law in effect at the time of the commission of the offence and the criminal law was not applied retroactively. The acts which were the subject of the charges amounted to continuing offences, which ended on 26 October 1995, that is after the entry into force of the criminal law on 13 January 1995 which did not necessarily require a previous administrative punishment for its application. The courts gave detailed reasons for bringing the incriminated acts under that law. There was a constant case-law of the Supreme Court on the interpretation of Article 148-1 § 7 of the Criminal Code and on the concept of an ongoing offence in tax cases. The case-law was published and accessible to everyone. It was thus foreseeable to the applicant that his acts entailed criminal responsibility. The notion of an ongoing crime has been widely known in the Estonian criminal law and used for years. Therefore the conviction of the applicant and the application of the concept of an ongoing crime by the domestic court was neither arbitrary nor contrary to Article 7.

B. The Court's assessment

24. The Court recalls that the guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 in time of war or other public emergency. It should be construed and applied, as follows from its

object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment (see *S.W. v. the United Kingdom and C.R. v. the United Kingdom*, judgments of 22 November 1995, Series A nos. 335-B and 335-C, pp. 41-42, § 35, and pp. 68 and 69, §§ 33, respectively.

25. According to the Court's case-law, Article 7 of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage: it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crime nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment. From these principles it follows that an offence must be clearly defined in the law. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable (*ibidem*, see also *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A no. 260-A, p. 22, § 52).

26. The Court observes at the outset that the present case is similar to that of *Veeber v. Estonia (no. 2)* (no. 45771/99, ECHR 2003-I) in which it found a violation of Article 7 § 1 of the Convention. It will examine the particular circumstances of the present case in the light of the application of the foregoing principles in that case (see paragraphs 31-37 of the aforementioned judgment).

27. In the instant case, the Court notes that the applicant was convicted under Article 148-1 § 7 of the Criminal Code, in force as from 13 January 1995, of tax offences which were committed in the period from April 1993 to October 1995.

It observes that the application of the criminal law of 13 January 1995 to subsequent acts is not at issue in the presence case. The question to be determined is whether the extension of the law to acts committed prior to that date infringed the guarantee set forth in Article 7 of the Convention.

28. In this connection the Court recalls that it is not its task to rule on the applicant's criminal responsibility, that being primarily a matter for the assessment of the domestic courts, but to consider, from the standpoint of Article 7 § 1 of the Convention, whether the applicant's acts, at the time when they were committed, constituted offences defined with sufficient accessibility and foreseeability by the national law (see *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, § 51, ECHR 2001-II).

29. It notes that under Article 148-I of the Criminal Code tax evasion was an offence also prior to 13 January 1995, in particular in 1993-1994 when the applicant committed part of the incriminated acts. However, a prerequisite for criminal conviction under the law in force at that time was that the person concerned had been previously found liable and subjected to an administrative punishment for a similar offence.

The version of Article 148-1 of the Criminal Code which came into effect on 13 January 1995 maintained the element of a previous administrative sanction, but added the condition of intent in its text. The two conditions were alternative, not cumulative, making a person criminally liable if one of the conditions was satisfied. Thus, the fact that an

administrative punishment had not previously been imposed on an accused did not bar his criminal conviction under that law.

However, the domestic courts brought under the 1995 law also the applicant's behaviour during the preceding two years, finding that it was part of a continuing criminal activity which lasted until October 1995.

30. The Court recalls that, by definition, a "continuing offence" is a type of crime committed over a period of time (see *Ecer and Zeyrek v. Turkey*, nos. 29295/95 and 29363/95, § 33, ECHR 2001-II). It notes that the applicant was charged with and convicted for having intentionally and continuously failed to pay the required taxes over a period of time. While the starting point of the applicant's conduct pre-dated the entry into effect of the law under which he was convicted, the conduct lasted beyond the critical date.

31. The Court observes that, according to the text of Article 148-1 of the Criminal Code before its amendment in 1995, a person could be held criminally liable for tax evasion only "if an administrative punishment ha[d] been imposed on the offender for a similar offence." The condition was thus an element of the offence of tax evasion without which a criminal conviction could not follow.

It further observes that the conduct of which the applicant was convicted concerned for the most part the period prior to 13 January 1995 and that the sentence imposed on him – four years suspended imprisonment – took into consideration his behaviour both before and after that date. In these circumstances, the approach of the domestic courts could not but affect also the severity of the sanction.

32. As regards the Government's submission that the established case-law on the interpretation and application of Article 148-1 § 7 of the Criminal Code made the risk of conviction foreseeable to the applicant, the Court notes that the Supreme Court decisions referred to by the Government were taken on 8 April 1997, 27 January 1998 and 8 April 1998. The applicant's complaint concerns however his conduct in 1993 and 1994. During that period the applicant could not expect that at the first discovery of his behaviour he would risk a criminal conviction, considering the terms of criminal law in force at that time.

33. In the light of the above, the Court finds that the domestic authorities applied retrospectively the 1995 law to behaviour which did not previously constitute a criminal offence.

34. Consequently, there has been a violation of Article 7 § 1 of the Convention.

1.2. The applicant's conviction under the law of 20 July 1993

35. The applicant complained that in finding him guilty of the offence under Article 148-4 of the Criminal Code, which had entered into force on 20 July 1993, the national courts applied retrospectively the law to acts committed prior to that date.

A. Arguments of the parties

36. The applicant submitted that he could not be held responsible under Article 148-4 of the Criminal Code for the period prior to its entry into force on 20 July 1993. The application by the courts of the concept of a

continuing offence allowed them to evade the prohibition of retrospective application of criminal law in Article 7 of the Convention.

37. The Government argued that Article 7 of the Convention had not been breached. Although the applicant's company lacked any bookkeeping as from 5 May 1993, this state of affairs continued after the entry into force of Article 148-4 of the Criminal Code on 20 July 1993. Moreover, the applicant had the obligation to keep proper accounting records also prior to that date, according to the Government decree of 6 July 1990.

It was further maintained that the present case was distinguishable from the *Veeber (no. 2)* case, cited above, in that most of the applicant's acts fell within the period after 20 July 1993, from which date onwards the risk of criminal punishment was clearly foreseeable for the applicant.

The Government also referred to the jurisprudence of the Supreme Court concerning the application and interpretation of the law and the concept of an ongoing crime.

B. The Court's assessment

38. The Court notes that the applicant was convicted under Article 148-4 of the Criminal Code for having failed adequately to organise bookkeeping in his company during the period of its activity from 5 May 1993 until 1 October 1993.

It observes that under the Government decree of 6 July 1990 the applicant was required to ensure proper bookkeeping in his company during the whole period of its operation (see paragraph 11 above). However, criminal liability for an infringement of the relevant rules was established only on 20 July 1993, when Article 148-4 of the Criminal Code took effect.

In applying the criminal law to the applicant's behaviour before the material date, the domestic courts found that it was part of a continuing offence which lasted beyond that date.

39. While it is true that the applicant's conduct concerned mostly the period after 20 July 1993, the length of the period to which the law was applied retrospectively is not decisive in considering whether or not the guarantees of Article 7 of the Convention have been respected.

40. Finally, the Court notes that the jurisprudence referred to by the Government relates to the years 1997-1998, whereas the applicant's complaint concerns a situation before 20 July 1993. In the absence of a law on criminal liability for inadequate organisation of accounting, the applicant could not foresee the risk of criminal punishment for his conduct during that period.

41. In these circumstances, the Court finds that the domestic courts applied retrospectively the 1993 law to behaviour which previously did not constitute a criminal offence.

42. Accordingly, there has been a violation of Article 7 § 1 of the Convention.

Sentenza del 10 ottobre 2006, sez. II, causa PESSINO c. Francia (in particolare, par. 15-37)

En l'affaire Pessino c. France,

La Cour européenne des Droits de l'Homme (deuxième section), siégeant en une chambre composée de :

MM. A.B. BAKA, *président*,
J.-P. COSTA,
I. CABRAL BARRETO,
M[mes] A. MULARONI,
E. FURA-SANDSTRÖM,
D. JOCIENE,
MM. D. POPOVIC, *juges*,
R. TÜRMEN,
M. UGREKHELIDZE, *juges suppléants*,
et de Mme S. DOLLE, *greffière de section*,

Après en avoir délibéré en chambre du conseil le 19 septembre 2006,

Rend l'arrêt que voici, adopté à cette date :

PROCÉDURE

1. A l'origine de l'affaire se trouve une requête (n° 40403/02) dirigée contre la République française et dont un ressortissant de cet Etat, M. Dominique Pessino (« le requérant »), a saisi la Cour le 31 octobre 2002 en vertu de l'article 34 de la Convention de sauvegarde des Droits de l'Homme et des Libertés fondamentales (« la Convention »).

2. Le requérant est représenté par Me H. Charles, avocat à Nice. Le gouvernement français (« le Gouvernement ») est représenté par son agent, Mme E. Belliard, Directrice des Affaires juridiques au ministère des Affaires étrangères.

3. Le 25 août 2005, le Président de la deuxième section a décidé de communiquer la requête au Gouvernement. Se prévalant des dispositions de l'article 29 § 3, il a décidé que seraient examinés en même temps la recevabilité et le bien-fondé de l'affaire.

EN FAIT

LES CIRCONSTANCES DE L'ESPÈCE

4. Le requérant est né en 1924 et réside à Menton.

5. Le 27 octobre 1992, la société civile immobilière (SCI) dont le requérant était gérant, obtint du maire de Cannes un permis de construire un hôtel.

6. Sur requête d'une association de défense, le tribunal administratif de Nice ordonna le 11 octobre 1993 le sursis à exécution du permis. Une lettre recommandée notifiant le jugement fut présentée à la société le 19 octobre 1993, mais ne fut retirée que le 25 octobre 1993. La SCI interjeta appel le jour même.

7. Le 2 novembre suivant, un agent assermenté de la ville de Cannes constata la poursuite des travaux.

8. Le 6 octobre 1994, un nouveau permis fut délivré à la SCI.

9. Le 6 avril 1995, le tribunal administratif de Nice annula, par deux jugements distincts et pour des motifs différents, les deux permis de construire.

10. Le 26 juin 1995, l'association défense de Cannes déposa plainte. Une information fut ouverte pour infraction à la législation sur l'urbanisme. Un expert constata que les superstructures de l'immeuble étaient montées du quatrième au sixième étage inclus entre le 4 octobre 1993 et le 3 novembre 1993. Il ajouta toutefois qu'après le 28 octobre 1993, date de la prise de possession de la lettre recommandée, les travaux semblaient avoir consisté à terminer le niveau en cours de réalisation pour éviter sa dégradation dans le temps.

11. Le 9 février 2000, le tribunal de grande instance de Grasse déclara le requérant coupable d'avoir exécuté des travaux de gros œuvre nonobstant le jugement du 11 octobre 1993 ordonnant le sursis à exécution, faits prévus par les articles L 480-4 et L 480-7 du code de l'urbanisme. Il le condamna à 1 500 000 FF d'amende, ordonna la démolition des travaux exécutés irrégulièrement, avec astreinte de 500 FF par jour de retard.

12. Par arrêt du 3 juillet 2001, la cour d'appel d'Aix-en-Provence rappela tout d'abord que les juridictions répressives ont le droit et le devoir de caractériser les faits de la prévention sous toutes les qualifications dont ils sont susceptibles de relever et qu'elles peuvent toujours retenir des qualifications différentes de l'acte de poursuite à la condition qu'elles s'appliquent aux faits dont elles sont saisies et ne comportent aucun élément nouveau.

Elle constata que l'interruption des travaux n'ayant pas été ordonnée comme le prévoit l'article L 480-2 du code de l'urbanisme, le requérant ne pouvait être poursuivi et condamné pour construction malgré arrêté interruptif de travaux.

Elle considéra en revanche que les faits commis par le requérant constituaient le délit d'exécution de travaux sans permis de construire préalable, prévu et réprimé par les articles L 421-1, L 480-1, L 480-4, L 480-5 et L 480-7 du code de l'urbanisme. Elle nota que le conseil du requérant avait été invité à s'expliquer sur cette requalification au cours des débats et de la plaidoirie.

Elle estima qu'il y avait lieu de déclarer le requérant coupable de cette infraction mieux qualifiée et « qu'eu égard à la valeur de la construction, à la particulière mauvaise foi du prévenu qui s'est manifestement hâté de faire terminer la construction, en cherchant à placer les autorités devant le fait accompli, l'amende est équitable. »

La cour d'appel ordonna également la démolition des travaux exécutés irrégulièrement à compter du 25 octobre 1993 et la remise en l'état des lieux sous astreinte.

13. Le requérant se pourvut en cassation. Il soutenait que la loi pénale est d'interprétation stricte et que le fait de continuer des travaux entrepris malgré une décision du juge administratif ordonnant le sursis à exécution du

permis de construire, et dont le bénéficiaire a eu connaissance, ne constituait pas une infraction pénale. Il ne caractérisait en particulier pas l'infraction prévue à l'article L 480-3 du code de l'urbanisme dès lors que l'exécution de ces travaux n'avait pas été précédée d'un arrêté prescrivant leur interruption ou celle prévue à l'article L 480-4 dès lors que le permis de construire n'avait pas été annulé au moment de la continuation des travaux.

14. Dans son arrêt du 6 mai 2002, la Cour de cassation se prononça comme suit :

> « Sur le moyen unique de cassation, pris de la violation des articles L. 421-1, L. 421-3, L. 421-9, L. 480-1, L. 480-2, L. 480-3, L. 480-4, L. 480-5 et L. 480-7 du Code de l'urbanisme, 111-3 et 111-4 du Code pénal, 2, 427, 485, 512, 591 et 593 du Code de procédure pénale, défaut de motifs, manque de base légale :
>
> " en ce que l'arrêt attaqué a déclaré Dominique X... coupable d'avoir à Cannes du 25 octobre 1993 au 16 novembre 1993 exécuté des travaux, en l'espèce des travaux de gros oeuvre du 5e et du 6e étages et d'aménagement d'un hôtel, sans permis de construire ;
>
> " aux motifs que les juridictions répressives ont le droit et le devoir de caractériser les faits de la prévention sous toutes les qualifications différentes de l'acte de poursuite à la condition toutefois que celles-ci s'appliquent aux faits dont elles sont saisies et ne comportent aucun élément nouveau ; qu'en l'espèce, il est reproché au prévenu d'avoir exécuté des travaux nonobstant le jugement qui avait ordonné le sursis à exécution du permis de construire délivré ; que la citation vise l'article L. 480-3 réprimant l'exécution de travaux malgré un arrêté interruptif de travaux ; que le fait que les travaux aient été poursuivis après le jugement du tribunal administratif, établi par le procès-verbal de l'agent de la mairie et l'expertise, n'est pas contesté ; qu'en droit le juge administratif peut décider du sursis à exécution dans toutes les instances en matière d'urbanisme ; que, lorsque, tel est le cas d'espèce, la décision en cause est un permis de construire, l'article R. 122 (dans la numérotation en vigueur au moment des faits, du Code des tribunaux administratifs et des cours administratives d'appel), prévoit que le jugement prescrivant le sursis à exécution d'une décision administrative est dans les 24 heures notifié aux parties en cause ainsi qu'à l'auteur de cette décision et énonce expressément : "Les effets de ladite décision sont suspendus à partir du jour où son auteur reçoit cette notification" ; que l'article R. 125 précise que le recours devant la cour administrative d'appel n'a pas d'effet suspensif, sauf, ce qui n'est pas le cas en l'espèce, si la Cour en décide autrement ; qu'il s'en déduit qu'à compter de la date de la notification du jugement, soit à compter du 25 octobre 1993, et non à compter du prononcé du jugement, comme l'ont estimé à tort les premiers juges, le prévenu, gérant de la SCI, et à ce titre informé du jugement de sursis à exécution, était tenu d'arrêter les travaux, puisqu'à compter de cette date, le permis de construire était suspendu ; que le fait que ni le maire ni, à défaut, le représentant de l'Etat dans le département n'aient cru devoir prescrire par arrêté l'interruption des travaux comme le prévoit l'article L. 480-2, alinéa 10, dans tous les cas de construction sans permis de construire ou de constructions poursuivies malgré une décision de juridiction administrative ordonnant qu'il soit sursis à l'exécution du

permis de construire, a seulement pour conséquence que le prévenu ne pouvait être poursuivi et condamné pour construction malgré arrêté interruptif de travaux ; que, pour autant, l'absence de poursuites à cet égard n'implique nullement que les faits d'exécution de travaux tels que visés à la prévention ne sont susceptibles d'aucune qualification pénale ; qu'en effet les faits commis par le prévenu constituent non le délit prévu par l'article L. 480-3 visé dans la prévention, mais celui d'exécution de travaux sans permis de construire préalable, prévu et réprimé par les articles L. 421-1, L. 480-1, L. 480-4, L. 480-5, alinéas 1 et 2, L. 480-7 du Code de l'urbanisme, commis à compter du 25 octobre 1993 jusqu'au 16 novembre 1993 ; que le conseil du prévenu a été invité par le président au cours des débats et de la plaidoirie à s'expliquer sur cette requalification ; qu'il y a lieu de déclarer le prévenu coupable de cette infraction mieux qualifiée ;

" alors que la loi pénale est d'interprétation stricte ; que le fait de continuer les travaux entrepris malgré une décision du juge administratif ordonnant le sursis à l'exécution du permis de construire, et dont le bénéficiaire a eu connaissance, ne constitue pas une infraction pénale et ne caractérise en particulier ni l'infraction de l'article L. 480-3 du Code de l'urbanisme dès lors que l'exécution desdits travaux n'a pas été précédée d'un arrêté du maire ou du préfet prescrivant leur interruption, ni le délit de construction sans permis prévu à l'article L. 480-4 du même Code dès lors que la juridiction administrative n'avait pas, au moment de la continuation des travaux, annulé le permis de construire sur le fondement duquel ceux-ci ont été entrepris ; qu'ainsi, en se déterminant par la circonstance qu'à compter de la notification du jugement ordonnant le sursis à exécution du permis de construire, soit à compter du 25 octobre 1993, le prévenu était tenu d'arrêter les travaux, puisqu'à compter de cette date, le permis était suspendu, pour en déduire que, faute de l'avoir fait, il s'était rendu coupable du délit d'exécution de travaux sans permis de construire préalable, commis en l'espèce du 25 octobre au 16 novembre 1993, la cour d'appel, qui a méconnu le principe de la légalité criminelle et le principe d'interprétation stricte de la loi pénale, a violé les textes susvisés " ;

Attendu qu'il résulte de l'arrêt attaqué que, le 27 octobre 1992, la société civile immobilière Brougham, dont Dominique X... est le gérant, a obtenu un permis de construire en vue d'édifier un hôtel pour une surface hors oeuvre nette de 2 384 mètres carrés ; Qu'à la suite d'une action de l'association " Information et Défense de Cannes ", le tribunal administratif de Nice a, par jugement en date du 11 octobre 1993, ordonné le sursis à exécution dudit permis ;

Que sa décision a été confirmée par la cour administrative d'appel de Lyon le 29 mars 1994 et que le permis a été annulé par jugement du tribunal administratif de Nice le 6 avril 1995 ;

Attendu que, pour déclarer Dominique X... coupable de construction sans permis, les juges du second degré relèvent que le prévenu, informé de la décision de sursis à exécution par la notification du jugement, faite le 25 octobre 1993, a poursuivi les travaux jusqu'au 16 novembre 1993, exécutant pendant cette période des travaux de gros oeuvre des 5e et 6e étages de l'hôtel ;

Attendu qu'en se déterminant ainsi, la cour d'appel a justifié sa décision au regard des articles L. 421-1 et L. 480-4 du Code de l'urbanisme ; qu'en effet, le constructeur ne peut se prévaloir d'aucun permis de construire lorsque l'exécution de celui-ci a été suspendue par une décision du juge administratif ;

Et attendu que l'arrêt est régulier en la forme ;

REJETTE le pourvoi. »

II. LE DROIT ET LA PRATIQUE INTERNES PERTINENTS

Code de l'urbanisme

Article L421-1

« Les constructions, même ne comportant pas de fondations, doivent être précédées de la délivrance d'un permis de construire.

Un décret en Conseil d'Etat arrête la liste des travaux exécutés sur des constructions existantes ainsi que des changements de destination qui, en raison de leur nature ou de leur localisation, doivent également être précédés de la délivrance d'un tel permis. »

Article L480-1

« Les infractions aux dispositions des titres Ier, II, III, IV et VI du présent livre sont constatées par tous officiers ou agents de police judiciaire ainsi que par tous les fonctionnaires et agents de l'Etat et des collectivités publiques commissionnés à cet effet par le maire ou le ministre chargé de l'urbanisme suivant l'autorité dont ils relèvent et assermentés. Les procès-verbaux dressés par ces agents font foi jusqu'à preuve du contraire. »

Article L480-3

« En cas de continuation des travaux nonobstant la décision judiciaire ou l'arrêté en ordonnant l'interruption, une amende de 75 000 euros et un emprisonnement de trois mois, ou l'une de ces deux peines seulement, sont prononcés par le tribunal contre les personnes visées à l'article L. 480-4 (2. alinéa). »

Article L480-4

« Les peines prévues à l'alinéa précédent peuvent être prononcées contre les utilisateurs du sol, les bénéficiaires des travaux, les architectes, les entrepreneurs ou autres personnes responsables de l'exécution desdits travaux.

Ces peines sont également applicables :

1. En cas d'inexécution, dans les délais prescrits, de tous travaux accessoires d'aménagement ou de démolition imposés par les autorisations visées au premier alinéa ;

2. En cas d'inobservation, par les bénéficiaires d'autorisations accordées pour une durée limitée ou à titre précaire, des délais impartis pour le rétablissement des lieux dans leur état antérieur ou la réaffectation du sol à son ancien usage. »

Article L480-5

« En cas de condamnation d'une personne physique ou morale pour une infraction prévue aux articles L. 160-1 et L. 480-4, le tribunal, au vu des observations écrites ou après audition du maire ou du fonctionnaire compétent, statue même en l'absence d'avis en ce sens de ces derniers, soit sur la mise en conformité des lieux ou celle des ouvrages avec les règlements, l'autorisation ou la déclaration en tenant lieu, soit sur la démolition des ouvrages ou la réaffectation du sol en vue du rétablissement des lieux dans leur état antérieur.

Le tribunal pourra ordonner la publication de tout ou partie du jugement de condamnation, aux frais du délinquant, dans deux journaux régionaux ou locaux diffusés dans tout le département, ainsi que son affichage dans les lieux qu'il indiquera. »

Article L480-7

« Le tribunal impartit au bénéficiaire des travaux irréguliers ou de l'utilisation irrégulière du sol un délai pour l'exécution de l'ordre de démolition, de mise en conformité ou de réaffectation ; il peut assortir sa décision d'une astreinte de 7,5 à 75 euros par jour de retard.

Au cas où le délai n'est pas observé, l'astreinte prononcée, qui ne peut être révisée que dans le cas prévu au troisième alinéa du présent article, court à partir de l'expiration dudit délai jusqu'au jour où l'ordre a été complètement exécuté.

si l'exécution n'est pas intervenue dans l'année de l'expiration du délai, le tribunal peut, sur réquisition du ministère public, relever à une ou plusieurs reprises, le montant de l'astreinte, même au-delà du maximum prévu ci-dessus.

Le tribunal peut autoriser le reversement ou dispenser du paiement d'une partie des astreintes pour tenir compte du comportement de celui à qui l'injonction a été adressée et des difficultés qu'il a rencontrées pour l'exécuter. »

Arrêt de la Cour de cassation (chambre criminelle) du 9 novembre 1993

« Sur le moyen unique de cassation pris de la violation des articles L. 421-1, L. 421-3, L. 421-9, L. 480-1, L. 480-2, L. 480-4 du Code de l'urbanisme, des articles 2, 575, 2 et 6 , ainsi que 593 du Code de procédure pénale ;

"en ce que l'arrêt attaqué a dit n'y avoir lieu à renvoyer devant le tribunal correctionnel, du chef de l'infraction visée et réprimée par l'article L. 480-4 du Code de l'urbanisme, un propriétaire et son architecte pour avoir poursuivi les travaux entrepris malgré trois décisions du tribunal administratif ayant ordonné le sursis à l'exécution des permis de construire ;

"aux motifs qu'Allain et Beaudoux, en leurs qualités respectives de propriétaire et d'architecte, avaient poursuivi ou laissé poursuivre des travaux de construction malgré les jugements du tribunal administratif dont ils avaient eu connaissance ordonnant le sursis à exécution des permis de construire délivrés ; que, cependant, la juridiction administrative n'avait pas, au moment de ces continuations de travaux, annulé l'un ou l'autre des permis attaqués ; que si le maire de

Douarnenez avait lui-même annulé le 12 novembre 1990 son précédent permis de construire du 18 avril 1990, il n'en demeurait pas moins que cette dernière décision, même s'il avait été sursis à son exécution, subsistait lors de la première période litigieuse, soit entre le 25 et le 29 septembre 1990 ; qu'il n'y avait donc pas eu, en l'espèce, construction sans permis ou après annulation d'un permis préalablement accordé ; qu'en conséquence, les faits reprochés aux inculpés ne pouvaient être poursuivis sur le fondement des dispositions de l'article L. 480-4 du Code de l'urbanisme ; qu'aucune des décisions de la juridiction administrative ordonnant un sursis à exécution n'avait été suivie d'un arrêté du maire ou, à défaut, du préfet prescrivant l'interruption des travaux ; que, faute de cet élément matériel, les faits ne pouvaient davantage tomber sous le coup des dispositions de l'article L. 480-3 du Code de l'urbanisme punissant les personnes qui continuaient des travaux nonobstant un arrêté en ordonnant l'interruption ;

"alors que, d'une part, quiconque désire entreprendre une construction doit au préalable obtenir un permis de construire ; que ce permis est certes exécutoire de plein droit dès sa notification au requérant et sa transmission au représentant de l'Etat mais cesse de l'être aussitôt que le tribunal administratif, saisi au principal d'une demande en annulation, prend avant qu'il soit statué au fond, une décision de sursis à l'exécution ; que l'obligation d'obtenir avant tous travaux un permis de construire s'entend nécessairement d'un permis exécutoire en sorte que constitue bien l'infraction de construction sans permis, prévue et réprimée par l'article L. 480-4 du Code de l'urbanisme, la poursuite des travaux après décision du tribunal administratif ayant prononcé un sursis à l'exécution, décision qui fait légalement obstacle à la poursuite des travaux, peu important qu'ait été ou non pris, suite à la décision de sursis, un arrêté du maire ou du préfet ordonnant l'interruption ou que soit intervenue une décision judiciaire la prescrivant, la poursuite des travaux constituant alors l'infraction distincte, plus lourdement sanctionnée, visée et réprimée par l'article L. 480-3 du Code de l'urbanisme ; qu'en déclarant que les faits ne supportaient aucune qualification pénale au prétexte que les permis de construire subsistaient jusqu'à leur annulation, la chambre d'accusation a rendu en réalité une décision de refus d'informer ;

"alors que, d'autre part, dans leur plainte avec constitution de partie civile, les demandeurs avaient fait valoir que le sursis à exécution d'une autorisation de construire rendait inévitablement irréguliers les travaux que l'on continuait de réaliser après l'intervention d'une telle décision, en tout cas, dès sa notification aux parties en cause ; que la chambre d'accusation ne pouvait délaisser ce chef péremptoire des écritures des demandeurs concernant la portée de la décision de sursis à exécution et de sa notification, l'arrêt attaqué n'a pas satisfait aux conditions essentielles de son existence légale" ;

Attendu que les énonciations de l'arrêt attaqué et les pièces de la procédure permettent à la Cour de Cassation de s'assurer que, pour confirmer l'ordonnance de non-lieu rendue à la suite de l'information à laquelle le juge d'instruction a procédé sur la plainte des parties civiles, la chambre d'accusation, après avoir exposé les faits, objet de cette information, a, répondant au mémoire des parties civiles, énoncé les

motifs pour lesquels elle estimait que les faits poursuivis ne constituaient pas une infraction pénale ;

Que le moyen, sous couvert d'un prétendu refus d'informer et d'un prétendu défaut de réponse à conclusions, ne tend qu'à remettre en cause la valeur de ces motifs que la partie civile aux termes de l'article 575 du Code de procédure pénale, n'est pas admise à discuter à l'appui de son seul pourvoi contre un arrêt de la chambre d'accusation ;

Attendu qu'il n'est ainsi justifié d'aucun des griefs énumérés par le texte précité comme autorisant la partie civile à se pourvoir contre un tel arrêt en l'absence de recours du ministère public ;

DECLARE le pourvoi IRRECEVABLE . »

Arrêt de la Cour de cassation (chambre criminelle) du 4 novembre 1998

« Sur le second moyen de cassation, pris de la violation des articles L. 421-1, L. 480-4, L. 480-5, L. 480-13 du Code de l'urbanisme, 112-1 du Code pénal, 593 du Code de procédure pénale, défaut de motifs, manque de base légale :

" en ce que l'arrêt infirmatif attaqué a déclaré le prévenu coupable d'avoir, à Toulouse, du 2 juillet 1990 au 4 mai 1993, construit un immeuble sans permis de construire, l'a condamné à une amende de 500 000 francs et a ordonné la publication du présent arrêt dans différents journaux ;

" aux motifs que la construction litigieuse a été achevée le 4 mai 1993 ; que l'arrêt du Conseil d'Etat du 23 juillet 1993 a expressément annulé l'arrêté du maire de Toulouse du 16 juin 1989 ayant autorisé la SMCI à effectuer les travaux en litige ; que l'affirmation du tribunal correctionnel, selon laquelle les jugements d'annulation prononcés par les juridictions administratives n'auraient pas d'effet rétroactif, est inexacte ; qu'au contraire, de telles décisions ont pour conséquence de faire disparaître la totalité des effets juridiques de l'acte administratif annulé ; qu'ainsi, une construction faite sur la base d'un permis déclaré illégal doit être assimilée à une construction sans permis en vertu de ce principe de rétroactivité ; que, si l'article L. 480-13 du Code de l'urbanisme dispose que "lorsqu'une construction a été édifiée conformément à un permis de construire, le propriétaire ne peut être condamné par un tribunal de l'ordre judiciaire du fait de la méconnaissance des règles d'urbanisme ou des servitudes d'utilité publique" ; que, si, préalablement, le permis de construire a été annulé pour "excès de pouvoir ou son illégalité constatée par la juridiction administrative", il convient cependant de souligner que cette disposition procédurale concerne la responsabilité civile des constructeurs et n'affecte nullement les poursuites pénales ;

" qu'en outre, l'arrêt du Conseil d'Etat, qui a annulé l'arrêté du maire de Toulouse autorisant la construction, a révélé la fraude commise par le prévenu lors de la délivrance du permis en litige ; que cette décision est intervenue postérieurement à l'arrêt de la cour d'appel de Toulouse ayant prononcé la relaxe du demandeur du chef d'abattage d'arbres sans autorisation ; que la cour d'appel de renvoi de Bordeaux a relevé que la faute ainsi commise par le prévenu se confondait avec le délit prévu par

l'article L. 480-4 du Code de l'urbanisme ; que cette juridiction en a tiré les conséquences civiles en le condamnant à verser une somme de 50 000 francs à titre de dommages et intérêts à la partie civile ; qu'ainsi, si Jean-Marie Jacquemart a été relaxé du délit d'abattage d'arbres sans autorisation, il n'en a pas moins commis une fraude au sens civil du terme, fraude qui lui a permis d'obtenir une autorisation de construire qui n'aurait pas été accordée en son absence ; que cette fraude constitue l'élément intentionnel du délit de construction sans permis reproché à Jean-Marie Jacquemart ;

" alors que, d'une part, l'existence d'une infraction s'apprécie au jour de la commission des faits reprochés ; qu'ainsi, les travaux exécutés et terminés avant le retrait sont réguliers ; qu'en l'espèce, il résulte des propres constatations de l'arrêt attaqué que les travaux litigieux ont été achevés le 4 mai 1993 et que l'arrêt du Conseil d'Etat du 23 juillet 1993 a annulé l'arrêté du maire de Toulouse du 16 juin 1989 ayant autorisé la SMCI à effectuer les travaux en litige ; qu'ainsi, la qualification pénale faisait défaut quand la construction a été réalisée ; que, pour en avoir autrement décidé, la cour d'appel a violé les articles 112-1 du Code pénal et L. 480-4 du Code de l'urbanisme ;

" alors, d'autre part, et en tout état de cause, que n'ont pas été réalisés sans permis de construire les travaux entrepris avec un permis régulier et que l'irrégularité constatée après l'achèvement des travaux n'est pas frauduleuse ; qu'en l'espèce, si dans son arrêt du 23 juillet 1993, le Conseil d'Etat a constaté que le permis de construire du 16 juin 1989 avait été obtenu par fraude, la SMCI ayant au préalable fait abattre des arbres de haute tige sur le terrain litigieux, le prévenu a été définitivement relaxé par arrêt de la cour d'appel de Toulouse du 11 février 1993 du chef d'abattage illégal d'arbres ; que l'élément de fraude relevé par le Conseil d'Etat est donc inexistant et que, par suite l'élément matériel, comme l'élément intentionnel font défaut, la faute civile sanctionnée par la cour d'appel de Bordeaux ne pouvant constituer l'élément intentionnel du délit reproché au prévenu ; qu'ainsi, la cour d'appel a violé l'article 121-3 du Code pénal et L. 480-4 du Code de l'urbanisme " ;

Attendu qu'il résulte de l'arrêt attaqué que la SMCI, dont Jean-Marie Jacquemart est le directeur, a obtenu un permis de construire en vue d'édifier un immeuble sur un terrain lui appartenant ; qu'à la suite de la réclamation de Xavier Bourgon, propriétaire d'un terrain voisin, le maire a rapporté sa décision, au motif que le projet de construction envisagé imposait notamment l'abattage d'une dizaine d'arbres de haute tige ; que la SMCI, après avoir procédé à l'abattage de ces arbres, a obtenu un nouveau permis de construire, lequel a été annulé par arrêt du Conseil d'Etat du 23 juillet 1993 ;

Attendu que Xavier Bourgon a fait citer directement Jean-Marie Jacquemart devant le tribunal correctionnel pour construction sans permis ; que les juges du premier degré l'ont relaxé de ce chef ;

Attendu que pour infirmer cette décision et déclarer le prévenu coupable, les juges d'appel retiennent que la faute commise par le prévenu a été constatée par la décision de la juridiction administrative, ayant annulé le permis de construire ; qu'elle ajoute que cette fraude,

qui a consisté à abattre des arbres afin d'échapper aux exigences du plan d'occupation des sols et obtenir ainsi une autorisation de construire, constitue l'élément intentionnel du délit reproché ;

Attendu qu'en cet état, la cour d'appel a justifié sa décision au regard des articles L. 421-1 et L. 480-4 du Code de l'urbanisme, dès lors qu'un permis obtenu frauduleusement équivaut à son absence et que son obtention ne saurait soustraire le prévenu à l'application des textes précités;

D'où il suit que le moyen ne peut qu'être écarté (...) »

EN DROIT

I. SUR LA VIOLATION ALLÉGUÉE DE L'ARTICLE 7 DE LA CONVENTION

15. Le requérant allègue que les faits qui lui ont été reprochés ne constituaient pas une infraction au moment où ils ont été commis et que, seul le renversement de jurisprudence opéré par la Cour de cassation pour rejeter son pourvoi, est venu rétroactivement donner à ces faits une qualification délictuelle. Il en conclut que l'article 7 de la Convention a été violé. Cette disposition se lit notamment :

> « 1. Nul ne peut être condamné pour une action ou une omission qui, au moment où elle a été commise, ne constituait pas une infraction d'après le droit national ou international. De même il n'est infligé aucune peine plus forte que celle qui était applicable au moment où l'infraction a été commise. (...) »

16. Le Gouvernement s'oppose à cette thèse.

A. Sur la recevabilité

17. La Cour constate que la requête n'est pas manifestement mal fondée au sens de l'article 35 § 3 de la Convention. Elle relève par ailleurs que celle-ci ne se heurte à aucun autre motif d'irrecevabilité. Il convient donc de la déclarer recevable.

B. Sur le fond

18. Le Gouvernement fait observer d'emblée que le requérant ne conteste pas que la construction d'un immeuble en l'absence de permis de construire constitue une infraction, mais seulement la définition de l'infraction telle que donnée par la jurisprudence.

19. Il souligne que la Cour a estimé dans ses arrêts *C.R. c. Royaume-Uni* et *S.W. c. Royaume-Uni* (arrêts du 22 novembre 1995, série A n° 335-B et 335-C, §§ 34 et 36 respectivement) qu'

> « On ne saurait interpréter l'article 7 de la Convention comme proscrivant la clarification graduelle des règles de la responsabilité pénale par l'interprétation judiciaire d'une affaire à l'autre, à condition que le résultat soit cohérent avec la substance de l'infraction et raisonnablement prévisible. »

20. Il considère que le requérant fait une interprétation erronée de l'arrêt de la Cour de cassation du 9 novembre 1993. Selon lui, elle n'a pas pris position sur la pertinence de l'arrêt de la chambre d'accusation qui avait jugé que les faits poursuivis, qui étaient de la même nature que ceux pour lesquels le requérant a été condamné, ne constituaient pas une infraction

pénale. Celle-ci aurait uniquement constaté que la partie civile n'était pas habilitée à former ce pourvoi au sens de l'article 575 du code de procédure pénale qui dispose que la partie civile ne peut se pourvoir en cassation contre les arrêts de la chambre de l'instruction que s'il y a pourvoi du ministère public, sauf dans certains cas énumérés limitativement.

21. Le Gouvernement est dès lors d'avis que le requérant n'est pas fondé à soutenir que la Cour de cassation a opéré un revirement de jurisprudence en rejetant son pourvoi en cassation. Il ajoute que la base de données « Légifrance » ne présente pas cet arrêt comme un revirement de jurisprudence mais invite à rapprocher cet arrêt d'un précédent du 4 novembre 1998 (voir ci-dessus).

22. En conclusion, le Gouvernement estime que les faits reprochés au requérant constituaient bien, une infraction au moment où ils ont été commis, conformément aux articles L 421-1, L 480-1, L 480-4, L 480-5 et L 480-7 du code de l'urbanisme et à l'interprétation donnée par la Cour de cassation. Dès lors, le grief du requérant n'est pas fondé.

23. Le requérant conteste l'interprétation que le Gouvernement fait de l'arrêt de la Cour de cassation du 9 novembre 1993. Il souligne que celle-ci a indiqué dans son arrêt que :

> « les énonciations de l'arrêt attaqué et les pièces de la procédure permettent à la Cour de Cassation de s'assurer que, pour confirmer l'ordonnance de non-lieu rendue à la suite de l'information à laquelle le juge d'instruction a procédé sur la plainte des parties civiles, la chambre d'accusation, après avoir exposé les faits, objet de cette information, a, répondant au mémoire des parties civiles, énoncé les motifs pour lesquels elle estimait que les faits poursuivis ne constituaient pas une infraction pénale ».

Il estime qu'elle ne l'aurait pas fait si elle n'avait pas approuvé, au fond, l'analyse de la cour d'appel.

24. Il souligne que le Gouvernement ne peut produire aucune décision, notamment de la Cour de cassation, antérieure à son affaire et concluant que le fait de poursuivre des travaux de construction malgré un sursis à exécution du permis de construire émis par le juge administratif constitue une infraction pénale, car il n'en existe pas.

25. Il estime donc que l'article 7 de la Convention a été violé dans la mesure où, à la date de l'opération litigieuse, le droit pénal français n'incriminait pas la construction sur le fondement d'un permis ayant fait l'objet d'une décision de sursis à exécution.

26. Le requérant se réfère quant à lui à la décision *Enkelmann c. Suisse* de la Commission du 4 mars 1985 (D.R. 41, p.178) qui se lit notamment :

> « La Commission a admis d'autre part, que le juge pouvait préciser les éléments constitutifs d'une infraction mais non les modifier, de manière substantielle, au détriment de l'accusé. Elle a reconnu qu'il n'y avait rien à objecter à ce que les éléments constitutifs existants de l'infraction soient précisés et adaptés à des circonstances nouvelles pouvant raisonnablement entrer dans la conception originelle de l'infraction. En revanche, il est exclu qu'un acte qui n'était pas jusqu'alors punissable se voie attribuer par les tribunaux un caractère pénal ou que la

définition d'infractions existantes soit élargie de façon à englober des faits qui ne constituaient pas jusqu'alors une infraction pénale. »

27. Il estime que la règle posée par la Chambre criminelle n'était pas raisonnablement prévisible, au point que le commentaire qui en a été fait par un article de doctrine paru dans la « revue de droit pénal » en septembre 2002 indique que « l'arrêt rapporté renverse [la jurisprudence antérieure] par une sèche affirmation que ne soutient aucun raisonnement juridique ».

28. La Cour rappelle que l'article 7 de la Convention consacre, de manière générale, le principe de la légalité des délits et des peines (*nullum crimen, nulla poena sine lege*) et prohibe, en particulier, l'application rétroactive du droit pénal lorsqu'elle s'opère au détriment de l'accusé (*Kokkinakis c. Grèce*, arrêt du 25 mai 1993, série A n° 260-A, p. 22, § 52). S'il interdit en particulier d'étendre le champ d'application des infractions existantes à des faits qui, antérieurement, ne constituaient pas des infractions, il commande en outre de ne pas appliquer la loi pénale de manière extensive au détriment de l'accusé, par exemple par analogie. Il s'ensuit que la loi doit définir clairement les infractions et les peines qui les répriment. Cette condition se trouve remplie lorsque le justiciable peut savoir, à partir du libellé de la disposition pertinente et au besoin à l'aide de l'interprétation qui en est donnée par les tribunaux, quels actes et omissions engagent sa responsabilité pénale (voir, notamment, *Cantoni c. France*, arrêt du 15 novembre 1996, *Recueil des arrêts et décisions* 1996-V, p. 1627, § 29 et *Achour c. France* [GC], n° 67335/01, § 41, 29 mars 2006).

29. La notion de « droit » (« law ») utilisée à l'article 7 correspond à celle de « loi » qui figure dans d'autres articles de la Convention ; elle englobe le droit d'origine tant législative que jurisprudentielle et implique des conditions qualitatives, entre autres celles de l'accessibilité et de la prévisibilité (voir, notamment, *Cantoni*, précité, § 29 ; *Coëme et autres c. Belgique*, n°s 32492/96, 32547/96, 32548/96, 33209/96 et 33210/96, § 145, CEDH 2000-VII ; *E.K. c. Turquie*, n° 28496/95, § 51, 7 février 2002).

30. La tâche qui incombe à la Cour est donc de s'assurer que, au moment où un accusé a commis l'acte qui a donné lieu aux poursuites et à la condamnation, il existait une disposition légale rendant l'acte punissable et que la peine imposée n'a pas excédé les limites fixées par cette disposition (*Coëme et autres*, précité, § 145 et *Achour c. France* [GC], précité, § 43).

31. La Cour a déjà constaté qu'en raison même du principe de généralité des lois, le libellé de celles-ci ne peut présenter une précision absolue. L'une des techniques types de réglementation consiste à recourir à des catégories générales plutôt qu'à des listes exhaustives. Aussi de nombreuses lois se servent-elles par la force des choses de formules plus ou moins floues, afin d'éviter une rigidité excessive et de pouvoir s'adapter aux changements de situation. L'interprétation et l'application de pareils textes dépendent de la pratique (voir, parmi d'autres, *Kokkinakis*, précité § 40 et *Cantoni*, précité §31).

La fonction de décision confiée aux juridictions sert précisément à dissiper les doutes qui pourraient subsister quant à l'interprétation des normes, en tenant compte des évolutions de la pratique quotidienne.

32. La Cour doit dès lors rechercher si, en l'espèce, le texte de la disposition légale, lue à la lumière de la jurisprudence interprétative dont elle s'accompagne, remplissait cette condition à l'époque des faits (*Cantoni* précité, § 32).

33. Elle rappelle que la portée de la notion de prévisibilité dépend dans une large mesure du contenu du texte dont il s'agit, du domaine qu'il couvre ainsi que du nombre et de la qualité de ses destinataires (*Groppera Radio AG et autres c. Suisse* du 28 mars 1990, série A n° 173, p. 26, par. 68). La prévisibilité de la loi ne s'oppose pas à ce que la personne concernée soit amenée à recourir à des conseils éclairés pour évaluer, à un degré raisonnable dans les circonstances de la cause, les conséquences pouvant résulter d'un acte déterminé (voir, parmi d'autres, *Tolstoy Miloslavsky c. Royaume-Uni*, 13 juillet 1995, série A n° 316-B, p. 71, § 37). Il en va spécialement ainsi des professionnels, habitués à devoir faire preuve d'une grande prudence dans l'exercice de leur métier. Aussi peut-on attendre d'eux qu'ils mettent un soin particulier à évaluer les risques qu'il comporte (*Cantoni*, précité, §35).

34. La Cour constate qu'en l'espèce, le Gouvernement n'a pas été en mesure de produire des décisions des juridictions internes, que ce soit de la Cour de cassation ou de juridictions du fond, établissant qu'avant l'arrêt rendu dans la présente affaire, il a été jugé explicitement que le fait de poursuivre des travaux de construction, malgré un sursis à exécution émis par le juge administratif à l'encontre du permis de construire, constituait une infraction pénale.

35. En outre, l'analyse des textes du code de l'urbanisme reproduits ci-dessus semble montrer que le prononcé du sursis à l'exécution d'un permis à construire ne saurait être, en ce qui concerne ses conséquences pénales, clairement assimilable à une « décision judiciaire ou arrêté ordonnant l'interruption des travaux », en vertu notamment de l'article L 480-3 de ce code.

Si la Cour admet aisément que les juridictions internes sont mieux placées qu'elle-même pour interpréter et appliquer le droit national, elle rappelle également que le principe de la légalité des délits et des peines, contenu dans l'article 7 de la Convention, interdit que le droit pénal soit interprété extensivement au détriment de l'accusé, par exemple par analogie (voir par exemple *Coëme et autres c. Belgique*, CEDH 2000-VII, § 145).

Il en résulte que, faute au minimum d'une interprétation jurisprudentielle accessible et raisonnablement prévisible, les exigences de l'article 7 ne sauraient être regardées comme respectées à l'égard d'un accusé. Or le manque de jurisprudence préalable en ce qui concerne l'assimilation entre sursis à exécution du permis et interdiction de construire résulte en l'espèce de l'absence de précédents topiques fournis par le Gouvernement en ce sens.

36. Il résulte ainsi de tout ce qui précède que, même en tant que professionnel qui pouvait s'entourer de conseils de juristes, il était difficile, voire impossible pour le requérant de prévoir le revirement de jurisprudence de la Cour de cassation et donc de savoir qu'au moment où il les a commis, ses actes pouvaient entraîner une sanction pénale (*a contrario Cantoni c. France,* précité, § 35 et *Coëme et autres c. Belgique*, précité, § 150).

A cet égard, la Cour considère que la présente affaire se distingue clairement des arrêts S.W. et C.R. c. Royaume-Uni (paragraphe 19 ci-dessus), dans lesquelles il s'agissait d' un viol et d'une tentative de viol de deux hommes sur leurs femmes. La Cour avait pris soin de noter dans ces arrêts (§§ 44 et 42, respectivement) le caractère par essence avilissant du viol, si manifeste que la qualification pénale de ces actes, commis par des

maris sur leurs épouses, devait être regardée comme prévisible et non contraire à l'article 7 de la Convention, à la lumière des objectifs fondamentaux de celle-ci, "dont l'essence même est le respect de la dignité et de la liberté humaines".

37. Dans ces conditions, la Cour estime qu'en l'espèce il y a eu violation de l'article 7 de la Convention.

II. SUR L'APPLICATION DE L'ARTICLE 41 DE LA CONVENTION

38. 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. »

A. Dommage

39. Au titre du préjudice matériel, le requérant demande le remboursement des sommes suivantes : 228 673,53 euros (EUR) au titre de l'amende qu'il a dû payer, 281 856, 43 EUR correspondant à la taxe payée pour le permis de construire, 93 625 EUR au titre de l'astreinte qu'il doit payer pour ne pas avoir détruit l'immeuble et 1 524 500 EUR pour le manque à gagner sur le chiffre d'affaires de l'hôtel qui a ouvert plus tard que prévu et dont il est gérant.

Pour ce qui est de son préjudice moral, le requérant l'estime à 152 000 EUR, compte tenu du fait qu'il a été meurtri très profondément par cette procédure et que le problème n'est toujours pas réglé.

40. Le Gouvernement estime que ces demandes sont manifestement excessives et que le requérant ne justifie ni du caractère certain des préjudices invoqués, qui sont pour l'essentiel purement hypothétiques, ni de la réalité du lien de causalité entre la violation alléguée de l'article 7 de la Convention. Il est d'avis que le seul constat de violation constituerait, le cas échéant, une satisfaction équitable suffisante.

41. La Cour considère qu'il existe un lien de causalité entre le paiement de l'amende infligée au requérant et la violation de l'article 7 qu'elle vient de relever, de sorte que l'intéressé doit recouvrer cette somme. Il y a lieu donc d'octroyer le montant de l'amende dont il s'est effectivement acquitté. Le constat de manquement figurant dans le présent arrêt constitue par ailleurs une satisfaction équitable pour tout autre dommage.

B. Frais et dépens

42. Le requérant demande également 18 000 EUR pour les frais et dépens encourus devant les juridictions internes, dont 1 794 EUR pour le pourvoi en cassation.

43. Le Gouvernement rappelle que le requérant ne peut prétendre au remboursement que des frais engagés pour prévenir ou faire corriger par les juridictions internes la violation alléguée et souligne que les documents produits ne permettent pas d'identifier et de chiffrer avec précision les frais engagés à cet effet. Il propose d'allouer au requérant 1 500 EUR à ce titre.

44. Selon la jurisprudence constante de la Cour, l'allocation des frais et dépens exposés par le requérant ne peut intervenir que dans la mesure où se trouvent établis leur réalité, leur nécessité et le caractère raisonnable de leur taux (voir, parmi beaucoup d'autres, *Sardinas Albo c. Italie*, n° 56271/00, § 110, 17 février 2005 et *Kaufmann c. Italie*, précité, § 49).

Pour ce qui est des coûts de la procédure interne, la Cour relève que les honoraires d'avocat réclamés se rapportent à la défense du requérant dans l'ensemble de la procédure nationale, et ne concernent pas uniquement le pourvoi en cassation. Les sommes sollicitées n'ont donc pas été nécessairement exposées pour faire redresser la violation de la Convention constatée par la Cour dans la présente espèce (voir, *mutatis mutandis*, *Nikolova c. Bulgarie*, n° 31195/96, § 79, CEDH 1999-II et *Kaufmann c. Italie*, précité, § 50). Il n'en demeure pas moins que le requérant a encouru des dépenses pour tenter de faire corriger la violation de la Convention par la Cour de cassation et que celles-ci se montent à 1 794 EUR. Compte tenu des éléments en sa possession et de sa pratique en la matière, la Cour considère raisonnable de lui accorder 1 794 EUR de ce chef.

C. Intérêts moratoires

45. 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. *Déclare* la requête recevable ;

2. *Dit* qu'il y a eu violation de l'article 7 de la Convention ;

3. *Dit* que le constat de violation de l'article 7 de la Convention constitue en soi une satisfaction équitable suffisante pour le dommage moral éventuellement subi par le requérant ;

4. *Dit*

a) que l'Etat défendeur doit verser au requérant, dans les trois mois à compter du jour où l'arrêt sera devenu définitif conformément à l'article 44 § 2 de la Convention, la somme effectivement payée par le requérant au titre de l'amende qui lui a été infligée ; 1 794 EUR (mille sept cent quatre-vingt quatorze euros) pour frais et dépens, plus tout montant pouvant être dû à titre d'impôt ;

b) qu'à compter de l'expiration dudit délai et jusqu'au versement, ces montants seront à majorer d'un intérêt simple à un taux égal à celui de la facilité de prêt marginal de la Banque centrale européenne applicable pendant cette période, augmenté de trois points de pourcentage ;

4. *Rejette* la demande de satisfaction équitable pour le surplus.

Fait en français, puis communiqué par écrit le 10 octobre 2006 en application de l'article 77 §§ 2 et 3 du règlement.

S. Dolle — A.B. Baka
Greffière — Président

Estratto (par. 125-152) della sentenza del 12 febbraio 2008, Grande Camera, causa KAFKARIS c. Cipro

IV. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

125. The applicant complained that the unforeseeable prolongation of his term of imprisonment as a result of the repeal of the Regulations and, further, the retroactive application of the new legislative provisions violated Article 7 of the Convention, which provides as follows:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
>
> 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

A. The parties' submissions

1. The applicant

126. The applicant submitted that when he had been sentenced to mandatory life imprisonment on 10 March 1989 by the Limassol Assize Court, under the Prison Regulations applicable at the time, "life imprisonment" had been tantamount to imprisonment for a period of twenty years. As a result of the repeal of the Regulations, the amendment of the relevant legislative provisions and the retroactive application of the provisions thus amended, he had been subjected to an unforeseeable prolongation of his term of imprisonment from a definite twenty-year sentence to an indeterminate term for the remainder of his life, with no prospect of remission, and to a change in the conditions of his detention. Thus, a heavier penalty had been imposed than that applicable at the time he had committed the offence of which he had been convicted, in breach of Article 7 of the Convention.

127. In the applicant's view, the Government should be estopped from denying that his sentence had been more than twenty years and that by applying the Regulations he would have served his sentence by 2002. It was clear from the facts that the applicant believed that his sentence expired in 2002. He had not appealed against his sentence, relying on the notice and release date given by the prison authorities. In fact, both the prison authorities and the Office of the Attorney-General had been aware of this. The prolongation of his sentence following the repeal of the Regulations could not have been foreseen either at the time of committing the offence or at the time of his sentencing. His sentence had been retroactively increased from a definite twenty-year term to an indefinite term without the prospect of remission.

128. Finally, the applicant considered that his case did not fall within the ambit of the exemption provided for in the second paragraph of Article 7 of the Convention.

2. *The Government*

129. The Government pointed out that Article 7 did not relate to changes in how a sentence passed by a court was executed, as opposed to changes in the substantive penalty prescribed for the offence itself (relying, *inter alia*, on *Hogben v. the United Kingdom*, no. 11653/85, Commission decision of 3 March 1986, DR 46; *Grava v. Italy* no. 43522/98, § 51, 10 July 2003; and *Uttley v. the United Kingdom* (dec.), no. 36946/03, 29 November 2005).

130. Section 203(2) of the Criminal Code, imposing a mandatory life sentence for premeditated murder, was the only substantive provision of domestic law prescribing the applicable penalty to be imposed by the courts for such a crime. In contrast, the Regulations did not contain a provision which defined in substantive terms the penalty for the offence of murder but had been subordinate legislation made on the basis of, and for the purposes of, the Prison Discipline Law and simply concerned the manner of the execution of that sentence. They had not been made pursuant to the Criminal Code, but rather under sections 4 and 9 of the Prison Discipline Law, which, as its title suggested, had been concerned with prison discipline. Neither of the two sections authorised the making of regulations prescribing the sentences that could be imposed by the courts.

131. The definition in Regulation 2 (as inserted by the 1987 Regulations) that "imprisonment for life meant imprisonment for twenty years" and Regulation 93 (as amended by the 1987 Regulations) prescribing that a life prisoner could earn a remission of his sentence on the grounds of good conduct and diligence concerned the execution of the life sentence imposed by the court.

132. The Government noted that the above analysis had been accepted by the domestic courts. First of all, the Limassol Assize Court, when sentencing the applicant in March 1989, had questioned the validity of the Regulations under the Constitution and held that, in any event, even if they had been valid, they could not have been taken into account when sentencing the applicant so as to enable it to impose three consecutive life sentences. That court had considered that "imprisonment for life meant imprisonment for the remainder of the accused's life". Under the Constitution subordinate legislation could not alter that position. No appeal had been brought against this sentence in 1989. Furthermore, the Supreme Court, when examining the applicant's appeal concerning his habeas corpus application, had held that the then existing Regulations did not change the fact that, in accordance with the law, imprisonment for the remainder of the applicant's life had been imposed.

133. In the Government's view the Supreme Court's interpretation of the legal effect of the Regulations had been correct. The penalty for the offence within the meaning of Article 7 of the Convention had always been mandatory life imprisonment in accordance with section 203(2) of the Criminal Code. A change in law which required a prisoner to serve a greater part of his original sentence than he would have had to serve at the time he committed the offence did not constitute a violation of Article 7. Judged from the prisoner's perspective, the position was no doubt harsher. But this did not alter the fact that the "applicable penalty" for the purposes of Article 7 remained throughout the penalty prescribed by the relevant domestic law.

134. If the applicant's argument were correct, it would mean that a retrospective change in subordinate legislation or indeed any change in administrative practice in any member State of the Council of Europe which postponed the date on which a prisoner was eligible for early release from a prison sentence, whether determinate or indeterminate, that was lawfully imposed by a court would be incompatible with Article 7. That would be a significant departure from the existing case-law under the Convention.

135. For all the above reasons, the Government considered that it could not be said that the repeal of the Regulations had resulted in the retroactive increase of the penalty of life imprisonment which had been applicable at the time the murders were committed by the applicant and which had been imposed on him by the Limassol Assize Court in respect of those offences.

136. Finally, the Government noted that in the event the Court were to conclude that at the time of the commission of the offence the Regulations had operated in domestic law in such a way as to limit the maximum penalty for the offence to twenty years (as distinct from governing the manner of implementation of a penalty of life imprisonment), then the repeal of those Regulations had resulted in a retrospective increase in that maximum. It would then also be necessary to consider whether the maximum penalty prescribed by the regulations was fifteen years or twenty years. If the latter was the case then the applicant would not have been entitled to release pursuant to the requirements of Article 7 until July 2007. It had been clear under the Regulations that the maximum period a life prisoner could be required to serve was twenty years and the earliest date of release was after serving fifteen years of his sentence. Although it was administrative practice to deduct the five years at the outset of the sentence, so as to identify the earliest possible date of release, this practice was not required by the Regulations or by the enabling legislation. An administrative practice of such nature could not in the Government's view constitute a substantive restriction on the maximum length of the sentence imposed by the court. The Government, however, emphasised that this was not the correct interpretation of domestic law and that the interpretation given by the Supreme Court should be followed and adopted by the Court.

B. The Court's assessment

1. General principles

137. The guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 of the Convention in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment (see *S.W. v. the United Kingdom*, and *C.R. v. the United Kingdom*, 22 November 1995, §§ 35 and 33 respectively, Series A no. 335-B and C).

138. Accordingly, it embodies in general terms the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) (see *Kokkinakis v. Greece*, 25 May 1993, § 52, Series A no. 260-A). While it prohibits in particular extending the scope of existing offences to acts which previously were not criminal offences, it also lays

down the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy (*Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 145, ECHR 2000-VII, and *Achour*, cited above, § 41).

139. When speaking of "law", Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises statute law as well as case-law (see, *mutatis mutandis*, The Sunday Times *v. the United Kingdom (no. 1)*, 26 April 1979, § 47, Series A no. 30; *Kruslin v. France*, 24 April 1990, § 29, Series A no. 176-A; and *Casado Coca v. Spain*, 24 February 1994, § 43, Series A no. 285-A). In this connection, the Court has always understood the term "law" in its "substantive" sense, not its "formal" one. It has thus included both enactments of lower rank than statutes and unwritten law (see, in particular, *mutatis mutandi*s, *De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, § 93, Series A no. 12). In sum, the "law" is the provision in force as the competent courts have interpreted it (see *Leyla Şahin v. Turkey* [GC], no. 44774/98, § 88, ECHR 2005-XI).

140. Furthermore, the term "law" implies qualitative requirements, including those of accessibility and foreseeability (see, among other authorities, *Cantoni v. France*, 15 November 1996, § 29, *Reports* 1996-V; *Coëme and Others*, cited above, § 145; and *E.K. v. Turkey*, no. 28496/95, § 51, 7 February 2002). These qualitative requirements must be satisfied as regards both the definition of an offence and the penalty the offence in question carries (see *Achour*, cited above, § 41). An individual must know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it what acts and omissions will make him criminally liable and what penalty will be imposed for the act committed and/or omission (see, among other authorities, *Cantoni*, cited above, § 29). Furthermore, a law may still satisfy the requirement of "foreseeability" where the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see, among other authorities, ibid., § 35, and *Achour*, cited above, § 54).

141. The Court has acknowledged in its case-law that however clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice (see, *mutatis mutandis*, The Sunday Times *(no. 1)*, § 49, and *Kokkinakis*, § 40, both cited above). The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain (see, *mutatis mutandis*, *Cantoni*, cited above). Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, "provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen" (see *S.W. v. the United Kingdom*,

cited above, § 36, and *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, § 50, ECHR 2001-II).

142. The concept of "penalty" in Article 7 is, like the notions of "civil right and obligations" and "criminal charge" in Article 6 § 1 of the Convention, autonomous in scope. To render the protection afforded by Article 7 effective, the Court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a "penalty" within the meaning of this provision (see *Welch v. the United Kingdom*, 9 February 1995, § 27, Series A no. 307-A, and *Jamil v. France*, 8 June 1995, § 30, Series A no. 317-B). The wording of Article 7 § 1, second sentence, indicates that the starting-point in any assessment of the existence of a penalty is whether the measure in question is imposed following conviction for a "criminal offence". Other factors that may be taken into account as relevant in this connection are the nature and purpose of the measure in question; its characterisation under national law; the procedures involved in the making and implementation of the measure; and its severity (see *Welch*, cited above, § 28, and *Jamil*, cited above, § 31). To this end, both the Commission and the Court in their case-law have drawn a distinction between a measure that constitutes in substance a "penalty" and a measure that concerns the "execution" or "enforcement" of the "penalty". In consequence, where the nature and purpose of a measure relates to the remission of a sentence or a change in a regime for early release, this does not form part of the "penalty" within the meaning of Article 7 (see, *inter alia*, *Hogben*, cited above; *Hosein v. the United Kingdom*, no. 26293/95, Commission decision of 28 February 1996, unreported; *Grava*, cited above, § 51; and *Uttley*, cited above). However, in practice, the distinction between the two may not always be clear cut.

2. Application of the above principles to the instant case

143. At the outset the Court notes that it is common ground between the parties that at the time the applicant was prosecuted and convicted, the offence of premeditated murder was punishable by mandatory life imprisonment under section 203(2) of the Criminal Code and that he had been sentenced under that provision. The legal basis for the applicant's conviction and sentence was therefore the criminal law applicable at the material time and his sentence corresponded to that prescribed in the relevant provisions of the Criminal Code.

144. The essence of the parties' arguments concerns the actual meaning of the term "life imprisonment". On the one hand the applicant maintains that at the time he committed the offence of which he was convicted life imprisonment had been tantamount to imprisonment for a period of twenty years. The subsequent repeal of the Prison Regulations and the retroactive application of the Prison Law of 1996 brought about both an unforeseeable prolongation of his term of imprisonment to an indefinite term for the remainder of his life and a change in the conditions of his detention. On the other hand the Government submit that section 203(2) of the Criminal Code was, and still remains, the only substantive provision of domestic law prescribing the penalty of a life sentence to be imposed by the courts for premeditated murder. This was the penalty imposed by the Limassol Assize Court on the applicant. The Prison Regulations concerned the execution of the life sentence imposed by the court, namely, the assessment of a possible remission of his sentence on the grounds of good conduct and diligence.

145. Consequently, the issue that the Court needs to determine in the present case is what the "penalty" of life imprisonment actually entailed under the domestic law at the material time. The Court must, in particular, ascertain whether the text of the law, read in the light of the accompanying interpretative case-law, satisfied the requirements of accessibility and foreseeability. In doing so it must have regard to the domestic law as a whole and the way it was applied at the material time.

146. Although at the time the applicant committed the offence it was clearly provided by the Criminal Code that the offence of premeditated murder carried the penalty of life imprisonment, it is equally clear that at that time both the executive and the administrative authorities were working on the premise that this penalty was tantamount to twenty years' imprisonment (see paragraph 65 above). The prison authorities were applying the Prison Regulations, made on the basis of the Prison Discipline Law (Cap. 286), under which all prisoners, including life prisoners, were eligible for remission of their sentence on the grounds of good conduct and industry. For these purposes, Regulation 2 defined life imprisonment as meaning imprisonment for twenty years (see paragraph 42 above). As admitted by the Government, this was understood at the time by the executive and the administrative authorities, including the prison service, as imposing a maximum period of twenty years to be served by any person who had been sentenced to life imprisonment (see paragraph 65 above). The prison authorities were therefore assessing the remission of the life sentences of prisoners on the basis of twenty years' imprisonment. This also transpires from the letter sent by the then Attorney-General of the Republic to the President at that time (see paragraph 53 above).

147. On 5 February 1988 the Nicosia Assize Court, in its sentencing judgment in the case of *the Republic of Cyprus v. Andreas Costa Aristodemou, alias Yiouroukkis*, clearly stated that life imprisonment under the Criminal Code was for the remainder of the biological existence of the convicted person and not for twenty years. Subsequently, on 10 March 1989 the Limassol Assize Court, when passing sentence on the applicant, relied on the findings of the Nicosia Assize Court in the above case. It accordingly sentenced the applicant to "life imprisonment" for the remainder of his life. In spite of this, when the applicant was admitted to prison to serve his sentence, he was given a written notice by the prison authorities with a conditional release date, the remission of his life sentence having been assessed on the basis that it amounted to imprisonment for a term of twenty years. It was not until 9 October 1992 in the case of *Hadjisavvas v. the Republic of Cyprus* (see paragraphs 19 and 50 above) that the Regulations were declared unconstitutional and *ultra vires* by the Supreme Court (see paragraphs 50-51 above). They were eventually repealed on 3 May 1996.

148. In view of the above, while the Court accepts the Government's argument that the purpose of the Regulations concerned the execution of the penalty, it is clear that in reality the understanding and the application of these Regulations at the material time went beyond this. The distinction between the scope of a life sentence and the manner of its execution was therefore not immediately apparent. The first clarification by a domestic court in this respect was given in the *Yiouroukkis* case subsequent to the commission of the offence by the applicant that led to his prosecution and

conviction. Furthermore, the Court notes that in both the case of *Yiouroukkis* and that of the applicant, the prosecution was inclined to take the view that life imprisonment was limited to a period of twenty years (see paragraphs 15 and 47 above).

149. At the same time, however, the Court cannot accept the applicant's argument that a heavier penalty was retroactively imposed on him since in view of the substantive provisions of the Criminal Code it cannot be said that at the material time the penalty of a life sentence could clearly be taken to have amounted to twenty years' imprisonment.

150. The Court considers, therefore, that there is no element of retrospective imposition of a heavier penalty involved in the present case but rather a question of "quality of law". In particular, the Court finds that at the time the applicant committed the offence, the relevant Cypriot law taken as a whole was not formulated with sufficient precision as to enable the applicant to discern, even with appropriate advice, to a degree that was reasonable in the circumstances, the scope of the penalty of life imprisonment and the manner of its execution. Accordingly, there has been a violation of Article 7 of the Convention in this respect.

151. However, as regards the fact that as a consequence of the change in the prison law (see paragraph 58 above), the applicant, as a life prisoner, no longer has a right to have his sentence remitted, the Court notes that this matter relates to the execution of the sentence as opposed to the "penalty" imposed on him, which remains that of life imprisonment. Although the changes in the prison legislation and in the conditions of release may have rendered the applicant's imprisonment effectively harsher, these changes cannot be construed as imposing a heavier "penalty" than that imposed by the trial court (see *Hogben* and *Hosein*, both cited above). In this connection, the Court would reiterate that issues relating to release policies, the manner of their implementation and the reasoning behind them fall within the power of the member States in determining their own criminal policy (see *Achour*, cited above, § 44). Accordingly, there has not been a violation of Article 7 of the Convention in this regard.

152. In conclusion, the Court finds that there has been a violation of Article 7 of the Convention with regard to the quality of the law applicable at the material time. It further finds that there has been no violation of this provision in so far as the applicant complains about the retrospective imposition of a heavier penalty with regard to his sentence and the changes in the prison law exempting life prisoners from the possibility of remission of their sentence.

Sentenza del 17 dicembre 2009, sez. V, causa M. c. Germania (in particolare, par. 106-137)

In the case of M. v. Germany,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Peer Lorenzen, *President,*
Renate Jaeger,
Karel Jungwiert,
Mark Villiger,
Isabelle Berro-Lefèvre,
Mirjana Lazarova Trajkovska,
Zdravka Kalaydjieva, *judges,*

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 24 November 2009,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 19359/04) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a German national, Mr M. ("the applicant"), on 24 May 2004. The applicant was granted legal aid. On 7 July 2008 the President of the Chamber acceded to the applicant's request of 1 July 2008 not to have his identity disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicant alleged a breach of Article 5 § 1 of the Convention on account of his continued preventive detention beyond the ten-year period which had been the maximum for such detention under the legal provisions applicable at the time of his offence and conviction. He further claimed that the retrospective extension of his preventive detention to an unlimited period of time had breached his right under Article 7 § 1 of the Convention not to have a heavier penalty imposed on him than the one applicable at the time of his offence.

3. A Chamber of the Fifth Section communicated the application on 13 March 2007. A hearing on admissibility and merits took place in public in the Human Rights Building, Strasbourg, on 1 July 2008 (Rule 54 § 3).

There appeared before the Court:

(a) *for the Government*

Mrs A. WITTLING-VOGEL, *Ministerialdirigentin,* *Agent,*
Mr H. SCHÖCH, Professor of criminal law, *Counsel,*
Mr M. BORNMANN, public prosecutor,
Mr B. BÖHM, *Ministerialdirigent,*
Mr B. BÖSERT, *Ministerialrat,*
Mrs G. LAUNHARDT, public prosecutor,
Mr J. BACHMANN, Governor of Schwalmstadt Prison, *Advisers*;

(b) *for the applicant*

Mr B. SCHROER,
Mr A.H. STOPP, *Counsel,*
Mr T. SCHULLA, *Adviser.*

The Court heard addresses by Mrs Wittling-Vogel, Mr Schöch and Mr Stopp as well as their replies to questions put to them.

4. By a decision of 1 July 2008, following the hearing, the Court declared the application admissible.

5. The applicant and the Government each filed further written observations (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1957 and is currently in Schwalmstadt Prison.

A. The applicant's previous convictions and the order for his preventive detention and execution thereof

1. The applicant's previous convictions

7. Since the applicant attained the age of criminal responsibility he has been convicted at least seven times and has spent only a couple of weeks outside prison.

8. Between 1971 and 1975 he was repeatedly convicted of theft committed jointly with others and burglary. He escaped from prison four times.

9. On 5 October 1977 the Kassel Regional Court, applying the criminal law relating to young offenders, convicted the applicant of attempted murder, robbery committed jointly with others, dangerous assault and blackmail and sentenced him to six years' imprisonment. It found that approximately one week after his release from prison the applicant, together with an accomplice, had injured and robbed an acquaintance of his and had forced the victim, a homosexual, to sign a borrower's note. Moreover, he had injured and attempted to kill his victim one day later when he learned that the latter had reported the robbery to the police. Having regard to a report submitted by expert D., the court found that the applicant suffered from a pathological mental disorder, with the result that his criminal responsibility was diminished (Article 21 of the Criminal Code).

10. On 8 March 1979 the Wiesbaden Regional Court convicted the applicant of dangerous assault, sentenced him to one year and nine months' imprisonment and ordered his subsequent placement in a psychiatric hospital under Article 63 of the Criminal Code (see paragraph 47 below). The applicant had injured a prison guard by throwing a heavy metal box at his head and stabbing him with a screwdriver after having been reprimanded. As confirmed by expert D., the applicant suffered from a serious pathological mental disorder, with the result that his criminal responsibility was diminished.

11. On 9 January 1981 the Marburg Regional Court, on appeal, convicted the applicant of assault of a disabled fellow prisoner following a discussion as to whether or not the cell window should remain open. Incorporating the sentence imposed by the judgment of the Wiesbaden

Regional Court of 8 March 1979, it sentenced him to a cumulative sentence of two years and six months' imprisonment. Moreover, it upheld the order for the applicant's placement in a psychiatric hospital. In the proceedings, an expert found that there were no longer any signs that the applicant suffered from a pathological brain disorder.

2. The preventive detention order against the applicant

12. On 17 November 1986 the Marburg Regional Court convicted the applicant of attempted murder and robbery and sentenced him to five years' imprisonment. It further ordered his placement in preventive detention (*Sicherungsverwahrung*) under Article 66 § 1 of the Criminal Code (see paragraphs 49-50 below). It found that when the conditions of his detention in the psychiatric hospital where he had been detained since October 1984 had been relaxed, the applicant had on 26 July 1985 robbed and attempted to murder a woman who had volunteered to spend a day with him in a city away from the hospital. Having regard to the report of a neurological and psychiatric expert, W., the court found that the applicant still suffered from a serious mental disorder which could, however, no longer be qualified as pathological and did not have to be treated medically. He therefore had not acted with diminished criminal responsibility and the preconditions for his placement in a psychiatric hospital under Article 63 of the Criminal Code were no longer met. However, he had a strong propensity to commit offences which seriously damaged his victims' physical integrity. It was to be expected that he would commit further spontaneous acts of violence and he was dangerous to the public. Therefore, his preventive detention was necessary.

3. Execution of the order for the applicant's preventive detention

13. Since 18 August 1991 the applicant, having served his full prison sentence, has been in preventive detention in Schwalmstadt Prison.

14. On 14 January 1992 the Gießen Regional Court refused to suspend on probation the applicant's placement in preventive detention and in a psychiatric hospital. It relied on a report submitted by expert M.-I., who had concluded that the applicant was likely to commit offences as a result of his propensity to re-offend within the meaning of Article 66 of the Criminal Code, whereas it was not very probable that he would commit offences as a result of his psychiatric condition within the meaning of Article 63 of the Criminal Code.

15. On 26 October 1995 the applicant took advantage of a day release to abscond, but gave himself up to the police on 17 November 1995.

16. On 17 November 1998 the Marburg Regional Court refused to suspend on probation the applicant's preventive detention and his placement in a psychiatric hospital, as it had previously done on 20 September 1994 and 13 November 1996. It took into consideration the fact that in the meantime the applicant, who at that time associated himself with skinheads, had assaulted and broken the nose of a fellow prisoner and had grossly insulted the governor of Schwalmstadt Prison.

B. The proceedings at issue

1. The decision of the Marburg Regional Court

17. On 10 April 2001 the Marburg Regional Court dismissed the applicant's requests to suspend on probation his preventive detention as

ordered by that court on 17 November 1986 and his placement in a psychiatric hospital as ordered by it on 9 January 1981. Applying Article 67e § 3 of the Criminal Code (see paragraph 56 below), it declared that no request for review of this decision would be admissible within a two-year period.

18. Having regard to the applicant's previous convictions and his conduct in prison, the Regional Court found that it could not be expected that the applicant, if released, would not commit further serious offences (Article 67d § 2 of the Criminal Code, see paragraph 53 below). The court had heard evidence from the applicant, who was represented by officially appointed counsel, in person. It had further consulted Schwalmstadt Prison and the Marburg public prosecutor's office, both of which had recommended not suspending on probation the orders for the applicant's detention. It also agreed with the report submitted by an external expert in forensic psychiatry, K. The expert had taken the view that the applicant, who had a narcissistic personality and totally lacked empathy, but could not be regarded as suffering from a psychopathic disorder, needed to be observed for several years before it could be assumed that he was no longer dangerous to the public.

19. The Regional Court stated that it was ordering the applicant's preventive detention also for the period after 8 September 2001, when (after a period during which the applicant had escaped from detention had been deducted) he would have served ten years in preventive detention. There were no constitutional obstacles to such a decision. According to the court, the applicant's continued preventive detention was authorised by Article 67d § 3 of the Criminal Code as amended in 1998 (see paragraph 53 below). In section 1a(3) of the Introductory Act to the Criminal Code, as amended in 1998, the Article in question had been declared applicable also to prisoners whose preventive detention had been ordered prior to the change in the law (see paragraph 54 below). The Federal Constitutional Court had refused to admit a constitutional complaint in which the change in the law had indirectly been at issue. In view of the gravity of the applicant's criminal past and possible future offences his continued preventive detention was not disproportionate.

20. As to the order for the applicant's placement in a psychiatric hospital, his request was premature as he was neither currently detained nor about to be detained in a psychiatric hospital.

2. The decision of the Frankfurt am Main Court of Appeal

21. On 26 October 2001 the Frankfurt am Main Court of Appeal, amending the decision of the Marburg Regional Court in this respect, quashed the order of 9 January 1981 for the applicant's placement in a psychiatric hospital. Upholding the remainder of the Regional Court's decision, it decided not to suspend on probation the applicant's preventive detention as ordered by the Marburg Regional Court's judgment of 17 November 1986, and ordered his continued detention also after the expiry of ten years of detention on 8 September 2001. It confirmed that a request for review of the decision would not be admissible within a two-year period.

22. The Court of Appeal found that the order for the applicant's placement in a psychiatric hospital was devoid of purpose. Having regard to the expert reports submitted to the criminal courts since 1985 and a new report by expert K. requested by the court itself, it was clear that the applicant no longer suffered from a serious mental disorder which should be qualified as pathological.

23. As to the preventive detention of the applicant, who was represented by counsel, the Court of Appeal, endorsing the reasons given by the Regional Court, found that the applicant's dangerousness necessitated his continued detention. In view of the offences he had committed and could be expected to commit on release, his continued detention was proportionate. No material change in the circumstances decisive for his detention was to be expected within a two-year period (Article 67e § 3 of the Criminal Code).

24. According to the Court of Appeal, Article 67d § 3 of the Criminal Code, as amended in 1998, was constitutional. The court conceded that at the time when the applicant's preventive detention was ordered, it would have ceased after ten years of detention at the latest. However, Article 2 § 6 of the Criminal Code (see paragraph 48 below) authorised a retrospective worsening of the applicant's situation as far as measures of correction and prevention such as preventive detention were concerned. Such measures were not classified as penalties, but as preventive measures, and were therefore not prohibited under Article 103 § 2 of the Basic Law (see paragraph 61 below) as retrospective criminal provisions.

25. Likewise, the applicant's continued preventive detention did not infringe the prohibition in principle of retrospective provisions enshrined in the rule of law. Weighty public-interest grounds, namely the protection of the public from dangerous offenders, justified the adoption of such retrospective provisions by the legislator in the present case.

3. The decision of the Federal Constitutional Court

26. On 26 November 2001 the applicant, represented by counsel, lodged a complaint with the Federal Constitutional Court against the decisions ordering his continued preventive detention even on completion of the ten-year period. He claimed, in particular, that these decisions were based on Article 67d § 3 of the Criminal Code, as amended in 1998, under the terms of which the duration of a convicted person's first period of preventive detention could be extended retrospectively from a maximum period of ten years to an unlimited period of time. Accordingly, this provision violated the prohibition of retrospective punishment under Article 103 § 2 of the Basic Law, the prohibition of retrospective legislation enshrined in the rule of law, the principle of proportionality and his right to liberty under Article 2 § 2, second sentence, of the Basic Law (see paragraph 57 below). Moreover, the impugned provision entailed his being refused any relaxation in his conditions of detention which would allow him to obtain a positive finding to the effect that he was no longer dangerous to the public. As a consequence, it entailed life-long imprisonment without any prospect of release.

27. On 5 February 2004 a panel of eight judges of the Federal Constitutional Court, having held a hearing at which it also consulted psychiatric experts and several prison governors, dismissed the applicant's constitutional complaint (no. 2 BvR 2029/01) as ill-founded. In its thoroughly reasoned leading judgment (running to 84 pages) it held that

Article 67d § 3 of the Criminal Code, read in conjunction with section 1a(3) of the Introductory Act to the Criminal Code, as amended in 1998, was compatible with the Basic Law.

(a) Right to liberty

28. The Federal Constitutional Court held that preventive detention based on Article 67d § 3 of the Criminal Code restricted the right to liberty as protected by Article 2 § 2 of the Basic Law in a proportionate manner.

29. The court stressed that the longer a person was held in preventive detention, the stricter became the requirements concerning the proportionality of the deprivation of liberty. However, Article 67d § 3 of the Criminal Code took into account the increased importance of the right to liberty after ten years in custody. It set a higher standard with respect to the legal interest under threat (protecting only threats to the victims' physical or mental integrity) and the proof of the applicant's dangerousness (requiring a duly substantiated report by an experienced external psychiatric expert). It also made termination of detention the rule and extension the exception, to be used as a measure of last resort. Moreover, the procedural provisions on preventive detention (Articles 67c § 1, 67d §§ 2 and 3 and Article 67e of the Criminal Code) provided for regular review to determine whether the person's detention could be suspended or terminated. Due to the special significance which the relaxation of detention conditions had for the prognosis of future dangerousness, the court responsible for the execution of the sentence was not permitted to accept without sufficient reason a refusal by the prison authorities to relax detention conditions as a possible precursor to the termination of a detainee's preventive detention.

30. Preventive detention did not serve to avenge past offences but to prevent future ones. Therefore, the *Länder* had to ensure that a detainee was able to have his or her detention conditions improved to the full extent compatible with prison requirements.

(b) Prohibition of retrospective criminal laws

31. The Federal Constitutional Court further held that Article 67d § 3 of the Criminal Code, taken in conjunction with section 1a(3) of the Introductory Act to the Criminal Code, did not violate Article 103 § 2 of the Basic Law. The absolute ban on the retrospective application of criminal laws imposed by that Article did not cover the measures of correction and prevention, such as preventive detention, provided for in the Criminal Code.

32. Interpreting the notions of "punished" and "punishable act" in Article 103 § 2 of the Basic Law, the Federal Constitutional Court found that the Article applied only to State measures which expressed sovereign censure of illegal and culpable conduct and involved the imposition of a penalty to compensate for guilt. Having regard to the genesis of the Basic Law and the purpose of Article 103 § 2, it did not apply to other State measures interfering with a person's rights.

33. In particular, Article 103 § 2 of the Basic Law did not extend to measures of correction and prevention, which had always been understood as differing from penalties under the Criminal Code's twin-track system of penalties and measures of correction and prevention. The fact that a measure

was connected with unlawful conduct or entailed considerable interference with the right to liberty was not enough. Unlike a penalty, preventive detention was not aimed at punishing criminal guilt, but was a purely preventive measure aimed at protecting the public from a dangerous offender. Therefore, preventive detention was not covered by Article 103 § 2, even though it was directly connected with the qualifying offence.

(c) Protection of legitimate expectations under the rule of law

34. The Federal Constitutional Court further held, by six votes to two on this issue, that the abolition of the maximum period of detention where preventive detention was ordered for the first time, and the application of the relevant provision (Article 67d § 3 of the Criminal Code read in conjunction with section 1a(3) of the Introductory Act to the Criminal Code) to criminals who had been placed in preventive detention prior to its enactment and entry into force and who had not yet fully served their sentences, were in conformity with the protection of legitimate expectations guaranteed in a State governed by the rule of law (Article 2 § 2 read in conjunction with Article 20 § 3 of the Basic Law; see paragraph 59 below).

35. The court stressed that Article 67d § 3 of the Criminal Code as amended did not retrospectively alter the legal consequences attaching to the offence as fixed in the final judgment of the sentencing court. It had always been the courts responsible for the execution of sentences which had jurisdiction to decide whether and for how long a convicted person was held in preventive detention.

36. Nevertheless, the maximum duration of a first period of preventive detention as laid down in the old version of Article 67d §§ 1 and 3 of the Criminal Code gave detainees reason to expect release when ten years had elapsed. However, pursuant to Article 2 § 6 of the Criminal Code (see paragraph 48 below), the ten-year maximum duration of preventive detention, like all other measures of correction and prevention, had been subject from the outset to changes in the law.

37. Weighing the interests involved, the Federal Constitutional Court concluded that the legislator's duty to protect members of the public against interference with their life, health and sexual integrity outweighed the detainee's reliance on the continued application of the ten-year limit. As Article 67d § 3 of the Criminal Code was framed as an exception to the rule and in the light of the procedural guarantees which attached to it, its retrospective application was not disproportionate.

(d) Human dignity

38. The Federal Constitutional Court further found that a person's human dignity as enshrined in Article 1 § 1 of the Basic Law did not impose a constitutional requirement that there be a fixed maximum period for a convicted person's preventive detention. The person's dignity was not violated even by a long period of preventive detention if this was necessary owing to the continued danger which he or she posed. However, the aim of preventive detention had to be to rehabilitate detainees and to lay the foundations for a responsible life outside prison. Human dignity required laws and enforcement programmes which gave detainees real prospects of regaining their freedom.

39. Preventive detention in its present form met these requirements. The courts responsible for the execution of sentences had, in particular, to examine before the end of a convicted person's prison term (Article 67c § 1 of the Criminal Code) and subsequently at least every two years (Article 67e § 2 of the Criminal Code) whether the measure could be suspended. If ten years had been spent in preventive detention, they declared the measure terminated under Article 67d § 3 of the Criminal Code if no specific dangers remained. In practice, persons in preventive detention were released after having spent a certain length of time in prison.

(e) Removal from jurisdiction of the lawful judge

40. Lastly, the Federal Constitutional Court found that the prohibition on being removed from the jurisdiction of the lawful judge, as guaranteed by Article 101 § 1 of the Basic Law (see paragraph 60 below), did not apply. Article 67d § 3 of the Criminal Code did not render unnecessary a court decision on the continuation of preventive detention which took into account all the circumstances of the case in issue.

C. The execution in practice of the preventive detention order against the applicant

41. In Schwalmstadt Prison, persons in preventive detention like the applicant are placed in a separate building from prisoners serving their sentence. They have certain privileges compared with convicted offenders serving their sentence. For instance, they have the right to wear and wash their own clothes and have more pocket money. They can practise sport in a separate sports room and may stay outside in the yard for several hours every day. They may equip their more comfortable cells with additional furniture and equipment and have longer visiting hours.

42. As to measures aimed at reintegration into society, persons held in preventive detention in Schwalmstadt Prison, like those detained in other prisons, are offered a weekly discussion group which proposes ideas for recreational activities and for structuring daily life. Furthermore, there are individual discussions to improve the detainee's integration into the group and a residential group evening every two weeks aimed, *inter alia*, at motivating detainees to accept the treatment on offer. Where it is found to be indicated, detainees are offered individual therapy sessions with an external therapist or group therapy in the socio-therapeutic facility of another prison. The detainee may also request a consultation with the psychologist or social worker in charge in order to deal with crisis situations.

43. The applicant has been receiving therapy since he was placed in preventive detention. Since the beginning of 1993 he has had therapy sessions with a psychologist in Schwalmstadt Prison. From September 2000 to March 2003 he also had regular individual therapy sessions with an external psychologist. Continuation of the completed therapy was found to be no longer indicated at that point. In addition, the applicant has been examined by psychiatrists at regular intervals in order to evaluate his dangerousness and to permit relaxation of the prison regime as appropriate. As to relaxation of the conditions of the applicant's preventive detention, he is currently granted short periods of leave under escort (*Ausführungen*) a

few times per year. He also receives regular visits (on average three times per month) from his fiancée, to whom he has been engaged since 2005. He has been working, with a short interruption, in prison and is currently working in the prison's metal workshop, with net earnings of approximately 350 to 543 euros (EUR) per month.

44. According to a psychiatric expert report and an additional psychological report drawn up in September 2006, the applicant had made important steps towards reintegration into society, in particular by turning away from his criminal identity, which he had developed since his childhood, and by trying to think before acting. His new relationship with his fiancée could be seen as a further positive development and would also improve his social circumstances in the event of his release from prison. However, this trend had not yet stabilised and a lack of loyalty and empathy towards others as well as a dangerous impulsiveness, which had manifested itself again when the applicant had punched a fellow detainee in the face following a dispute concerning a baking tin in 2005, persisted. The expert recommended maintaining and cautiously extending the current measures to relax the conditions of the applicant's preventive detention.

II. RELEVANT DOMESTIC, COMPARATIVE AND INTERNATIONAL LAW AND PRACTICE

A. Domestic law and practice

1. Penalties and measures of correction and prevention

45. The German Criminal Code distinguishes between penalties (*Strafen*) and so-called measures of correction and prevention (*Maßregeln der Besserung und Sicherung*) to deal with unlawful acts. This twin-track system of sanctions, the introduction of which had been considered and discussed since the end of the 19th century, was incorporated into the Criminal Code by the Act on dealing with dangerous habitual offenders and on measures of correction and prevention (the Habitual Offenders Act – *Gesetz gegen gefährliche Gewohnheitsverbrecher und über Maßregeln der Besserung und Sicherung*) of 24 November 1933. The rules on preventive detention remained in force, essentially unchanged, after 1945 and underwent several reforms enacted by the legislator from 1969 onwards.

46. Penalties (see Articles 38 *et seq.* of the Criminal Code) consist mainly of prison sentences and fines. The penalty is fixed according to the defendant's guilt (Article 46 § 1 of the Criminal Code).

47. Measures of correction and prevention (see Articles 61 *et seq.* of the Criminal Code) consist mainly of placement in a psychiatric hospital (Article 63 of the Criminal Code) or a detoxification facility (Article 64 of the Criminal Code) or in preventive detention (Article 66 of the Criminal Code). The purpose of these measures is to rehabilitate dangerous offenders or to protect the public from them. They may be ordered for offenders in addition to their punishment (compare Articles 63 *et seq.*). They must, however, be proportionate to the gravity of the offences committed by, or to be expected from, the defendants as well as to their dangerousness (Article 62 of the Criminal Code).

48. The temporal applicability of provisions of the Criminal Code depends on whether they relate to penalties or measures of correction and prevention. The penalty is determined by the law which is in force at the time of the act (Article 2 § 1 of the Criminal Code); if the law in force on

completion of the act is amended before the court's judgment, the more lenient law applies (Article 2 § 3). On the other hand, decisions on measures of correction and prevention are based on the law in force at the time of the decision unless the law provides otherwise (Article 2 § 6).

2. *Provisions of the Criminal Code and the Code of Criminal Procedure governing preventive detention*

(a) The preventive detention order

49. The sentencing court may, at the time of the offender's conviction, order his preventive detention under certain circumstances in addition to his prison sentence if the offender has been shown to be dangerous to the public (Article 66 of the Criminal Code).

50. In particular, the sentencing court orders preventive detention in addition to the penalty if someone is sentenced for an intentional offence to at least two years' imprisonment and if the following further conditions are satisfied. Firstly, the perpetrator must have been sentenced twice already, to at least one year's imprisonment in each case, for intentional offences committed prior to the new offence. Secondly, the perpetrator must previously have served a prison sentence or must have been detained pursuant to a measure of correction and prevention for at least two years. Thirdly, a comprehensive assessment of the perpetrator and his acts must reveal that, owing to his propensity to commit serious offences, notably those which seriously harm their victims physically or mentally or which cause serious economic damage, the perpetrator presents a danger to the general public (see Article 66 § 1).

51. Article 67c of the Criminal Code governs orders for the preventive detention of convicted persons which are not executed immediately after the judgment ordering them becomes final. Paragraph 1 of the Article provides that if a term of imprisonment is executed prior to a simultaneously ordered placement in preventive detention, the court responsible for the execution of sentences (that is, a special Chamber of the Regional Court composed of three professional judges, see sections 78a and 78b(1)(1) of the Court Organisation Act) must review, before completion of the prison term, whether the person's preventive detention is still necessary in view of its objective. If that is not the case, it suspends on probation the execution of the preventive detention order; supervision of the person's conduct (*Führungsaufsicht*) commences with suspension.

(b) The duration of preventive detention

(i) Provision in force prior to 31 January 1998

52. At the time of the applicant's offence and his conviction, Article 67d of the Criminal Code, in so far as relevant, was worded as follows:

Article 67d Duration of detention

"(1) Detention in a detoxification facility may not exceed two years and the first period of preventive detention may not exceed ten years. ...

(2) If there is no provision for a maximum duration or if the time-limit has not yet expired, the court shall suspend further execution of the detention order on probation as soon as there are justifiable reasons for testing whether the detainee can be released without committing further unlawful acts. Suspension shall automatically entail supervision of the conduct of the offender.

(3) If the maximum duration has expired, the detainee shall be released. The measure shall thereby be terminated."

(ii) Amended provision in force since 31 January 1998

53. Article 67d of the Criminal Code was amended while the applicant was in preventive detention for the first time, by the Combating of Sexual Offences and Other Dangerous Offences Act (*Gesetz zur Bekämpfung von Sexualdelikten und anderen gefährlichen Straftaten*) of 26 January 1998, which entered into force on 31 January 1998. The amended provision, in so far as relevant, provided:

Article 67d Duration of detention

"(1) Detention in a detoxification facility may not exceed two years ...

(2) If there is no provision for a maximum duration or if the time-limit has not yet expired, the court shall suspend on probation further execution of the detention order as soon as it is to be expected that the person concerned will not commit any further unlawful acts on his or her release. Suspension shall automatically entail supervision of the conduct of the offender.

(3) If a person has spent ten years in preventive detention, the court shall declare the measure terminated if there is no danger that the detainee will, owing to his criminal tendencies, commit serious offences resulting in considerable psychological or physical harm to the victims. Termination shall automatically entail supervision of the conduct of the offender."

54. As to the applicability *ratione temporis* of Article 67d of the Criminal Code as amended, the Introductory Act to the Criminal Code, in so far as relevant, reads:

Section 1a Applicability of the rules on preventive detention

"(3) Article 67d of the Criminal Code, as amended by the Combating of Sexual Offences and Other Dangerous Offences Act of 26 January 1998 (Federal Gazette I, p. 160), shall apply without restriction."

55. With respect to the judicial examination required under Article 67d § 3 of the Criminal Code and to the subsequent decisions under Article 67d § 2, Article 463 § 3 of the Code of Criminal Procedure, as amended by the Combating of Sexual Offences and Other Dangerous Offences Act, makes it compulsory for the court responsible for the execution of sentences both to consult an expert on the question whether the convicted person is likely to commit serious offences when released and to appoint defence counsel to represent him or her.

(c) Review of a convicted person's preventive detention

56. In addition to Articles 67c § 1 and 67d §§ 2 and 3 of the Criminal Code, Article 67e of the Criminal Code provides for the review of a convicted person's preventive detention. The court may review at any time whether the further execution of the preventive detention order should be suspended on probation. It is obliged to do so within fixed time-limits (§ 1 of Article 67e). For persons in preventive detention, this time-limit is two years (§ 2 of Article 67e). The court may shorten this time-limit, but may also set terms within the statutory limits for review before which an application for review shall be inadmissible (§ 3 of Article 67e).

3. Provisions of the Basic Law and case-law of the Federal Constitutional Court

57. Article 2 § 2, second sentence, of the Basic Law provides that the liberty of the person is inviolable.

58. Pursuant to Article 20 § 3 of the Basic Law, the legislature is bound by the constitutional order, the executive and the judiciary by law and justice.

59. According to the well-established case-law of the Federal Constitutional Court, Article 2 § 2 read in conjunction with Article 20 § 3 of the Basic Law protects legitimate expectations in a State governed by the rule of law. A law may be retrospective in the sense that, while its legal effects are not produced until it is published, its definition covers events "set in motion" before it is published (so-called *unechte Rückwirkung*; see the decisions of the Federal Constitutional Court in the compendium of decisions of the Federal Constitutional Court (*BVerfGE*), vol. 72, pp. 200 *et seq.*, 242, and vol. 105, pp. 17 *et seq.* and 37 *et seq.*). In respect of retrospective laws in that sense, the principles of legal certainty and protection of legitimate expectations are not given overall priority over the intention of the legislator to change the existing legal order in response to changing circumstances. The legislator may enact such retrospective laws if the importance of the purpose of the legislation for the common good outweighs the importance of the interest in protecting legitimate expectations (see the judgment of the Federal Constitutional Court in the instant case, pp. 70-73, with many references to its case-law).

60. Pursuant to Article 101 § 1 of the Basic Law, no one may be removed from the jurisdiction of the lawful judge.

61. Under Article 103 § 2 of the Basic Law, an act may be punished only if the fact of its being punishable was determined by law before the act was committed.

4. Rules and practice in relation to the execution of preventive detention orders

(a) The Execution of Sentences Act

62. The (Federal) Execution of Sentences Act (*Strafvollzugsgesetz*) lays down rules for the execution of sentences of imprisonment in prisons and for the execution of measures of correction and prevention depriving the persons concerned of their liberty (see section 1 of the Act). Its provisions were applicable in all *Länder* until 31 December 2007; since then, the *Länder* have had the power to legislate on these issues. In so far as they have already made use of this power, the provisions laid down by the *Länder* on the execution of preventive detention orders do not differ significantly from those laid down in the Execution of Sentences Act.

63. Section 2 of the Execution of Sentences Act deals with the purpose of the execution of sentences of imprisonment. During the execution of a sentence of imprisonment the detainee should become capable henceforth of leading a socially responsible life without committing offences (purpose of execution; first sentence). The execution of the sentence of imprisonment is also aimed at protecting the public from further offences (second sentence).

64. Sections 129 to 135 of the Execution of Sentences Act contain special rules for the execution of preventive detention orders. Section 129 provides that persons held in preventive detention shall be detained in secure conditions for the protection of the public (first sentence). They are

to be given assistance in readjusting to life outside prison (second sentence). Unless stipulated otherwise (in sections 131 to 135 of the said Act), the provisions concerning the execution of prison sentences shall apply *mutatis mutandis* to preventive detention (section 130 of that Act).

65. According to section 131 of the Execution of Sentences Act, the equipment of the institutions in which persons are held in preventive detention, notably detention cells, and particular measures to promote their welfare, must be designed to help detainees to organise their life in the institution in a reasonable manner and to protect them from damage caused by a lengthy deprivation of liberty. Their personal needs are to be taken into account as far as possible. Section 132 of the said Act provides that detainees may wear their own clothes and use their own linen and bedding, unless this is prohibited for security reasons and provided they see to their cleaning, repair and regular changing at their own expense. Moreover, under section 133 of the said Act, detainees are allowed to occupy themselves against payment if this serves the objective of imparting, maintaining or promoting skills needed for paid employment after their release. They also receive pocket money. Pursuant to section 134 of the said Act, the conditions of detention may be relaxed and special leave for a period of up to one month may be granted in order to test detainees' readiness and prepare them for release.

66. Section 140(1) of the Execution of Sentences Act provides that preventive detention is served either in a separate institution or in a separate wing of a prison for the execution of sentences of imprisonment.

(b) Statistical material

67. According to statistical material submitted by the Government, which was not contested by the applicant, the German sentencing courts made a total of 75 preventive detention orders in 2005, 42 of which concerned sexual offenders. A total of 415 persons were being held in preventive detention in Germany on 31 March 2007. In 2002, the average duration of a first period of preventive detention was between two years and three months and seven years in the different *Länder*. In that year, 261 persons placed in preventive detention for the first time were affected by the abolition of the maximum duration of preventive detention of ten years under Article 67d § 3 of the Criminal Code, read in conjunction with section 1a(3) of the Introductory Act to the Criminal Code as amended in 1998. In 2008, 70 persons were still affected by that change in the law and had been in preventive detention for more than ten years.

68. According to statistical material submitted by the Government, which was not contested by the applicant, Germany had 95 prisoners per 100,000 inhabitants in 2006, whereas there were, for example, 333 prisoners per 100,000 inhabitants in Estonia, 185 in the Czech Republic, 149 in Spain, 148 in England and Wales, 85 in France, 83 in Switzerland, 77 in Denmark and 66 in Norway. Furthermore, according to the Council of Europe Annual Penal Statistics, Survey 2006, of 12 December 2007 (PC-CP (2007) 9 prov. 2, p. 47), the total number of prisoners sentenced to terms of imprisonment ranging from ten years up to and including life imprisonment on 1 September 2006 was 2,907 in Germany, 402 in Estonia, 1,435 in the Czech Republic, 3,568 in Spain, 12,049 in England and Wales, 8,620 in France, 172 in Denmark and 184 in Norway.

B. Comparative law

1. *Systems to protect the public against dangerous offenders*

69. According to the information and material before the Court, the member States of the Council of Europe have chosen different ways of shielding the public from convicted offenders who acted with full criminal responsibility at the time of the offence (as did the applicant at the relevant time) and who risk committing further serious offences on release from detention and therefore present a danger to the public.

70. Apart from Germany, at least seven other Convention States have adopted systems of preventive detention in respect of convicted offenders who are not considered to be of unsound mind, in other words, who acted with full criminal responsibility when committing their offence(s), and who are considered dangerous to the public as they are liable to re-offend. These include Austria (see Articles 23 et seq. and 47 et seq. of the Austrian Criminal Code, and Articles 435 et seq. of the Austrian Code of Criminal Procedure), Denmark (see Articles 70 et seq. of the Danish Criminal Code), Italy (see Articles 199 et seq. of the Italian Criminal Code), Liechtenstein (see Articles 23 et seq. and 47 of the Liechtenstein Criminal Code and Articles 345 et seq. of the Liechtenstein Code of Criminal Procedure), San Marino (see Articles 121 et seq. of the San Marinese Criminal Code), Slovakia (see Articles 81 and 82 of the Slovakian Criminal Code) and Switzerland (see Articles 56 et seq. of the Swiss Criminal Code). Preventive detention in these States is ordered, as a rule, by the sentencing courts and is generally executed after the persons concerned have served their prison sentences (with the exception of Denmark, where preventive detention is ordered instead of a prison sentence). The detainees' dangerousness is reviewed on a periodic basis and they are released on probation if they are no longer dangerous to the public.

71. As to the place and duration of the placement, persons subject to preventive detention are placed in special institutions in Austria (see Article 23 of the Austrian Criminal Code), Liechtenstein (see Article 23 of the Liechtenstein Criminal Code), San Marino (see Articles 121 et seq. of the San Marinese Criminal Code), Slovakia (see Article 81 of the Slovakian Criminal Code) and Switzerland (see Article 64 of the Swiss Criminal Code). Even though Italian law also stipulates that preventive detention is to be served in special institutions (compare Articles 215 et seq. of the Italian Criminal Code), it appears that in practice these institutions no longer exist and that the persons concerned are kept in ordinary prisons under a special detention regime. Dangerous offenders in preventive detention in Denmark are also kept in ordinary prisons under a special detention regime. In Denmark, Italy, San Marino, Slovakia (see the express provisions of Article 82 § 2 of the Slovakian Criminal Code) and Switzerland, the applicable provisions do not fix a maximum duration of preventive detention. By contrast, in Austria and Liechtenstein, such detention may not exceed ten years (see Article 25 § 1 of both the Austrian and the Liechtenstein Criminal Codes).

72. As regards the temporal applicability of the provisions on preventive detention, it is to be noted that, according to the wording of the applicable

provisions in some of the States concerned, they may be applied retrospectively. Thus, pursuant to Article 200 of the Italian Criminal Code, a decision on preventive measures is to be based on the law in force at the time of their execution, and pursuant to Article 2 § 3 of the Slovakian Criminal Code, these decisions are to be based on the law in force at the time of the decision ordering the security measure. Under Article 4 § 1 of the Danish Criminal Code, the question whether an offence is to be punished by preventive detention is decided by applying the law in force at the time of the judgment in the criminal proceedings. The San Marinese Criminal Code likewise does not prohibit the retrospective application of preventive measures. By contrast, retrospective application appears to be prohibited in respect of preventive detention measures pursuant to Articles 23 § 1 et seq. of both the Austrian and the Liechtenstein Criminal Codes and under Swiss law.

73. In many other Convention States, there is no system of preventive detention and offenders' dangerousness is taken into account both in the determination and in the execution of their sentence. On the one hand, prison sentences are increased in the light of offenders' dangerousness, notably in cases of recidivism. In this respect it is to be noted that, unlike the courts in the majority of the Convention States, the sentencing courts in the United Kingdom expressly distinguish between the punitive and the preventive part of a life sentence. The retributive or tariff period is fixed to reflect the punishment of the offender. Once the retributive part of the sentence has been served, a prisoner is considered as being in custody serving the preventive part of his sentence and may be released on probation if he poses no threat to society (see, *inter alia*, sections 269 and 277 of the Criminal Justice Act 2003 and section 28 of the Crime (Sentences) Act 1997). On the other hand, offenders' dangerousness generally has an influence both on their conditions of detention and on their chances of benefiting from a reduction of their sentence or from release on probation.

2. *The distinction between penalties and preventive measures and its consequences*

74. As regards the distinction between penalties and preventive measures in the Convention States and the consequences drawn from the qualification of the sanction in question, it must be noted that the same type of measure may be qualified as an additional penalty in one State and as a preventive measure in another. Thus, the supervision of a person's conduct after release, for example, is an additional penalty under Articles 131-36-1 et seq. of the French Criminal Code and a preventive measure under Articles 215 and 228 of the Italian Criminal Code.

75. Moreover, the Act of 25 February 2008 on post-sentence preventive detention and diminished criminal responsibility due to mental deficiency (*Loi relative à la rétention de sûreté et à la déclaration d'irresponsabilité pénale pour cause de trouble mental*) has introduced preventive detention into French law. Under Article 706-53-13 of the French Code of Criminal Procedure, this measure may be ordered against particularly dangerous offenders who pose a high risk of recidivism because they suffer from a serious personality disorder. The French Constitutional Council, in its decision of 21 February 2008 (no. 2008-562 DC, Official Gazette (*Journal officiel*) of 26 February 2008, p. 3272), found that such preventive detention, which was not based on the guilt of the person convicted but was designed to prevent persons from re-offending, could not be qualified as a

penalty (§ 9 of the decision). To that extent, it thus took the same view as the German Federal Constitutional Court in respect of preventive detention under German law (see paragraphs 31-33 above). Nevertheless, in view of its custodial nature, the time it may last, the fact that it is indefinitely renewable and the fact that it is ordered after conviction by a court, the French Constitutional Council considered that post-sentence preventive detention could not be ordered retrospectively against persons convicted of offences committed prior to the publication of the Act (§ 10 of the decision). In this respect, it came to a different conclusion than the German Federal Constitutional Court (see paragraphs 31-33 and also paragraphs 34-37 above).

C. Observations made by international monitoring bodies on preventive detention

1. The Council of Europe's Commissioner for Human Rights

76. The Council of Europe's Commissioner for Human Rights, Mr Thomas Hammarberg, stated the following in his report on his visit to Germany from 9 to 11 and 15 to 18 October 2006 (CommDH (2007) 14 of 11 July 2007) regarding the issue of what he referred to as "secured custody (*Sicherungsverwahrung*)":

> "203. During the visit, the Commissioner discussed the issue of secured custody with several *Länder* authorities, judges and medical experts. The Commissioner is aware of the public pressure judges and medical experts are exposed to when they make decisions regarding the release of a person who might recommit a serious crime. It is impossible to predict with full certainty whether a person will actually re-offend. Psychiatrists regularly assess the behaviour of an imprisoned person who might act differently outside the prison. In addition, it is difficult to foresee all the conditions that wait for the offender out side the prison.
>
> 204. The Commissioner calls for an extremely considerate application of secured custody. Alternative measures should also be considered before recourse to secured custody is taken. The Commissioner is concerned about the rising number of people deprived of their liberty under secured custody. He encourages the German authorities to commission independent studies on the implementation of secured custody in order to evaluate the measure in terms of protecting the general public and its impact on the detained individual. ...
>
> 206. Furthermore, the Commissioner was informed that persons kept under secured custody regularly experience a loss of future perspective and give up on themselves. This would appear to call for the provision of psychological or psychiatric care. The medical opinion may occasionally be divided on the efficacy of care provided to persons kept under secured custody, yet the possibility of their eventual rehabilitation and release should not be excluded. Accordingly, people held under secured custody should receive adequate medical treatment or other care that addresses their specific situation."

2. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

77. In its report to the German Government on its visit to Germany from 20 November to 2 December 2005 (CPT/Inf (2007) 18 of 18 April 2007), the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) made the following findings in respect of the "unit for Secure Placement (*Sicherungsverwahrung*)" in Berlin-Tegel Prison:

"94. Material conditions in the unit were of a good or even very good standard, with several particularly positive elements: well equipped single rooms with sanitary annexes; a light and reasonably spacious communal environment; a small kitchen with equipment for inmates to prepare hot drinks and light snacks, and an area where washing, drying and ironing could be done.

95. In principle, inmates had access to the same activities as ordinary prisoners (in terms of work, education, etc.). In addition, in accordance with the relevant legislation, inmates benefited from a number of special privileges. In particular, cell doors remained open throughout the day, and inmates were granted additional entitlements for visits (two hours instead of one hour per month), outdoor exercise (four hours instead of one hour on non-working days), the supply of parcels (six rather than three per year) and pocket money (if there was no work). It is also noteworthy that all inmates had unrestricted access to the telephone.

96. In theory, at least, the unit offered opportunities for a positive custodial living environment. However, not all inmates were capable of making the best of these opportunities, which was not surprising if one takes into account that, according to medical staff, most if not all of the inmates were suffering from multiple personality disorders. The vast majority of inmates were completely demotivated, with only two taking any outdoor exercise, three working full-time and one part-time. Twelve inmates were offered work, but were not willing to take part in it. Thus, the vast majority of inmates was idling away their time alone in their cells, occupying themselves with watching TV or playing video games.

Even among those inmates who apparently assumed and coped with the responsibility for their daily lives on the unit, the sense was that the activities were strategies to pass time, without any real purpose. As might be expected, this appeared to be related to their indefinite *Sicherungsverwahrung*. Several inmates interviewed expressed a clear sense that they would never get out and one stated that the only thing he could do was prepare himself to die.

97. According to the prison administration, staff worked according to special treatment criteria, the aim being the individual's release from placement in *Sicherungsverwahrung*; the focus was to minimise the risk to the general public, as well as to deal with the physical and psychological effects of long-term custody. Yet, the delegation observed that in practice, staff (including the social worker) were conspicuous by their absence in this unit, thereby keeping staff-inmate contacts to a minimum. ...

99. Even for the other inmates who were apparently coping better with their situation, the lack of staff engagement on the unit was not justifiable. Allowing inmates responsibility and a degree of independence does not imply that staff should leave them to their own devices. The duty of care cannot be ignored, particularly in relation to such a special group of inmates. The delegation gained the distinct impression that the staff themselves were not clear as to how to approach their work with these inmates. As well as empowering inmates to take charge of their lives in custody, there is a need for on-going support to deal with indefinite detention, as well as to address the legacy of serious past histories of aberrant behaviour and apparent psychological problems. Psychological care and support appeared to be seriously inadequate; **the CPT recommends that immediate steps be taken to remedy this shortcoming.**

100. The difficult question of how to implement in practice a humane and coherent policy regarding the treatment of persons placed in *Sicherungsverwahrung* needs to be addressed as a matter of urgency at the highest level. Working with this group of inmates is bound to be one of the hardest challenges facing prison staff.

Due to the potentially indefinite stay for the small (but growing) number of inmates held under *Sicherungsverwahrung*, there needs to be a particularly clear vision of the objectives in this unit and of how those objectives can be realistically achieved. The approach requires a high level of care involving a team of multi-disciplinary staff, intensive work with inmates on an individual basis (via promptly-prepared individualised plans), within a coherent framework for progression towards release, which should be a real option. The system should also allow for the maintenance of family contacts, when appropriate.

The CPT recommends that the German authorities institute an immediate review of the approach to *Sicherungsverwahrung* at Tegel Prison and, if appropriate, in other establishments in Germany accommodating persons subject to *Sicherungsverwahrung*, in the light of the above remarks."

3. The United Nations Human Rights Committee

78. In its concluding observations adopted in its session from 7 to 25 July 2008 on the report submitted by France under Article 40 of the International Covenant on Civil and Political Rights (CCPR; see CCPR/C/FRA/CO/4 of 31 July 2008), the United Nations Human Rights Committee found:

> "16. The Committee is concerned by the State party's claim of authority under Act No. 2008/174 (25 February 2008) to place criminal defendants under renewable one-year terms of civil preventive detention (*rétention de sureté*) because of 'dangerousness', even after they have completed their original prison sentences. While the Constitutional Council has prohibited retroactive application of the statute, and the judge who sentences a criminal defendant contemplates the possibility of future civil preventive detention as part of the original disposition of a case, nonetheless, in the view of the Committee, the practice may remain problematic under articles 9, 14 and 15 of the Covenant."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

79. The applicant complained that his continued preventive detention beyond the period of ten years which had been the maximum for such detention under the legal provisions applicable at the time of his offence and conviction breached Article 5 § 1 of the Convention which, in so far as relevant, provides:

> "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court; ...
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; ...
>
> (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; ..."

80. The Government contested this view.

A. The parties' submissions

1. The applicant

81. In the applicant's submission, his preventive detention was not covered by Article 5 § 1 (a) of the Convention. There was not a sufficient causal connection between his continued detention after the completion of ten years in detention and his conviction in 1986. When the Marburg Regional Court had ordered his preventive detention in 1986, such detention could last for ten years at the most under the applicable legal provisions. It could not be ruled out that the Marburg Regional Court might not have ordered his preventive detention if it had known that the measure could remain in force for more than ten years. His continued preventive detention

after the completion of ten years in detention was therefore based solely on the change in the law in 1998 which had abolished the maximum duration of a first period of preventive detention, and no longer on his conviction in 1986. If there had been no change in the law he would have been released automatically in 2001, without the court responsible for the execution of sentences having jurisdiction to order an extension of his preventive detention. In view of the absolute time-limit on the first period of preventive detention fixed by law at the time of his conviction, the change in the law abolishing the maximum duration concerned the question whether preventive detention should be applicable and not just the arrangements for executing it, so that the causal link between his conviction and his preventive detention no longer existed after ten years of detention.

82. The applicant further took the view that his detention was neither "lawful" nor "in accordance with a procedure prescribed by law" as required by Article 5 § 1. Unlike the Federal Constitutional Court, many scholars considered preventive detention and the abolition of its maximum duration of ten years if ordered for the first time to be unconstitutional. The maximum period for a first period of preventive detention had been fixed by law. When he committed his offence, he could not have foreseen that this maximum duration would be abolished with immediate effect at a time when he was already in preventive detention and that he might be held in preventive detention for a period exceeding ten years. His right to lawful detention could not be balanced against public safety concerns.

2. The Government

83. In the Government's view, the applicant's continued preventive detention complied with Article 5 § 1 (a) of the Convention. The applicant's preventive detention after the completion of ten years of detention had occurred "after conviction", as there was still a sufficient causal connection between his initial conviction and the deprivation of liberty. In its judgment of 17 November 1986, the Marburg Regional Court had convicted and sentenced the applicant to five years' imprisonment and had ordered his preventive detention without reference to any maximum duration. Under the provisions of the Criminal Code, it was for the Marburg Regional Court, giving sentence, to decide whether or not to order a measure of prevention, but for the Regional Court responsible for the execution of sentences to decide on the execution of that measure, in particular on the duration of a convicted person's preventive detention. Thus, both the sentencing court and the court responsible for the execution of sentences had participated in the applicant's "conviction by a competent court". Under Article 2 § 6 of the Criminal Code (see paragraph 48 above), it had always been open to the legislator to reintroduce preventive detention without a maximum duration with immediate effect. In view of this, the subsequent abolition of the maximum duration of a first period of preventive detention had not broken the causal link between the applicant's initial conviction in 1986 and his continued preventive detention.

84. The Government further argued that the applicant's continued preventive detention was "lawful" and "in accordance with a procedure prescribed by law" as stipulated by Article 5 § 1. The domestic courts had confirmed the compliance of the applicant's further detention with national law. Contrary to the applicant's submission, his preventive detention was not based exclusively on the change to Article 67d of the Criminal Code, but had been ordered by the Marburg Regional Court in April 2001 in

accordance with the procedures laid down in the Code of Criminal Procedure. It also satisfied the test of foreseeability. The maximum duration of a period of preventive detention did not have to be foreseeable at the time of the offence as the dangerousness of an offender did not necessarily cease after a fixed period of time. Nor could the applicant have legitimately expected that the maximum duration of a first period of preventive detention would not be abolished, not least because priority over that expectation had to be given to the protection of society. According to Article 2 § 6 of the Criminal Code, decisions concerning measures of correction and prevention were to be taken on the basis of the provisions in force at the time of the decision (of both the sentencing court and the courts responsible for the execution of sentences), and not on the basis of those applicable at the time of commission of the offence. Therefore, it had been clear that the legislator could authorise the courts at any time to order preventive detention for an indefinite period of time. Moreover, there had been numerous requests to re-abolish the maximum period for a first period of preventive detention, which had been introduced only in 1975.

85. Furthermore, the Government submitted that the applicant's continued preventive detention was not arbitrary, as the courts responsible for the execution of sentences ordered preventive detention in excess of ten years only as an exception to the rule that the measure was then terminated and on the basis that its extension was possible only if there was a danger that the person concerned would commit serious sexual or violent offences.

B. The Court's assessment

1. Recapitulation of the relevant principles

a. Grounds for deprivation of liberty

86. Article 5 § 1 sub-paragraphs (a) to (f) contain an exhaustive list of permissible grounds for deprivation of liberty, and no deprivation of liberty will be lawful unless it falls within one of those grounds (see, *inter alia*, *Guzzardi v. Italy*, 6 November 1980, § 96, Series A no. 39; *Witold Litwa v. Poland*, no. 26629/95, § 49, ECHR 2000-III; and *Saadi v. the United Kingdom* [GC], no. 13229/03, § 43, ECHR 2008-...). However, the applicability of one ground does not necessarily preclude that of another; a deprivation of liberty may, depending on the circumstances, be justified under one or more sub-paragraphs (see, among other authorities, *Eriksen v. Norway*, 27 May 1997, § 76, *Reports of Judgments and Decisions* 1997-III; *Erkalo v. the Netherlands*, 2 September 1998, § 50, *Reports* 1998-VI; and *Witold Litwa*, cited above, § 49).

87. For the purposes of sub-paragraph (a) of Article 5 § 1, the word "conviction", having regard to the French text ("*condamnation*"), has to be understood as signifying both a finding of guilt after it has been established in accordance with the law that there has been an offence (see *Guzzardi*, cited above, § 100), and the imposition of a penalty or other measure involving deprivation of liberty (see *Van Droogenbroeck v. Belgium*, 24 June 1982, § 35, Series A no. 50).

88. Furthermore, the word "after" in sub-paragraph (a) does not simply mean that the "detention" must follow the "conviction" in point of time: in addition, the "detention" must result from, follow and depend upon or occur

by virtue of the "conviction" (see *Van Droogenbroeck*, cited above, § 35). In short, there must be a sufficient causal connection between the conviction and the deprivation of liberty at issue (see *Weeks v. the United Kingdom*, 2 March 1987, § 42, Series A no. 114; *Stafford v. the United Kingdom* [GC], no. 46295/99, § 64, ECHR 2002-IV; *Waite v. the United Kingdom*, no. 53236/99, § 65, 10 December 2002; and *Kafkaris v. Cyprus* [GC], no. 21906/04, § 117, ECHR 2008-...). However, with the passage of time, the link between the initial conviction and a further deprivation of liberty gradually becomes less strong (compare *Van Droogenbroeck*, cited above, § 40, and *Eriksen*, cited above, § 78). The causal link required by sub-paragraph (a) might eventually be broken if a position were reached in which a decision not to release or to re-detain was based on grounds that were inconsistent with the objectives of the initial decision (by a sentencing court) or on an assessment that was unreasonable in terms of those objectives. In those circumstances, a detention that was lawful at the outset would be transformed into a deprivation of liberty that was arbitrary and, hence, incompatible with Article 5 (compare *Van Droogenbroeck*, cited above, § 40; *Eriksen*, cited above, § 78; and *Weeks*, cited above, § 49).

89. Furthermore, under sub-paragraph (c) of Article 5 § 1, detention of a person may be justified "when it is reasonably considered necessary to prevent his committing an offence". However, that ground of detention is not adapted to a policy of general prevention directed against an individual or a category of individuals who present a danger on account of their continuing propensity to crime. It does no more than afford the Contracting States a means of preventing a concrete and specific offence (see *Guzzardi*, cited above, § 102; compare also *Eriksen*, cited above, § 86). This can be seen both from the use of the singular ("an offence") and from the object of Article 5, namely to ensure that no one should be dispossessed of his liberty in an arbitrary fashion (see *Guzzardi*, ibid.).

b. "Lawful" detention "in accordance with a procedure prescribed by law"

90. It is well established in the Court's case-law under the sub-paragraphs of Article 5 § 1 that any deprivation of liberty must, in addition to falling within one of the exceptions set out in sub-paragraphs (a)-(f), be "lawful". Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof (see, among many other authorities, *Erkalo*, cited above, § 52; *Saadi v. the United Kingdom*, cited above, § 67; and *Kafkaris*, cited above, § 116). This primarily requires any arrest or detention to have a legal basis in domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all the Articles of the Convention (see *Stafford*, cited above, § 63, and *Kafkaris*, cited above, § 116). "Quality of the law" in this sense implies that where a national law authorises deprivation of liberty it must be sufficiently accessible, precise and foreseeable in its application, in order to avoid all risk of arbitrariness (see *Amuur v. France*, 25 June 1996, § 50, *Reports* 1996-III; *Nasrulloyev v. Russia*, no. 656/06, § 71, 11 October 2007; and *Mooren v. Germany* [GC], no. 11364/03, § 76, 9 July 2009). The standard of "lawfulness" set by the Convention thus requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action

may entail (see *Steel and Others v. the United Kingdom*, 23 September 1998, § 54, *Reports* 1998-VII, and *Baranowski v. Poland*, no. 28358/95, § 52, ECHR 2000-III).

91. Compliance with national law is not, however, sufficient: Article 5 § 1 requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness (see, among many other authorities, *Winterwerp v. the Netherlands*, 24 October 1979, § 37, Series A no. 33; *Saadi v. the United Kingdom*, cited above, § 67; and *Mooren*, cited above, § 72).

2. Application of these principles to the present case

92. The Court is called upon to determine whether the applicant, during his preventive detention for a period exceeding ten years, was deprived of his liberty in accordance with one of the sub-paragraphs (a) to (f) of Article 5 § 1. It will examine first whether the applicant's initial placement in preventive detention as such falls under any of the permissible grounds for detention listed in Article 5 § 1. If it does not, the more specific question whether the abolition of the maximum duration of ten years for a first period of preventive detention affected the compatibility with Article 5 § 1 of the applicant's continued detention on expiry of that period need not be answered.

93. In the Government's submission, the applicant's preventive detention was justified under sub-paragraph (a) of Article 5 § 1. It is indeed true that the Commission repeatedly found that preventive detention ordered by a sentencing court in addition to or instead of a prison sentence was, in principle, justified as being "detention of a person after conviction by a competent court" within the meaning of Article 5 § 1 (a) of the Convention (as regards preventive detention pursuant to Article 66 of the German Criminal Code, see *X. v. Germany*, no. 4324/69, Commission decision of 4 February 1971, and *Dax v. Germany*, no. 19969/92, Commission decision of 7 July 1992 with further references; as regards placement "at the disposal of the Government" in the Netherlands, a similar measure concerning persons with certain mental defects, see *X. v. the Netherlands*, no. 6591/74, Commission decision of 26 May 1975, Decisions and Reports (DR) 3, p. 90; as regards preventive detention in Norway, another similar measure applied to persons of impaired mental capacity, see *X. v. Norway*, no. 4210/69, Commission decision of 24 July 1970, Collection 35, pp. 1 et seq. with further references; and, as regards detention in a special detention centre of persons with certain mental defects in Denmark, see *X. v. Denmark*, no. 2518/65, Commission decision of 14 December 1965, Collection 18, pp. 4 et seq.).

94. The Court itself has affirmed, for instance, that the Belgian system of placement of recidivist and habitual offenders at the Government's disposal, ordered in addition to a prison sentence, constituted detention "after conviction by a competent court" for the purposes of Article 5 § 1 (a) (see *Van Droogenbroeck*, cited above, §§ 33-42). Likewise, it considered the Norwegian system of preventive detention imposed by way of a security measure on persons of underdeveloped or impaired mental capacity to fall in principle within Article 5 § 1 (a) (see *Eriksen*, cited above, § 78).

95. The Court reiterates that "conviction" under sub-paragraph (a) of Article 5 § 1 signifies a finding of guilt of an offence and the imposition of a penalty or other measure involving deprivation of liberty (see paragraph 87 above). It observes that the applicant's preventive detention was ordered by judgment of the Marburg Regional Court of 17 November 1986 (the sentencing court), which found him guilty of, *inter alia*, attempted murder (see paragraph 12 above). Since August 1991 the applicant, having served his prison sentence, has been in preventive detention as the courts responsible for the execution of sentences refused to suspend the preventive detention order on probation (see paragraphs 13 et seq.).

96. The Court is satisfied that the applicant's initial preventive detention resulted from his "conviction" by the sentencing court in 1986. The latter found him guilty of attempted murder and ordered his preventive detention, a penalty or other measure involving deprivation of liberty. It notes that in the Government's view, preventive detention is not fixed with regard to an offender's personal guilt, but with regard to the danger he presents to the public (see paragraph 113 below). It considers that pursuant to Article 66 § 1 of the Criminal Code, an order of preventive detention is nevertheless always dependent on and ordered together with a court's finding that the person concerned is guilty of an offence (see paragraphs 49-50 above). The applicant's placement in preventive detention was thus initially covered by sub-paragraph (a) of Article 5 § 1. The Court would add, however, that, contrary to the Government's submission, the decisions of the courts responsible for the execution of sentences to retain the applicant in detention do not satisfy the requirement of "conviction" for the purposes of Article 5 § 1 (a) as they no longer involve a finding of guilt of an offence.

97. In order to determine whether the applicant's preventive detention beyond the ten-year period was justified under Article 5 § 1 (a), the Court needs to examine whether that detention still occurred "after conviction", in other words whether there was still a sufficient causal connection between the applicant's conviction by the sentencing court in 1986 and his continuing deprivation of liberty after 8 September 2001.

98. The Court notes that according to the Government, the sentencing court had ordered the applicant's preventive detention without reference to any time-limit and that it was for the courts responsible for the execution of sentences to determine the duration of the applicant's preventive detention. As Article 2 § 6 of the Criminal Code permitted the abolition of the maximum duration of a first period of preventive detention with immediate effect, the courts responsible for the execution of sentences had the power to authorise the applicant's continued preventive detention beyond the ten-year period, following the change in the law in 1998. The Government argued that therefore, the amendment of Article 67d of the Criminal Code did not break the causal link between the applicant's conviction and his continued detention.

99. The Court is not convinced by that argument. It is true that the sentencing court ordered the applicant's preventive detention in 1986 without fixing its duration. However, the sentencing courts never fix the duration, by virtue of the applicable provisions of the Criminal Code (Articles 66 and 67c-e of the Criminal Code, see paragraphs 49 et seq. above); as the Government themselves submitted, the sentencing courts have jurisdiction only to determine whether or not to order preventive

detention as such in respect of an offender. The courts responsible for the execution of sentences are subsequently called upon to decide on the detailed arrangements for execution of the order, including the exact duration of the offender's preventive detention. However, the courts responsible for the execution of sentences were competent only to fix the duration of the applicant's preventive detention within the framework established by the order of the sentencing court, read in the light of the law applicable at the relevant time.

100. The Court observes that the order for the applicant's preventive detention was made by the sentencing court in 1986. At that time a court order of that kind, read in conjunction with Article 67d § 1 of the Criminal Code in the version then in force (see paragraph 52 above), meant that the applicant, against whom preventive detention was ordered for the first time, could be kept in preventive detention for a maximum period of ten years. Thus, had it not been for the amendment of Article 67d of the Criminal Code in 1998 (see paragraph 53 above), which was declared applicable also to preventive detention orders which had been made – as had the order against the applicant – prior to the entry into force of that amended provision (section 1a (3) of the Introductory Act to the Criminal Code; see paragraph 54 above), the applicant would have been released when ten years of preventive detention had expired, irrespective of whether he was still considered dangerous to the public. Without that change in the law, the courts responsible for the execution of sentences would not have had jurisdiction to extend the duration of the applicant's preventive detention. Therefore, the Court finds that there was not a sufficient causal connection between the applicant's conviction by the sentencing court in 1986 and his continued deprivation of liberty beyond the period of ten years in preventive detention, which was made possible only by the subsequent change in the law in 1998.

101. The Court considers that the present case must be distinguished in that respect from that of *Kafkaris* (cited above). In *Kafkaris* it found that there was a sufficient causal connection between the applicant's conviction and his continuing detention after twenty years' imprisonment. Mr Kafkaris' continuing detention beyond the twenty-year term was in conformity with the judgment of the sentencing court, which had passed a sentence of life imprisonment and had expressly stated that the applicant had been sentenced to imprisonment for the remainder of his life as provided by the Criminal Code, and not for a period of twenty years as set out in the Prison Regulations, subordinate legislation in force at the time (ibid., §§ 118-21). By contrast, the preventive detention of the applicant in the present case beyond the ten-year point was not ordered in the judgment of the sentencing court read in conjunction with the provisions of the Criminal Code applicable at the time of that judgment.

102. The Court shall further examine whether the applicant's preventive detention beyond the ten-year point was justified under any of the other sub-paragraphs of Article 5 § 1. It notes in this connection that the domestic courts did not address that issue because they were not required to do so under the provisions of the German Basic Law. It considers that sub-paragraphs (b), (d) and (f) are clearly not relevant. Under sub-paragraph (c),

second alternative, of Article 5 § 1, the detention of a person may be justified "when it is reasonably considered necessary to prevent his committing an offence". In the present case the applicant's continued detention was justified by the courts responsible for the execution of sentences with reference to the risk that the applicant could commit further serious offences – similar to those of which he had previously been convicted – if released (see paragraphs 18 and 23 above). These potential further offences are not, however, sufficiently concrete and specific, as required by the Court's case-law (see, in particular, *Guzzardi*, cited above, § 102) as regards, in particular, the place and time of their commission and their victims, and do not, therefore, fall within the ambit of Article 5 § 1 (c). This finding is confirmed by an interpretation of paragraph 1 (c) in the light of Article 5 as a whole. Pursuant to paragraph 3 of Article 5, everyone detained in accordance with the provisions of paragraph 1 (c) of that Article must be brought promptly before a judge and tried within a reasonable time or be released pending trial. However, persons kept in preventive detention are not to be brought promptly before a judge and tried for potential future offences. The Court notes in this connection that criminological experience shows that there is often a risk of recidivism on the part of a repeatedly convicted offender, irrespective of whether or not he or she has been sentenced to preventive detention (see also § 203 of the report of the Council of Europe's Commissioner for Human Rights dated 11 July 2007, paragraph 76 above).

103. The Court has further considered whether the applicant could have been kept in preventive detention beyond September 2001 under sub-paragraph (e) of Article 5 § 1 as being a person "of unsound mind". While it does not rule out the possibility that the preventive detention of certain offenders may meet the conditions of that ground for detention, it observes that, according to the decision of the Frankfurt am Main Court of Appeal in the instant case, the applicant no longer suffered from a serious mental disorder (see paragraph 22 above). In any event, the domestic courts did not base their decisions to further detain the applicant on the ground that he was of unsound mind. Therefore, his detention cannot be justified under Article 5 § 1 (e) either.

104. The Court further observes that the present application raises an issue in terms of the lawfulness of the applicant's detention. It reiterates that national law must be of a certain quality and, in particular, must be foreseeable in its application, in order to avoid all risk of arbitrariness (see paragraph 90 above). It has serious doubts whether the applicant, at the relevant time, could have foreseen to a degree that was reasonable in the circumstances that his offence could entail his preventive detention for an unlimited period of time. It doubts, in particular, whether he could have foreseen that the applicable legal provisions would be amended with immediate effect after he had committed his crime. However, in view of the above finding that the applicant's preventive detention beyond the ten-year period was not justified under any of the sub-paragraphs of Article 5 § 1, it is not necessary to decide this question.

105. Consequently, there has been a violation of Article 5 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

106. The applicant further complained that the retrospective extension of his preventive detention from a maximum period of ten years to an unlimited period of time violated his right not to have a heavier penalty imposed on him than the one applicable at the time of his offence. He relied on Article 7 § 1 of the Convention, which reads:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

107. The Government contested this allegation.

A. The parties' submissions

1. The applicant

108. In the applicant's submission, a heavier penalty had been imposed on him retrospectively, contrary to the second sentence of Article 7 § 1 of the Convention, by virtue of the order made for his continued preventive detention after he had been in preventive detention for ten years. Preventive detention constituted a "penalty" within the meaning of that Article. He claimed that the domestic courts' view that, since its introduction into German criminal law, preventive detention had not been considered as a "penalty" and could thus be applied retrospectively, should be given less weight in the light of the fact that preventive detention had been introduced by the Habitual Offenders Act of 24 November 1933, that is, during the Nazi regime. According to section 129 of the Execution of Sentences Act (see paragraph 64 above), the sanction in question, imposed following an offence and administered by the criminal courts, pursued exactly the same aims as the execution of a prison sentence (see section 2 of the Execution of Sentences Act, paragraph 63 above), namely both to protect the public from the detainee (prevention) and to help the latter to readjust to life outside prison (reintegration into society).

109. In the applicant's view, preventive detention was also a penalty by its nature. This was illustrated by the fact that the measure was ordered by the criminal courts in connection with an offence and that the rules governing it were contained in the Execution of "Sentences" Act. Preventive detention was related to an offender's guilt, not least because it could be imposed only following certain previous offences and could not be ordered against a person who had acted without criminal responsibility.

110. The applicant further stressed that there were no special facilities in Germany for persons being held in preventive detention. Persons held in preventive detention in ordinary prisons were granted some minor privileges compared to persons serving their sentence in the same prisons (see sections 131-135 of the Execution of Sentences Act; paragraphs 64-65 above), such as the right to wear their own clothes. However, even if put into practice, these privileges did not alter the fact that the execution of a preventive detention order did not differ significantly from that of a prison sentence. As a person in preventive detention, the applicant was in fact granted fewer relaxations of the conditions of his sentence than ordinary

prisoners. Moreover, no special measures in addition to those taken for ordinary prisoners were taken for persons held in preventive detention to help them prepare for a responsible life outside prison. The applicant's conditions in preventive detention in Schwalmstadt Prison did not differ from those he had encountered when serving the major part of his sentence there. He was working as he had already worked when serving his sentence and, apart from occasional short periods of leave under escort, no efforts were made to prepare him for life outside prison, nor was there any therapy available.
If one looked at the realities of detainees' situation rather than the wording of the Criminal Code, there was therefore no substantial difference between the execution of prison sentences and of preventive detention orders.

111. Moreover, the severity of a measure of indefinite preventive detention, which was executed after and in addition to his prison sentence of only five years, was illustrated by the fact that it had led to the applicant being deprived of his liberty – on the basis of the order for his preventive detention alone – for approximately eighteen years already. He claimed that, as a result, he had been detained for a considerably longer period of time than the period generally served by convicted offenders who unlike him had actually killed someone and had been ordered to serve just a prison sentence, without an additional order for their preventive detention. Given that he had been detained for more than twenty-two years already following his conviction in 1986, the fact that there had been only two incidents, which had occurred many years previously in a high-security prison setting, proved that he had learned to control his emotions and that his continued imprisonment was not justified.

112. The applicant submitted that the retrospective prolongation of his preventive detention, a penalty which had been clearly fixed by law at a maximum term of ten years at the time he had committed his offence, therefore violated the principle that only the law can prescribe a penalty (*nulla poena sine lege*), enshrined in Article 7.

2. The Government

113. In the Government's view, the applicant's preventive detention for a period exceeding ten years did not violate the prohibition under Article 7 § 1 on increasing a penalty retrospectively, because preventive detention was not a "penalty" within the meaning of that provision. German criminal law had a twin-track system of sanctions which made a strict distinction between penalties and what were referred to as measures of correction and prevention, such as preventive detention. Penalties were of a punitive nature and were fixed with regard to the offender's personal guilt. Measures of correction and prevention, on the other hand, were of a preventive nature and were ordered because of the danger presented by the offender, irrespective of his or her guilt. This twin-track system, introduced in 1933, had been evaluated and confirmed by the democratically elected legislature on several occasions since the end of World War II. Preventive detention was a measure of last resort aimed only at the prevention of dangers to the public emanating from the most dangerous offenders, as shown by the restrictive conditions laid down in the Criminal Code concerning preventive detention orders and the continuation of preventive detention (see paragraphs 47 and 49-56 above), and their restrictive application by the domestic courts. Unlike a penalty, preventive detention could be suspended on probation at any time, provided that it could be

expected that the detainee would no longer commit serious criminal offences outside prison. As confirmed by the Federal Constitutional Court in its judgment in the present case, preventive detention was therefore not a penalty to which the prohibition of retrospective punishment applied.

114. According to the Government, the execution of preventive detention orders differed significantly from the enforcement of prison sentences, as regards both the legislative provisions (see, in particular, sections 129-135 of the Execution of Sentences Act; paragraphs 64-65 above) and practice. It was true that there were no separate preventive detention facilities in the German *Länder* for economic reasons and in view of the range of treatment facilities required. Creating one central facility in Germany for all persons kept in preventive detention would render impossible visits by relatives or persons helping in the detainee's social reintegration, both of which were desirable. Persons in preventive detention were therefore kept in separate wings of prisons. However, compared to ordinary prisoners, persons in preventive detention had a number of privileges: unlike the former, they had the right to wear their own clothes and to receive longer visits of at least two hours per month. They also had more pocket money and the right to receive more parcels than ordinary prisoners. Moreover, if they so wished, they could have an individual cell which was not locked during the day, which they could furnish and equip in a personal manner. As regards the applicant's preventive detention in particular, the Government stressed that he no longer received any therapy as the psychologist he had consulted had considered his treatment to be completed. The applicant had almost daily discussions with the social worker and the psychologist in charge at his own initiative and participated in a discussion group which met every fortnight. In line with a psychiatric expert's recommendation, the applicant was benefiting from measures to relax the conditions of his preventive detention, such as short periods of leave under escort (see paragraphs 43-44 above).

115. The severity and duration of preventive detention alone did not suffice to classify it as a "penalty" within the meaning of Article 7 § 1. As found by the competent courts, the applicant was still dangerous to the public, irrespective of whether he had committed any offences in prison, and of what kind. The Government further argued that, according to the Court's judgment in the case of *Kafkaris* (cited above, §§ 151-52), subsequent changes which did not affect the penalty imposed in the initial judgment, but only the duration of the execution of that penalty, did not violate Article 7 § 1. This applied with even greater force to a case like the present one in which the initial judgment ordered a preventive measure (as opposed to a penalty), namely preventive detention, without stating a time-limit.

116. The Government stressed that the twin-track system of penalties and measures of correction and prevention made it possible to limit penalties for all offenders to what was strictly necessary to compensate the perpetrator's guilt. As shown by the penal statistics published by the Council of Europe (see paragraph 68 above), Germany had a low rate of enforced prison sentences as a result and its courts imposed short prison sentences compared to other Council of Europe member States. This proved that the

twin-track system led to a restrictive and responsible sanctioning practice. However, the principle enshrined in the Basic Law that punishment should not exceed a person's guilt prevented German criminal courts from imposing longer prison sentences instead of ordering preventive detention to serve the preventive aim of the protection of society. Other Convention States, in particular Austria, Denmark, Italy, Liechtenstein, San Marino, Slovakia and Switzerland, also applied systems of preventive detention.

B. The Court's assessment

1. Recapitulation of the relevant principles

117. The guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 of the Convention in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment (see *S.W. v. the United Kingdom*, 22 November 1995, § 34, Series A no. 335-B; *C.R. v. the United Kingdom*, 22 November 1995, § 32, Series A no. 335-C; *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, § 50, ECHR 2001-II; and *Kafkaris*, cited above, § 137).

118. Article 7 embodies, *inter alia*, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*). While it prohibits in particular the retrospective application of the criminal law to an accused's disadvantage (see *Kokkinakis v. Greece*, 25 May 1993, § 52, Series A no. 260-A) or extending the scope of existing offences to acts which previously were not criminal offences, it also lays down the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy (see *Uttley v. the United Kingdom* (dec.), no. 36946/03, 29 November 2005, and *Achour v. France* [GC], no. 67335/01, § 41, ECHR 2006-IV).

119. When speaking of "law" Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which implies qualitative requirements, including those of accessibility and foreseeability (see *Cantoni v. France*, 15 November 1996, § 29, *Reports* 1996-V; *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 145, ECHR 2000-VII; and *Achour*, cited above, § 42). These qualitative requirements must be satisfied as regards both the definition of an offence and the penalty the offence in question carries (see *Achour*, cited above, § 41, and *Kafkaris*, cited above, § 140). An individual must know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable and what penalty will be imposed for the act committed and/or omission (compare *Cantoni*, cited above, § 29; *Uttley*, cited above; and *Kafkaris*, cited above, § 140).

120. The concept of "penalty" in Article 7 is autonomous in scope. To render the protection afforded by Article 7 effective the Court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a "penalty" within the meaning of this provision (see *Welch v. the United Kingdom*, 9 February 1995, § 27, Series A no. 307-A; *Jamil v. France*, 8 June 1995, § 30, Series A no. 317-B; and *Uttley*, cited above). The wording of Article 7 paragraph 1, second

sentence, indicates that the starting-point in any assessment of the existence of a penalty is whether the measure in question is imposed following conviction for a "criminal offence". Other relevant factors are the characterisation of the measure under domestic law, its nature and purpose, the procedures involved in its making and implementation, and its severity (see *Welch*, cited above, § 28; *Jamil*, cited above, § 31; *Adamson v. the United Kingdom* (dec.), no. 42293/98, 26 January 1999; *Van der Velden v. the Netherlands* (dec.), no. 29514/05, ECHR 2006-XV; and *Kafkaris*, cited above, § 142). The severity of the measure is not, however, in itself decisive, since, for instance, many non-penal measures of a preventive nature may have a substantial impact on the person concerned (see *Welch*, cited above, § 32; compare also *Van der Velden*, cited above).

121. Both the Commission and the Court in their case-law have drawn a distinction between a measure that constitutes in substance a "penalty" and a measure that concerns the "execution" or "enforcement" of the "penalty". In consequence, where the nature and purpose of a measure relates to the remission of a sentence or a change in a regime for early release, this does not form part of the "penalty" within the meaning of Article 7 (see, *inter alia*, *Hogben v. the United Kingdom*, no. 11653/85, Commission decision of 3 March 1986, DR 46, p. 231; *Grava v. Italy*, no. 43522/98, § 51, 10 July 2003; and *Kafkaris*, cited above, § 142). However, in practice, the distinction between the two may not always be clear-cut (see *Kafkaris*, ibid., and *Monne v. France* (dec.), no. 39420/06, 1 April 2008).

2. Application of these principles to the present case

122. The Court shall thus examine, in the light of the foregoing principles, whether the extension of the applicant's preventive detention from a maximum of ten years to an unlimited period of time violated the prohibition of retrospective penalties under Article 7 § 1, second sentence.

123. The Court observes that at the time the applicant committed the attempted murder in 1985, a preventive detention order made by a sentencing court for the first time, read in conjunction with Article 67d § 1 of the Criminal Code in the version then in force, meant that the applicant could be kept in preventive detention for ten years at the most (see also paragraphs 99-100 above). Based on the subsequent amendment in 1998 of Article 67d of the Criminal Code, read in conjunction with section 1a (3) of the Introductory Act to the Criminal Code, which abolished that maximum duration with immediate effect, the courts responsible for the execution of sentences then ordered, in 2001, the applicant's continued preventive detention beyond the ten-year point. Thus, the applicant's preventive detention was prolonged with retrospective effect, under a law enacted after the applicant had committed his offence – and at a time when he had already served more than six years in preventive detention.

124. The Court, having regard to the criteria established in its case-law, therefore needs to determine whether the applicant's preventive detention constitutes a "penalty" within the meaning of the second sentence of Article 7 § 1. It notes at the outset that the applicant's preventive detention was imposed by the Marburg Regional Court in 1986 following his conviction for a "criminal offence", namely attempted murder and robbery.

Indeed, pursuant to Article 66 § 1 of the Criminal Code, preventive detention can only be ordered against someone who has, amongst other requirements, been sentenced for an intentional offence to at least two years' imprisonment (see paragraphs 49-50 above).

125. As to the characterisation of preventive detention under domestic law, the Court observes that in Germany, such a measure is not considered as a penalty to which the absolute ban on retrospective punishment applies. The findings of the courts responsible for the execution of sentences to that effect in the present case were confirmed by the Federal Constitutional Court in a thoroughly reasoned leading judgment (see paragraphs 27-40 above). Under the provisions of the German Criminal Code, preventive detention is qualified as a measure of correction and prevention. Such measures have always been understood as differing from penalties under the long-established twin-track system of sanctions in German criminal law. Unlike penalties, they are considered not to be aimed at punishing criminal guilt, but to be of a purely preventive nature aimed at protecting the public from a dangerous offender. This clear finding is, in the Court's view, not called into question by the fact that preventive detention was first introduced into German criminal law, as the applicant pointed out, by the Habitual Offenders Act of 24 November 1933, that is, during the Nazi regime. As the Commission found as far back as 1971 (see *X. v. Germany*, cited above), the provisions on preventive detention were confirmed by the German legislator – on several occasions – after 1945.

126. However, as reiterated above (at paragraph 120), the concept of "penalty" in Article 7 is autonomous in scope and it is thus for the Court to determine whether a particular measure should be qualified as a penalty, without being bound by the qualification of the measure under domestic law. It notes in this connection that the same type of measure may be and has been qualified as a penalty in one State and as a preventive measure to which the principle of *nulla poena sine lege* does not apply in another. Thus, the "placement at the Government's disposal" of recidivists and habitual offenders in Belgium, for instance, which is in many ways similar to preventive detention under German law, has been considered as a penalty under Belgian law (see *Van Droogenbroeck*, cited above, § 19). The French Constitutional Council, for its part, found in its decision of 21 February 2008 (no. 2008-562 DC) that the preventive detention recently introduced into French law could not be qualified as a penalty, but could nevertheless not be ordered retrospectively, notably in view of its indefinite duration (see paragraph 75 above; see, for a further example, paragraph 74 above).

127. The Court shall therefore further examine the nature of the measure of preventive detention. It notes at the outset that, just like a prison sentence, preventive detention entails a deprivation of liberty. Moreover, having regard to the manner in which preventive detention orders are executed in practice in Germany, compared to ordinary prison sentences, it is striking that persons subject to preventive detention are detained in ordinary prisons, albeit in separate wings. Minor alterations to the detention regime compared to that of an ordinary prisoner serving his sentence, including privileges such as detainees' right to wear their own clothes and to further equip their more comfortable prison cells, cannot mask the fact that there is no substantial difference between the execution of a prison sentence and that of a preventive detention order. This is further illustrated by the fact that there

are very few provisions in the Execution of Sentences Act dealing specifically with the execution of preventive detention orders and that, apart from these, the provisions on the execution of prison sentences apply *mutatis mutandis* (see sections 129 to 135 of the said Act, paragraphs 64-65 above).

128. Furthermore, having regard to the realities of the situation of persons in preventive detention, the Court cannot subscribe to the Government's argument (see paragraph 113 above) that preventive detention served a purely preventive, and no punitive purpose. It notes that, pursuant to Article 66 of the Criminal Code, preventive detention orders may be made only against persons who have repeatedly been found guilty of criminal offences of a certain gravity. It observes, in particular, that there appear to be no special measures, instruments or institutions in place, other than those available to ordinary long-term prisoners, directed at persons subject to preventive detention and aimed at reducing the danger they present and thus at limiting the duration of their detention to what is strictly necessary in order to prevent them from committing further offences.

129. The Court agrees with the findings of both the Council of Europe's Commissioner for Human Rights (see § 206 of his report, paragraph 76 above) and the CPT (see § 100 of its report, paragraph 77 above) that persons subject to preventive detention, in view of its potentially indefinite duration, are in particular need of psychological care and support. The achievement of the objective of crime prevention would require, as stated convincingly by the CPT (ibid.), "a high level of care involving a team of multi-disciplinary staff, intensive work with inmates on an individual basis (via promptly-prepared individualised plans), within a coherent framework for progression towards release, which should be a real option." The Court considers that persons subject to preventive detention orders must be afforded such support and care as part of a genuine attempt to reduce the risk that they will reoffend, thus serving the purpose of crime prevention and making their release possible. The Court does not lose sight of the fact that "[w]orking with this group of inmates is bound to be one of the hardest challenges facing prison staff" (see § 100 of the CPT's report, paragraph 77 above). However, in view of the indefinite duration of preventive detention, particular endeavours are necessary in order to support these detainees who, as a rule, will be unable to make progress towards release by their own efforts. It finds that there is currently an absence of additional and substantial measures – other than those available to all long-term ordinary prisoners serving their sentence for punitive purposes – to secure the prevention of offences by the persons concerned.

130. Moreover, pursuant to sections 2 and 129 of the Execution of Sentences Act, the execution of both penalties and measures of correction and prevention serves two aims, namely to protect the public and to help the detainee to become capable of leading a socially responsible life outside prison. Even though it could be said that penalties mainly serve punitive purposes whereas measures of correction and prevention are mainly aimed at prevention, it is nonetheless clear that the aims of these sanctions partly overlap. Furthermore, given its unlimited duration, preventive detention may well be understood as an additional punishment for an offence by the

persons concerned and entails a clear deterrent element. In any event, as the Court has previously found, the aim of prevention can also be consistent with a punitive purpose and may be seen as a constituent element of the very notion of punishment (see *Welch*, cited above, § 30).

131. As regards the procedures involved in the making and implementation of orders for preventive detention, the Court observes that preventive detention is ordered by the (criminal) sentencing courts. Its execution is determined by the courts responsible for the execution of sentences, that is, courts also belonging to the criminal justice system, in a separate procedure.

132. Finally, as to the severity of preventive detention – which is not in itself decisive (see paragraph 120 above) – the Court observes that this measure entails detention which, following the change in the law in 1998, no longer has any maximum duration. Moreover, the suspension of preventive detention on probation is subject to a court's finding that there is no danger that the detainee will commit further (serious) offences (see Article 67d of the Criminal Code, paragraph 53 above), a condition which may be difficult to fulfil (see to that effect also the Commissioner for Human Rights' finding that it was "impossible to predict with full certainty whether a person will actually re-offend"; § 203 of his report, cited in paragraph 76 above). Therefore, the Court cannot but find that this measure appears to be among the most severe – if not the most severe – which may be imposed under the German Criminal Code. It notes in this connection that the applicant faced more far-reaching detriment as a result of his continued preventive detention – which to date has been more than three times the length of his prison sentence – than as a result of the prison sentence itself.

133. In view of the foregoing the Court, looking behind appearances and making its own assessment, concludes that preventive detention under the German Criminal Code is to be qualified as a "penalty" for the purposes of Article 7 § 1 of the Convention.

134. The Court further reiterates that it has drawn a distinction in its case-law between a measure that constitutes in substance a "penalty" – and to which the absolute ban on retrospective criminal laws applies – and a measure that concerns the "execution" or "enforcement" of the "penalty" (see paragraph 121 above). It therefore has to determine whether a measure which turned a detention of limited duration into a detention of unlimited duration constituted in substance an additional penalty, or merely concerned the execution or enforcement of the penalty applicable at the time of the offence of which the applicant was convicted.

135. The Court observes that in the Government's submission the sentencing court had ordered the applicant's preventive detention without stating a time-limit. They argued that the prolongation of that measure therefore merely concerned the execution of the penalty imposed on the applicant by the sentencing court. The Court is not convinced by that argument. As it has found above (see paragraphs 99-101 and 123), at the time the applicant committed his offence, the sentencing court's order for his preventive detention, read in conjunction with Article 67d § 1 of the Criminal Code in the version then in force, meant that the applicant could be kept in preventive detention for a maximum period of ten years. The prolongation of the applicant's preventive detention by the courts

responsible for the execution of sentences following the change in Article 67d of the Criminal Code therefore concerns not just the execution of the penalty (preventive detention for up to ten years) imposed on the applicant in accordance with the law applicable when he committed his offences. It constitutes an additional penalty which was imposed on the applicant retrospectively, under a law enacted after the applicant had committed his offence.

136. In this respect the present case must again be distinguished from that of *Kafkaris* (cited above). Mr Kafkaris was sentenced to life imprisonment in accordance with the criminal law applicable at the time of his offence. It could not be said that at the material time, a life sentence could clearly be taken to amount to twenty years' imprisonment (ibid., §§ 143 et seq.). By contrast, in the present case, the applicable provisions of criminal law at the time the applicant committed his offences clearly and unambiguously fixed the duration of a first period of preventive detention at a maximum of ten years.

137. In view of the foregoing, the Court concludes that there has been a violation of Article 7 § 1 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

138. 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

139. The applicant claimed at least 172,000 euros (EUR) in respect of non-pecuniary damage for the long period of unlawful detention undergone since 2001 in clear contravention of Articles 5 and 7 and despite the fact that he had brought numerous sets of lengthy proceedings in the domestic courts in an attempt to obtain his release. He referred to the amounts of compensation awarded by the Court in the cases of *Karataş v. Turkey* ([GC], no. 23168/94, ECHR 1999-IV), and *Kokkinakis v. Greece* (25 May 1993, Series A no. 260-A) and argued that he should be granted compensation amounting to EUR 2,000 per month, that being the average monthly income attainable in Germany. As to pecuniary damage, the applicant submitted that he had been granted legal aid in the proceedings before the domestic courts. The applicant's lawyer requested any payments to be made into his own account, referring to his power of attorney authorising him, *inter alia*, to accept any payments to be made by the other party to the proceedings.

140. The Government considered the applicant's claim in respect of non-pecuniary damage to be excessive. They argued that under section 7 § 3 of the Act on Compensation for Criminal Prosecution Measures (*Gesetz über die Entschädigung für Strafverfolgungsmaßnahmen*), EUR 11 per day was payable in compensation for unlawful detention. They left it to the Court's discretion to fix an equitable amount.

141. The Court observes that it has found that the applicant's detention beyond the ten-year period breached both Article 5 § 1 and Article 7 § 1 of the Convention and that the applicant has thus been detained in breach of the Convention since 8 September 2001 (see paragraph 19 above). This must have caused non-pecuniary damage such as distress and frustration, which cannot be compensated solely by the findings of violations. Having regard to all the circumstances of the case and making its assessment on an equitable basis, it awards the applicant EUR 50,000 under this head, plus any tax that may be chargeable. Having regard to the power of attorney presented by the applicant's lawyer, which authorises him to accept any payments to be made by the other party to the proceedings, it orders this sum, awarded to the applicant, to be paid to him into his lawyer's fiduciary bank account.

B. Costs and expenses

142. The applicant, who was granted legal aid in the proceedings both before the domestic courts and before the Court, did not submit a claim for costs and expenses incurred in either of these proceedings. Accordingly, the Court does not make any award under this head.

C. Default interest

143. 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 5 § 1 of the Convention;

2. *Holds* that there has been a violation of Article 7 § 1 of the Convention;

3. *Holds*

   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 50,000 (fifty thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable, to be paid into his lawyer's fiduciary bank account;

   (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;

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

Done in English and French, and notified in writing on 17 December 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek, Registrar — Peer Lorenzen, President

Sentenza del 17 maggio 2010, Grande Camera, causa KONONOV c. Lettonia (in particolare, par. 76-149)

In the case of Kononov v. Latvia,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Boštjan M. Zupančič, *President*,
Corneliu Bîrsan,
Elisabet Fura-Sandström,
Alvina Gyulumyan,
Egbert Myjer,
David Thór Björgvinsson,
Ineta Ziemele, *judges*,
and Santiago Quesada, *Section Registrar*,

Having deliberated in private on 19 June 2008,

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

PROCEDURE

1. The case originated in an application (no. 36376/04) against the Republic of Latvia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental freedoms ("the Convention") by a Russian National, Mr Vassili Makarovich Kononov (" the applicant"), on 27 August 2004.

2. Before the Court, the applicant was represented by Mr M. Ioffé, a lawyer practising in Riga. The respondent Government ("the Government") were represented by the Agent Ms I. Reine. The Russian Government exercised its right of third-party intervention in accordance with Article 36 § 1 of the Convention and were represented by the representative of the Russian Federation at the Court, Ms V. Milinchuk.

3. The applicant alleged, in particular, that his conviction for "war crimes" as a result of his participation in a punitive military expedition in the Second World War had violated Article 7 of the Convention.

4. A hearing took place in public in the Human Rights Building, Strasbourg, on 20 September 2007 (Rule 59 § 3 of the Rules of Court).

There appeared before the Court:

(a) *for the Government*

Ms I. REINE, *Agent,*
Mr E. PLAKSINS, *Counsel*;

(b) *for the applicant*

Mr	M. IOFFÉ,	*Counsel,*
Mrs	M. ZAKHARINA,	
Mr	Y. LARINE,	*Advisors;*

(c) *for the Russian Government*

Mrs V. MILINCHUK,	*representative of the Russian Federation at the Court,*
Mr A. KOVALEV,	*Professor at the Diplomatic Academy, Ministry of Foreign Affairs,*
Miss M. MOLODTSOVA,	*Second Secretary, Permanent Representation of the Russian Federation to the Council of Europe.*

The Court heard addresses by Mrs Reine, Mr Ioffé and Mrs Milinchuk.

5. By a decision of 20 September 2007, the Chamber declared the application partly admissible following a hearing on the admissibility and merits of the case (Rule 54 § 3).

6. On 1 February 2008 the Court changed the composition of its Sections (Rule 25 § 1). The application in the present case nevertheless continued to be examined by the Chamber of the Former Third Section as previously composed.

7. The applicant and the Government each lodged additional written observations (Rule 59 § 1). Observations were also received from the Russian Government (Article 36 § 1 of the Convention and Rule 44 § 1 (b)).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1923 in the municipality of Mērdzene (district of Ludza, Latvia). He held Latvian nationality until 12 April 2000, when he was granted Russian nationality by a special decree issued by the President of the Russian Federation, Mr V. Putin.

A. Events prior to 27 May 1944

9. On 22 June 1941 Nazi Germany attacked the Soviet Union, of which Latvian territory formed a part. The lightning advance of the German Army (*Wehrmacht*) forced the Red Army to leave the Baltic region and withdraw towards Russia. The applicant, who was living near the border at the time, followed. By 5 July 1941 the whole of Latvia had been overrun by the *Wehrmacht*. The three Baltic States and part of Belarus were joined to form a vast territory administered by the Reich Commissariat for the Eastern Territories (*Reichskomissariat Ostland*), which took orders directly from Berlin.

10. After arriving in Russia the applicant initially found work on a collective farm (*kolkhoze*). He was subsequently employed as a metal turner in a factory that manufactured military equipment. In 1942 he was called up

as a soldier in the Soviet Army and assigned to the reserve regiment of the Latvian Division. From 1942 to 1943 he received special training in sabotage operations (*подрывники* in Russian), during which he learnt how to organise and lead commando raids behind enemy lines. After completing his training he was immediately promoted to the rank of sergeant. Shortly afterwards, on the night of 23 June 1943 he and some twenty fellow combatants were parachuted into Belarus territory, which was then under German occupation, near the Latvian border and thus to the area where he was born.

11. After landing, the applicant joined a Soviet commando unit (composed of members of the "Red Partisans") called the "*Vilis Laiviņš*" after its leader. In March 1944 he was put in command of a platoon by his two immediate superiors, whose primary objectives according to the applicant were as follows: to sabotage military installations, communication lines and German supply points, to derail trains and to spread political propaganda among the local population. The applicant claimed to have derailed 16 military trains and caused 42 German military targets to be blown up.

B. Events of 27 May 1944

12. On 27 May 1944 the Red Partisans attacked the village of Mazie Bati (municipality of Mērdzene, district of Ludza), which at the time was approximately 80 kilometres from the front.

1. The facts as established by the domestic courts and acknowledged by the Government

13. The events of 27 May 1944, as established by the public prosecutor's office and the Latvian courts, and acknowledged by the respondent Government may be summarised as follows.

14. In February 1944 the German Army discovered and wiped out a group of Red Partisans led by Major Chugunov who were hiding in a barn in the village of Mazie Bati. The applicant and his unit immediately suspected the villagers of having spied for the Germans and of having turned Chugunov's men in to the enemy. It was then decided to take reprisals against the inhabitants of Mazie Bati.

15. Meanwhile, in constant fear of an attack by the Red Partisans, the male inhabitants of Mazie Bati – who up to then had not carried weapons – sought assistance from the German military administration, which ultimately provided every man with a rifle and two grenades "for his own protection".

16. On 27 May 1944 the applicant and his men, who were armed and wearing *Wehrmacht* uniforms to avoid arousing suspicion, entered the village where the inhabitants were preparing to celebrate Pentecost. The commando unit split up into a number of small groups each of which attacked a house on the applicant's orders. Several Partisans burst into the home of a farmer, Modests Krupniks, seized weapons they found there and ordered him out into the yard. When he pleaded with them not to kill him in front of his children, they ordered him to run towards the forest before

opening fire when he did so. Krupniks was left, seriously wounded, on the edge of the forest, where he died the following morning from a massive haemorrhage. Although the surviving villagers heard his screams and groans, they were too afraid to go to his aid.

17. Two other groups of Red Partisans attacked the homes of two other farmers, Meikuls Krupniks and Ambrozs Buļs. Meikuls Krupniks was seized in his bath and savagely beaten. The Partisans took the weapons they had found in the two villagers' homes to Meikuls Krupniks' house. There they fired several rounds of bullets at Buļs, Meikuls Krupniks and Krupniks' mother. According to the initial findings of fact by the prosecutor's office and the first-instance court, it was the applicant himself who killed Buļs. However, he was subsequently acquitted in relation to that incident (see paragraph 45 below). Meikuls Krupniks and his mother were seriously injured. The Partisans then doused the house and all the farm buildings (including the barn and stable) with petrol and set them alight. Krupniks' wife, who was nine months pregnant, managed to escape, but was seized by the Partisans and pushed through a window of the house into the flames. The following morning the surviving villagers found the charred remains of the four victims. Mrs Krupniks' body was identified by the badly burnt skeleton of the baby lying next to her.

18. A fourth group of Partisans burst into Vladislavs Šķirmants' home, where they found him on his bed with his one year-old son. After finding a rifle and two grenades hidden in a cupboard, they ordered Šķirmants – who was still in his underwear – to go out into the yard. They then bolted the door from the outside to prevent his wife following him, took him to a remote corner of the yard and shot him dead.

19. A fifth group attacked the home of Juliāns Šķirmants. After finding and seizing a rifle and two grenades, the Partisans took him out to the barn, where they executed him.

20. Lastly, a sixth group attacked Bernards Šķirmants' home, seizing the weapons they found there. They then proceeded to kill Mr Šķirmants, wound his wife and set all the farm buildings on fire. Mr Šķirmants' wife burnt to death in the fire with her dead husband lying beside her. According to the initial domestic decisions, it was the applicant himself who killed Šķirmants. However, he was later acquitted of that charge (see paragraph 45 below).

21. According to the prosecution's initial findings of fact, the Partisans pillaged the village before leaving and made off with clothes and food, in addition to the weapons. In particular, before leaving Juliāns Šķirmants' house they stole a tub of butter and a roll of material. This factual finding did not, however, appear in either the final judgment on the merits or the final judgment on the appeal on points of law, both of which refer only to the seizure of the weapons found in the villagers' homes.

2. The applicant's version of events

22. The applicant contests the factual findings of the domestic courts. In his estimation, all the victims of the attack were collaborators and traitors who had delivered Major Chugunov's platoon into the hands of the Germans

in February 1944 by ruse, while Meikuls Krupniks and Bernards Šķirmants were *Schutzmänner* (members of the German auxiliary police force). In February 1944 Chugunov's group of Partisans – comprising nine men, two women and a small child – had taken refuge in Krupniks' barn. Three women (Krupniks' mother and wife and Bernards Šķirmants' wife) brought them provisions and assured them that the *Wehrmacht* was some distance away. However, while the women kept watch, Šķirmants sent Krupniks to alert a German garrison stationed in the neighbouring village. On arriving in Mazie Bati, the German soldiers had machine-gunned the barn with incendiary bullets causing it to catch fire. Any member of Chugunov's group, including the women and the child, who tried to escape was shot dead. After the carnage, Krupniks' mother had removed the coats from the bodies. For its part, the German military command had rewarded the villagers concerned with firewood, sugar, alcohol and a sum of money.

23. Approximately a week before the events of 27 May 1944, the applicant and all the men in his platoon had received a summons from their commanding officer. He had informed them that an *ad hoc* military court composed of members of the detachment had delivered judgment against the inhabitants of Mazie Bati allegedly implicated in the betrayal of Chugunov's men and that their platoon was required to execute the order. More specifically, they were required to "bring the six *Schutzmänner* from Mazie Bati to stand trial". The applicant had refused to lead the operation as the villagers had known him since childhood and he feared for the safety of his parents, who lived in the neighbouring village. The commanding officer had bowed to his wishes and assigned the mission to another Partisan. In the events that had followed, it was that other Partisan – not the applicant – who had given the orders.

24. On 27 May 1944 the applicant had followed the men from his unit, but had not entered the village. He had hidden behind a bush from which he could see Modests Krupniks' house. Shortly afterwards he had heard cries and gunfire and seen plumes of smoke. A quarter of an hour later, the Partisans had returned alone. One had been wounded in the arm; another was carrying six rifles, ten grenades and a large quantity of cartridges. All the weapons and munitions had been seized in the villagers' homes. The applicant's men told him that they had not been able to carry out their mission as the villagers had "fled while firing at them and the Germans had arrived". In his submissions to the Court, the applicant denied that his comrades had pillaged Mazie Bati. On returning to base, the Partisans had been severely reprimanded by the commanding officer for failing to capture the wanted persons.

C. Materials from the historical archives

25. Documents furnished by the Government from the Latvian Historical National Archives (*Latvijas Valsts vēstures arhīvs*) provides the following information on the regime set up by the occupying German administration during the relevant period.

26. By a notice published in the newspapers on 24 July 1941, the *Reichskomissar* for the Eastern Territories, Hinrich Lohse, ordered all citizens to surrender any firearms and munitions in their possession to the

authorities within 24 hours. The notice reappeared on 1 October 1941 and 12 August 1942. Members of the Latvian auxiliary police were, however, permitted to carry firearms.

27. Subsequently, as the front drew closer to Latvian territory and the number of Red Partisans in the border regions increased, the rules concerning the possession and carrying of firearms were relaxed. In a letter of 22 October 1998 to the Principal Public Prosecutor's Office, the Director of the Archives stated that the village of Mazie Bati was within the jurisdiction of police station no. 2 in the district of Ludza at the relevant time. Since the records from that police station had been lost or destroyed, there was no documentary evidence available to give a precise explanation for the Germans' decision to arm the villagers of Mazie Bati. However, the archives did contain a written order from the local commanding officer of the Latvian auxiliary police to the officer in charge at police station no. 1 in the same district concerning the village of Čeverova (which was approximately 20 kilometres from Mazie Bati). This document, dated 25 February 1944, reads as follows:

> "In order to protect the population from attacks by pillaging bandits, I order you to set up a defence unit in the village of Čeverova (in the municipality of Cibla) composed of ten to fifteen trustworthy local men. Those selected will receive rifles and the necessary quantity of munitions. A local *aizsargs* [member of the National Guard] will take command of the defence unit. The selected men will be required to gather every night to mount guard and keep watch.
>
> Report to me by 28 February on the execution of [this order]."

28. Further, in a letter dated 27 April 1944 the same commanding officer instructed the mayors of three municipalities (including Cibla) to select a person of trust from the inhabitants of each village who would be responsible for the surveillance of strangers or suspicious individuals and informing the mayor or police where necessary. The letter stated that these measures were intended to counteract the acts of "bandits" (by which was meant the Red Partisans).

D. Subsequent events

29. In July 1944 the Red Army entered Latvia. On 13 October 1944 it laid siege to and took Riga. On 8 May 1945 the last German divisions surrendered and the entire Latvian territory passed into the control of the Red Army.

30. The applicant remained in Latvia after the war ended. He was decorated for his military exploits with the Order of Lenin, the highest distinction awarded in the USSR. In November 1946 he joined the Communist Party of the Soviet Union. In 1957 he graduated from the USSR Interior Ministry Academy. Subsequently, and until his retirement in 1988, he worked as an officer in various branches of the Soviet police force.

31. On 4 May 1990 the Supreme Council of the Soviet Socialist Republic of Latvia adopted the Declaration on the Restoration of Independence, which declared Latvia's incorporation into the USSR unlawful and null and void and restored force of law to the fundamental provisions of the 1922 Constitution. After two unsuccessful coups d'état, on

21 August 1991 the Supreme Council passed the Constitutional Law on the Statehood of the Republic of Latvia proclaiming full independence with immediate effect.

32. By a law passed on 6 April 1993, the Supreme Council inserted into the special section of the former Criminal Code then in force a new Chapter 1-a, which contained provisions criminalising acts such as genocide, crimes against humanity or peace, war crimes and racial discrimination. A new Article 68-3 dealt with war crimes, which carried sentences of between three and fifteen years' imprisonment or life imprisonment. The same law also inserted an Article 6-1 into the Code permitting the retrospective application of the criminal law with respect to crimes against humanity and war crimes and an Article 45-1, which exempted such offences from statutory limitation.

E. The criminal proceedings against the applicant and his conviction

1. The first preliminary investigation and trial

33. In January 1998 the Centre for the Documentation of the Consequences of Totalitarianism (*Totalitārisma seku dokumentēšanas centrs*), an affiliate of the Constitution Protection Bureau (*Satversmes aizsardzības birojs*), launched a criminal investigation into the events of 27 May 1944. It considered that the applicant could have committed an offence under Article 68-3 of the former Criminal Code. On 28 July 1998 the investigation file was sent to the Principal Public Prosecutor's Office (*Ģenerālprokuratūra*).

34. In a decision of 2 August 1998, the Principal Public Prosecutor's Office charged the applicant with war crimes. On 10 October 1998 the applicant was brought before the Riga Central Court of First Instance, which ordered his detention pending trial.

35. On 19 November 1998 the prosecution announced that it had completed its investigation and served the papers on the applicant and his lawyer. On 17 December 1998 the applicant completed his examination of the documents in the investigation file. The following day the prosecution drew up the final bill of indictment (*apsūdzības raksts*) and forwarded the file to the Riga Regional Court, which would sit as the court of trial. According to the bill of indictment, the prosecution had also identified most of the other former Partisans who had taken part in the Mazie Bati operation. However, they had all died in the interim.

36. The substance of the charges was examined by the Riga Regional Court at a hearing on 21 January 2000 at which the applicant pleaded not guilty. He repeated his account of the events of 27 May 1944, stressing in particular that all the victims of the attack, including Meikuls Krupniks' pregnant wife, had been armed *Schutzmänner*. He denied any personal involvement in the events. As to the various documents, press articles and post-war works that attested to the contrary, he maintained that he had knowingly allowed the historical facts to be distorted for his own personal glory and in order to gain certain benefits. However, the Regional Court found that the file contained ample evidence of his guilt, namely:

(a) The depositions of eight children of the villagers killed by the Red Partisans on 27 May 1944. Three of these children were direct eye witnesses who had seen their parents killed. The other five had been in the neighbouring village at the time or too young to understand what was happening. However, they recalled accounts of the events related by members of their families.

(b) The depositions of 19 witnesses, including four direct eye witnesses.

(c) Various post-war records drawn up and signed by the applicant in person in which his account of the events in Mazie Bati exactly matched the facts as reconstructed by the prosecution. In particular, he had expressly admitted shooting Ambrozs Buļs dead and burning six people alive.

(d) Various records signed by the applicant's commanding officers, which gave a like account.

(e) A handwritten exercise book seized at the applicant's home containing the outline of an autobiographical work he had planned to write. The description it contained of the attack on 27 May 1944 was generally consistent with the facts as established by the prosecution.

(f) Various historical and encyclopaedic works, together with press articles and verbal accounts by the applicant which had been published in Soviet newspapers in the 1960s and 1970s.

(g) Depositions by the author of one of the aforementioned articles attesting to the fact that the description given in his article was based on the applicant's own account.

(h) Various documents from the Latvian National Archives containing information on the villagers from Mazie Bati, and on the actions and decisions of the German military administration at the material time.

(i) Depositions by a woman who had worked as a radio operator for the applicant's unit during the war.

37. On the basis of all this evidence, the Regional Court concluded that the applicant had perpetrated acts that were prohibited by the Charter of the International Military Tribunal for Nuremberg of 8 August 1945, the Hague Convention of 18 October 1907 concerning the laws and customs of war on land, and the Geneva Convention of 12 August 1949 relative to the Protection of Civilian Persons in Time of War. Consequently, it found him guilty of the offence set out in Article 68-3 of the former Criminal Code and imposed an immediate six-year custodial sentence. Both the applicant and the prosecution appealed against that judgment to the Criminal Affairs Division of the Supreme Court..

38. In a judgment of 25 April 2000, the Criminal Affairs Division quashed the impugned judgment and returned the case file to the Principal Public Prosecutor's Office with instructions to make additional inquiries. It stated in its judgment that there were lacunae in the Regional Court's

reasoning. In particular, the Regional Court had failed to deal clearly with questions that were decisive to the outcome of the case. Thus, issues such as whether Mazie Bati had in fact been within an "occupied territory", whether the applicant and his victims could be classified as "combatants" and "non-combatants" respectively and whether the fact that the German military administration had armed the villagers would make them "prisoners of war" in the event of their arrest remained unresolved. In addition, the Criminal Affairs Division stated that in the special circumstances of the case, the prosecution should have consulted specialists on history and international criminal law. It also decided to vary the preventive measure that had been imposed on the applicant and ordered his immediate release.

39. The prosecution appealed on points of law against the judgment of the Criminal Affairs Division. In a judgment of 27 June 2000, the Supreme Court Senate dismissed that appeal, although it amended the reasons that had been given by the Criminal Affairs Division for referring the case for further investigation. In particular, it ruled that the Criminal Affairs Division's direction that specialist advice should have been taken on international law was unfounded as expert evidence could not be sought on questions of pure law, which were solely for the courts to decide.

2. The second preliminary investigation and trial

40. On 17 May 2001 the applicant was again charged with an offence under Article 68-3 of the former Criminal Code after a fresh preliminary investigation by the Principal Public Prosecutor's Office. The Supreme Court Senate designated the Latgale Regional Court as the court of first instance.

41. The substance of the charge against the applicant was examined by the Latgale Regional Court on 3 October 2003. In a judgment delivered at the end of that hearing, the Regional Court acquitted the applicant of war crimes, but found him guilty of banditry, an offence under Article 72 of the former Criminal Code carrying a sentence of between three and fifteen years' imprisonment.

42. After analysing the situation in which Latvia had found itself as a result of the events in 1940 and the German invasion, the Regional Court concluded that the applicant could under no circumstances be equated to a "representative of the occupying forces". On the contrary, he had fought for the liberation of the country against the occupying forces of Nazi Germany. As Latvia had been incorporated into the USSR, the applicant's conduct had to be considered in the light of Soviet law. In addition, he could not reasonably have foreseen that he would one day be classified as a "representative of the Soviet occupation forces". With regard to the Mazie Bati operation, the Regional Court accepted that the villagers had collaborated with the German military administration and handed over Chugunov's group of Red Partisans to the *Wehrmacht* and that the attack on the village had been carried out pursuant to the judgment of the *ad hoc* military court set up within the detachment. The Regional Court also accepted that the deaths of the six men from Mazie Bati could be regarded as having been necessary and justified by considerations of a military order. However, it found that such justification did not extend to the killing of the

three women or the burning down of the village buildings. Consequently, as they had not confined themselves to executing the *ad hoc* military court's judgment, but had acted beyond their authority, both the applicant and his men had committed an act of banditry for which they bore full responsibility. Furthermore, as the commanding officer, the applicant was responsible for acts committed by his unit. However, since banditry did not fall into the category of offences exempt from statutory limitation, the Regional Court relieved the applicant of criminal liability on the ground that the prosecution of the offence was statute barred.

43. Both parties appealed against that judgment to the Criminal Affairs Division of the Supreme Court. Relying, *inter alia*, on Article 7 § 1 of the Convention, the applicant sought a full acquittal, arguing that the law had been applied against him retrospectively. The prosecution submitted that the Regional Court had made a number of serious errors of fact and law. In its view, the Regional Court had completely neglected the fact that Latvia's incorporation into the USSR was contrary to the Latvian Constitution of 1922 and to international law and therefore unlawful and that the Republic of Latvia had continued to exist *de jure*. Accordingly, the applicant's conduct in 1944 could and should have been analysed under Latvian and international law, rather than Soviet law. Further, the prosecution criticised the Regional Court's assessment of the evidence in the case. In its view, the court had relied on a series of assertions by the applicant that were unsupported by any evidence. This was true of the claims that the villagers from Mazie Bati were armed collaborators of the German administration who had helped the *Wehrmacht* to wipe out Chugunov's Partisans; that a "court" had been set up within the applicant's detachment; and that the real purpose of the Mazie Bati operation was not the summary execution of the villagers, but their arrest so they could be brought to trial. In the prosecution's submission, the evidence it had assembled tended to indicate the opposite. The prosecution complained that the Regional Court had accepted the applicant's depositions blindly without analysing the file as a whole.

44. In a judgment of 30 April 2004, the Criminal Affairs Division allowed the prosecution's appeal, quashed the impugned judgment and found the applicant guilty of the offence under Article 68-3 of the former Criminal Code. After reviewing the evidence referred to in the judgment of 21 January 2000 (see paragraph 36 above), it noted:

> "... Thus, V. Kononov and the Partisans from the special group he commanded stole the weapons that had been delivered to enable the villagers to defend themselves and killed nine civilians from the village, burning six of them – including three women, one in the final stages of pregnancy – alive in the process. They also burnt down two farms.
>
> By attacking those nine civilians from the village of Mazie Bati, who had not taken part in the fighting, by stealing their weapons and killing them, V. Kononov and the Partisans under his command ... committed an appalling violation of the laws and customs of war as set out in:
>
> – point (b) of the first paragraph of Article 23 of the Hague Convention of [18] October 1907 concerning the laws and customs of war on land, which is binding on all civilised nations and forbids the treacherous killing or wounding of members of the civil population; Article 25 [of the Hague Convention], which prohibits attacks by

whatever means of villages, dwellings or buildings which are undefended; and the first paragraph of Article 46 [of the Hague Convention], which lays down that family honour and rights, and the lives of persons and private property must be respected.

– Article 3 § 1, point (a), of the Geneva Convention of 12 August 1949 relative to the Protection of Civilian Persons in Time of War ..., which lays down that persons taking no active part in the hostilities must not be subjected to violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; point (d) [of the same paragraph], which provides ... that the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples is prohibited; Article 32, which prohibits murder, torture and all other brutality against protected persons; and Article 33, which provides that no protected person may be punished for an offence he or she has not personally committed and prohibits collective penalties, and all measures of intimidation, pillage and reprisals against protected persons and their property.

– Article 51 § 2 of the Protocol Additional to the [aforementioned] Convention and relating to the Protection of Victims of International Armed Conflicts adopted on 8 June 1977 ..., which lays down that the civilian population as such, as well as individual civilians, shall not be the object of attack and prohibits acts or threats of violence the primary purpose of which is to spread terror among the civilian population; § 4, point (a), [of the same Article], which prohibits indiscriminate attacks not directed at a specific military objective; § 6 [of the same Article], which prohibits attacks against the civilian population or civilians by way of reprisals; Article 75 § 2, point (a) ..., which prohibits violence to the life, health, or physical or mental well-being of persons, in particular, murder, torture of all kinds, whether physical or mental, and mutilation; and point (d) [of the same paragraph], which prohibits collective punishments.

By acting with particular cruelty and brutality and burning a pregnant villager alive ..., V. Kononov and his Partisans openly flouted the laws and customs of war set out in the first paragraph of Article 16 of the Geneva Convention ..., which lays down that expectant mothers shall be the object of particular protection and respect.

Likewise, by burning down the [dwelling] houses and other buildings belonging to the villagers ... Meikuls Krupniks and Bernards Šķirmants, V. Kononov and his Partisans contravened the provisions of Article 53 of that Convention, which prohibits the destruction of real property except where such destruction is rendered absolutely necessary by military operations and Article 52 of the first Protocol Additional ... which lays down that civilian property must not be the object of attack or reprisals.

...

In the light of the foregoing, the acts perpetrated by V. Kononov and his men must be classified as war crimes within the meaning of the second paragraph, point (b), of Article 6 of the Charter of the International Military Tribunal for Nuremberg, which lays down that the murder or torture of civilians in occupied territory, the plunder of private property, the wanton destruction of villages, or devastation that is not justified by military necessity constitute violations of the laws or customs of war, that is to say war crimes.

The acts perpetrated by V. Kononov and his Partisans must also be classified as 'grave breaches' within the meaning of Article 147 of the ... Geneva Convention...

Consequently ..., V. Kononov is guilty of the offence under Article 68-3 of the Criminal Code...

...

The material in the case file shows that after the war, the surviving members of the families of the [people] killed were ruthlessly persecuted and subjected to reprisals. Following the restoration of Latvian independence, all those killed were rehabilitated. It was stated in their rehabilitation certificates that they [had] not committed 'crimes

against peace [or] humanity, criminal offences ... or taken part ... in political repression ... by the Nazi regime'...

...

V. Kononov must be regarded as being subject [to the provision governing] the war crime [in question], in accordance with Article 43 of the First Protocol Additional to the Geneva Convention ..., which provides that combatants, that is to say, those who have the right to participate directly in hostilities, are the members of the armed forces of a Party to a conflict.

During the Second World War, V. Kononov was a member of the armed forces of a belligerent party, [namely] the USSR, and played an active part in military operations it had organised.

V. Kononov was sent on a special mission to Latvia with clear orders to fight behind enemy lines [and] to organise explosions there.

The platoon led by V. Kononov cannot be regarded as a group of volunteers because it was organised and led by the armed forces of one of the belligerent parties (the USSR); this is confirmed by the material in the case file. Similarly, at the time the crime of which he is accused was committed, V. Kononov was also acting as a combatant, leading an armed group which had the right to take part in military operations as an integral part of the armed forces of a belligerent party. ...

...

V. Kononov fought on Latvian territory occupied by the USSR and neither the fact that there was at that time dual occupation (Germany being the other occupying power), nor the fact that the USSR was part of the anti-Hitler coalition, affects his status as a war criminal...

...

The Criminal Affairs Division considers that all the villagers killed at Mazie Bati must be regarded as civilians within the meaning of Article 68-3 of the Criminal Code ... and the provisions of international law.

By virtue of Article 50 of the first Protocol Additional to the Geneva Convention ..., a civilian is defined as any person who does not belong to one of the categories of persons referred to in Article 43 of that Protocol or Article 4(A) of the Convention.

The attributes described in the aforementioned Articles, which are specific to [certain] categories of people and exclude them from the definition of civilians, did not apply to the villagers who were killed.

The fact that they had obtained weapons and munitions did not make them combatants and does not attest to any intention on their part to carry out any military operation.

...

It has been established ... that Chugunov's group of Partisans was wiped out by a German military detachment, this is also confirmed by reconnaissance headquarters' records ...

The case file does not contain any evidence to show that the villagers took part in that operation.

The fact that Meikuls Krupniks may have informed the Germans of the presence of Partisans in his barn did not exclude him from the category of 'civilians'.

Mr Krupniks lived on territory occupied by Germany and there is no doubt that the presence of Partisans on his farm in wartime constituted a danger to both him and his family.

...

The fact that the villagers had weapons in their homes and [regularly] kept watch at night does not signify that they were taking part in military operations, but attests to a genuine fear of attack.

All citizens, whether in wartime or peacetime, have the right to defend themselves and their families if their lives are in danger.

The case file shows that the Red Partisans, Chugunov's group included, used violence against civilians; thus causing the civilian population to fear for its safety.

The victim [K.] gave evidence that the Red Partisans pillaged houses and often took food supplies.

The criminal conduct of the Partisans was noted in the reports of commanding officers [S.] and [Č.], which indicate that the Red Partisans pillaged and murdered and committed other crimes against the local population. Many people had the impression that they were not really engaged in combat but in foraying. ...

...

The case file shows that of the villagers who were killed at Mazie Bati in 1943 and 1944 [only] Bernards Šķirmants and [his wife] were members of the Latvian National Guard (*aizsargi*). The archives do not contain any information to show that any of the other victims had participated in the activities of that or any other organisation...

The Criminal Affairs Division considers that the fact that the aforementioned persons participated in the activities of the Latvian National Guard does not enable them to be classified as combatants, as they have not been found ... to have taken part in military operations organised by the armed forces of a belligerent party.

It has been established ... that no German military formation was in the village of Mazie Bati and that the villagers were not performing any military duty, but, [on the contrary], were farmers.

At the time of the events [in issue], they were at home and preparing to celebrate Pentecost. Among the dead were not only men (who were armed) but also women, one of whom was in the final stages of pregnancy and thus entitled to special ... protection under the Geneva Convention.

In classifying those who were killed as civilians, the Criminal Affairs Division is in no doubt about their status; however, even supposing it were, the First Protocol Additional to the Geneva Convention states that in case of doubt everyone shall be considered to be a civilian.

...

Since Latvia has not acceded to the Hague Convention of 1907, the provisions of that instrument cannot serve as a basis for [finding] a violation.

War crimes are prohibited and all countries are required to convict anyone guilty of them because such crimes are an integral part of international law, irrespective of whether the parties to the conflict were parties to international treaties. ...”

45. For the aforesaid reasons the Criminal Affairs Division found that the applicant's conduct on 27 May 1944 constituted a war crime, within the meaning of Article 68-3 of the former Criminal Code. However, it excluded from the grounds for the charge two allegations that had been made but not proved to the requisite standard by the prosecution, namely the alleged murders of Ambrozs Buļs and Bernards Šķirmants by the applicant (see paragraphs 17 and 20 above) and the torture to which he was alleged to have subjected the villagers. After finding the applicant guilty of a serious offence and noting that he was now aged, infirm and harmless, the Criminal Affairs Division imposed an immediate custodial sentence of one year and

eight months, which the applicant was deemed to have served as he had spent longer than that in pre-trial detention.

46. The applicant appealed on points of law to the Supreme Court Senate, which dismissed his appeal in a judgment of 28 September 2004 in the following terms:

> "... In finding that V. Kononov was a combatant and had committed the offence in question on the territory occupied by the USSR, the Criminal Affairs Division based its judgment on the decisions of the higher representative bodies of the Republic of Latvia, on the relevant international conventions and on other evidence, taken as a whole, which had been verified and assessed in accordance with the rules of criminal procedure.
>
> In the declaration by the Supreme Council ... on 4 May 1990 on the restoration of the independence of the Republic of Latvia, it was acknowledged that the ultimatum delivered on 16 June 1940 to the Government of the Republic of Latvia by the former Stalinist USSR should be regarded as an international crime, as Latvia was occupied and its sovereign power abolished as a result. [However] the Republic of Latvia continued to exist as a subject of international law, as was recognised by more than fifty States worldwide...
>
> ...
>
> After analysing the merits of the judgment, the Senate ... considers that, to the extent that the Criminal Affairs Division found that V. Kononov came within the scope of Article 68-3 of the Criminal Code, ... his acts were correctly characterised, as, in his capacity as a belligerent and combatant on Latvian territory occupied by the USSR, he has violated the laws and customs of war, in that he planned and directed a military operation aimed at taking reprisals against civilians, namely peaceable inhabitants of the village of Mazie Bati, nine of whom were killed ... [and] whose property was stolen [or] burnt.
>
> As the court of appeal (rightly) noted, neither the fact that Latvian territory was subjected to two successive occupations in the Second World War by two States (one of which was Germany; a 'dual occupation' in the words of the court of appeal), nor the fact that the USSR was a member of an anti-Hitler coalition, changed V. Kononov's status as a person guilty of a war crime.
>
> As regards the allegation ... that, by finding V. Kononov guilty of the war crime in question the court [of appeal] violated the provisions of Article 6 of the Criminal Code ... concerning the temporal applicability of the criminal law, the [Senate] considers that it must be rejected for the following reasons.
>
> The judgment shows that the court of appeal applied the Conventions, namely the Geneva Convention of 12 August 1949 .., and [its] Protocol Additional of 8 June 1977 ..., to the war crime which V. Kononov was accused of, irrespective of when they entered into force. [This is consistent] with the United Nations Convention of 26 November 1968 on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. [The court of appeal stated] that the Republic of Latvia, which had been occupied by the USSR, had not been able to take a decision [to that end] earlier. By referring to the principle of the non-applicability of statutory limitation, the court of appeal complied with the obligations arising under the international treaties and held the persons guilty of committing the offences concerned criminally liable irrespective of the date they were perpetrated.
>
> Since the judgment characterised the violation of the laws and customs of war of which V. Kononov was accused as a war crime within the meaning of the second paragraph, point (b), of Article 6 of the Charter of the International Military Tribunal for Nuremberg ..., and, ... by virtue of the aforesaid United Nations Convention of 26 November 1968 ..., war crimes ... are not subject to statutory limitation, ... the Senate finds that his acts were correctly found to come within Article 68-3 of the Criminal Code...

There is no basis to the argument ... that ... the Declaration by the Supreme Council on 4 May 1990 on the Restoration of Independence of the Republic of Latvia and the Declaration by Parliament on 22 August 1996 on the Occupation of Latvia were mere political pronouncements which the court was precluded from using as a basis for its judgment and which could not be given binding force retrospectively.

The [Senate] finds that both declarations constitute State constitutional acts of indisputable legality.

In its judgment, [delivered after] assessing the evidence examined at the hearing, [the court of appeal] found that, in his capacity as a combatant, V. Kononov organised, commanded and led a Partisan military operation intent on taking reprisals through the massacre of the civilian population of the village of Mazie Bati and the pillage and destruction of the villagers' farms. That being so, the court of appeal rightly found that the acts of individual members of his group ... could not be seen as [mere] excesses on the part of those concerned.

In accordance with the criminal-law principles governing the responsibility of organised groups, members [of a group] are accomplices to the offence, independently of the role they play in its commission.

This principle of responsibility of the members of an organised group is recognised in the third paragraph of Article 6 of the Charter of the International Military Tribunal for Nuremberg, which lays down that leaders, organisers, instigators and accomplices participating in the execution of a common plan are responsible for all acts performed by any persons in the execution of that plan.

Consequently, the argument that the court of appeal had used an 'objective responsibility' test to find, in the absence of any evidence, V. Kononov guilty of acts perpetrated by members of the special group of Partisans he led, without examining his subjective attitude to the consequences, is unfounded. ..."

II. DECLARATIONS BY THE LATVIAN LEGISLATURE

47. On 4 May 1990 the Supreme Council adopted the Declaration of the Restoration of Independence of the Republic of Latvia and, on the same day, the Declaration on the Accession of the Republic of Latvia to Human Rights Instruments (*Par Latvijas Republikas pievienošanos starptautisko tiesību dokumentiem cilvēktiesību jautājumos*). The "accession" referred to in the declaration in practice meant a solemn, unilateral acceptance of the values embodied in the instruments concerned. Subsequently, most of the conventions referred to in the declaration were signed and ratified by Latvia in accordance with the established procedure.

48. On 22 August 1996 the Latvian Parliament adopted the Declaration on the Occupation of Latvia. The Declaration described the annexation of Latvian territory by the USSR in 1940 as a "military occupation" and an "illegal incorporation". The Soviet repossession of the territory at the end of the Second World War was referred to as the "re-establishment of an occupying regime".

III. RELEVANT DOMESTIC LAW

A. The Soviet Criminal Code of 1926

49. By a decree of 6 November 1940, the Supreme Soviet of the Soviet Socialist Republic (SSR) of Latvia replaced the Latvian Criminal Code of 1933 with the Criminal Code which Soviet Russia had adopted in 1926 and which thus became applicable in Latvia also. The relevant provisions of that Code, as worded during the Second World War, read as follows:

Article 2

"This Code shall apply to all citizens of the RSFSR [Russian Soviet Federated Socialist Republic] who commit socially dangerous acts on the territory of the RSFSR, or outside the USSR if they are apprehended on the territory of the RSFSR."

Article 3

"The liability of citizens from the other Soviet Federated Socialist Republics shall be determined in accordance with the laws of the RSFSR if they have committed offences either on the territory of the RSFSR or outside the territory of the USSR if they have been apprehended and handed over to a court or investigating authority on the territory of the RSFSR.

The liability of citizens of the Federated Socialist Republics for offences committed on the territory of the Union shall be determined in accordance with the laws of the place where the offence was committed."

Article 4

"The liability of aliens for offences committed on the territory of the USSR shall be determined in accordance with the laws of the place where the offence was committed."

Article 193-1

"Military crimes (*воинские преступления*) are offences committed by military personnel in the service of the Red Army of Workers and Peasants or the Red Navy of Workers and Peasants, or by persons assigned to maintenance teams or periodically conscripted into territorial detachments, [when such offences] are against the established order of military service and, owing to their nature and meaning, cannot be committed by citizens not serving in the Army or Navy. ..."

Article 193-3

"Any failure by a serviceman to execute a legitimate order issued in combat shall entail the application of measures for the protection of society in the form of at least three years' imprisonment.

Where such a failure has a deleterious effect on combat operations, the ultimate measure for the protection of society [that is, the death penalty] shall apply.

..."

Article 193-17

"Foraying (*мародерство*), that is to say divesting civilians of their belongings during combat by threatening them with weapons or on the pretext of requisitioning for military purposes, and removing personal belongings from the dead or injured for personal gain shall entail the application of the ultimate measure for the protection of society accompanied by confiscation of all the offender's belongings.

In the event of mitigating circumstances, [the sentence shall be reduced to] at least three years' imprisonment with strict solitary confinement."

Article 193-18

"Unlawful acts of violence by servicemen in wartime or during combat shall entail the application of measures for the protection of society in the form of at least three years' imprisonment with strict solitary confinement.

In the event of aggravating circumstances, the ultimate measure for the protection of society [shall be applied]."

50. Article 14 of the Code set statutory limitation periods of three, five or ten years, depending on the length of the sentence faced. However, the trial court was given an unfettered discretion not to apply the statutory limitation period in two sets of circumstances: namely, in cases concerning

"counter-revolutionary offences" and where the defendant was accused of "engaging in an active struggle against the working class and the revolutionary movement" as a senior official in the Tsarist regime or during the Russian Civil War (1917-1922). In the first of these eventualities, the defendant was not liable to the death penalty if the statutory limitation period was not applied. In the second, the court also retained a discretion to pass the death penalty.

B. Soviet, subsequently Latvian, Criminal Code of 1961

51. On 6 January 1961 the Supreme Soviet of the Latvian SSR introduced a new Criminal Code (*Kriminālkodekss*) replacing the 1926 Code. It entered into force on 1 April 1961 and the relevant provisions read as follows:

Article 72

(*amended by Law of 15 January 1998*)

"It shall be an offence punishable by between three and fifteen years' imprisonment ... or death ... to organise armed gangs with a view to attacking State undertakings, private undertakings, the authorities, organisations or private individuals or to be a member of such gangs or participate in attacks perpetrated by them."

Article 226

"The offences set out in this code shall be deemed military crimes where they are committed by military personnel ... against the established order of military service. ..."

Article 256

(*repealed by Law of 10 September 1991*)

"It shall be an offence punishable by between three and ten years' imprisonment or death to foray, unlawfully destroy property, engage in acts of violence against the population of a region liable to attack or to seize property unlawfully on the pretext of military necessity."

52. Article 45 of the Code stated that statutory limitation was not automatically applicable to crimes carrying the death penalty, but was within the discretion of the Court.

53. The Code remained in force – with a number of amendments – after Latvia regained its independence. On 10 September 1991 Article 256 was abolished. The Code was amended by a Law of 6 April 1993, which inserted the following provisions:

Article 6-1

"Persons guilty of crimes against humanity, genocide, crimes against peace or war crimes may be convicted irrespective of when the crimes were committed."

Article 45-1

"The statutory limitation of criminal liability shall not apply to persons guilty of crimes against humanity, genocide, crimes against peace or war crimes."

Article 68-3

"Any person found guilty of a war crime as defined in the relevant legal conventions, that is to say violations of the laws and customs of war through murder, torture, pillaging from the civil population in an occupied territory or from hostages or prisoners of war, the deportation of such people or their subjection to forced labour, or the unjustified destruction of towns and installations, shall be liable to life

imprisonment or to imprisonment for between three and fifteen years."

C. Latvian Criminal Code of 1998

54. With effect from 1 April 1999, the 1961 Code was replaced by the New Criminal Code (*Krimināllikums*), which was introduced in 1998. The substance of Articles 6-1, 45-1 and 68-3 of the former Code reappeared as Articles 5 § 4, 57 and 74 of the New Code. However, the maximum prison sentence that could be handed down in the event of no life sentence being imposed was increased to twenty years. The New Code also contained the following provisions:

Article 34 § 1

"Anyone who executes a criminal order or directive may be excused from liability for so doing only if he or she was unaware of its criminal nature and such nature was not apparent. However, even in such cases, criminal liability shall be incurred for crimes against humanity and peace, war crimes and genocide."

Article 75

"Anyone guilty of unlawful violence against the population of an area in which hostilities have been engaged and of the seizure or unlawful, violent destruction of the property of members of that population shall be liable to imprisonment for between three and fifteen years."

IV. RELEVANT INTERNATIONAL LAW

A. Law prior to the Second World War: the Hague Conventions (1899 and 1907)

55. The first legally binding codification of the laws and customs of war was the Hague Convention of 29 July 1899 concerning the laws and customs of war on land, which was adopted and opened for signature at the First Hague International Peace Conference. Appended to the Convention were a set of regulations concerning the laws and customs of war on land. Both the Convention and the Regulations entered into force on 28 June 1907.

56. On 18 October 1907 a second, identically named, convention was signed at the Second International Peace Conference. Like the 1899 Convention it contained regulations concerning the laws and customs of war on land. There were only slight differences between the two versions of the conventions and the regulations. Article 4 of the second Convention – which entered into force on 11 July 1910 – stated that it replaced the 1899 Convention. However, the 1899 Convention "remain[ed] in force as between the Powers which [had] signed it, and which d[id] not also ratify the [new] Convention". Both Germany and Russia ratified the 1907 Convention on 27 November 1909. However, it has never been ratified by Latvia.

57. The relevant paragraphs of the preamble to the 1907 Convention read as follows:

"... Thinking it important ... to revise the general laws and customs of war, either with a view to defining them with greater precision or to confining them within such limits as would mitigate their severity as far as possible;

[The High Contracting Parties h]ave deemed it necessary to complete and explain in certain particulars the work of the First Peace Conference, which, following on the

Brussels Conference of 1874, and inspired by the ideas dictated by a wise and generous forethought, adopted provisions intended to define and govern the usages of war on land.

According to the views of the High Contracting Parties, these provisions, the wording of which has been inspired by the desire to diminish the evils of war, as far as military requirements permit, are intended to serve as a general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants.

It has not, however, been found possible at present to concert regulations covering all the circumstances which arise in practice;

On the other hand, the High Contracting Parties clearly do not intend that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders.

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

..."

58. Article 2 of the 1907 Convention states:

"The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting powers, and then only if all the belligerents are parties to the Convention."

59. The relevant articles of the Regulations respecting the laws and customs of war on land – which are identical in both versions – read as follows:

Article 1

The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates;

2. To have a fixed distinctive emblem recognizable at a distance;

3. To carry arms openly; and

4. To conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination 'army'."

Article 2

"The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war."

Article 3

"The armed forces of the belligerent parties may consist of combatants and non-combatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war."

Article 22

"The right of belligerents to adopt means of injuring the enemy is not unlimited."

Article 23, paragraph 1

"In addition to the prohibitions provided by special Conventions, it is especially forbidden

...

(b) To kill or wound treacherously individuals belonging to the hostile nation or army;

...

(g) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war; ..."

Article 24

"Ruses of war and the employment of measures necessary for obtaining information about the enemy and the country are considered permissible."

Article 25

"The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited."

Article 28

"The pillage of a town or place, even when taken by assault, is prohibited."

Article 42

"Territory is considered occupied when it is actually placed under the authority of the hostile army.

The occupation extends only to the territory where such authority has been established and can be exercised."

Article 46

"Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.

Private property cannot be confiscated."

Article 47

"Pillage is formally forbidden."

Article 50

"No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible."

B. The Nuremberg and Tokyo Tribunals

1. The Charter of the International Military Tribunal for Nuremberg, its judgment and the "Nuremberg Principles"

60. The relevant provisions of the Charter of the International Military Tribunal for Nuremberg, which are annexed to the London Agreement of 1945, provided as follows:

Article 6

"The Tribunal established by the [London] Agreement ... for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

...

(b) War crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

...

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan."

Article 8

"The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires."

61. The relevant grounds of the judgment of the Nuremberg Tribunal delivered on 1 October 1946 read as follows:

"The Tribunal is ... bound by the Charter, in the definition which it gives both of war crimes and crimes against humanity. With respect to war crimes, however, as has already been pointed out, the crimes defined by Article 6, section (b), of the Charter were already recognised as war crimes under international law. They were covered by Articles 46, 50, 52, and 56 of the Hague Convention of 1907... That violations of these provisions constituted crimes for which the guilty individuals were punishable is too well settled to admit of argument.

But it is argued that the Hague Convention does not apply in this case, because of the 'general participation' clause in Article 2 of the Hague Convention of 1907. ...

Several of the belligerents in the recent war were not parties to this Convention.

In the opinion of the Tribunal it is not necessary to decide this question. The rules of land warfare expressed in the Convention undoubtedly represented an advance over existing international law at the time of their adoption. But the Convention expressly stated that it was an attempt 'to revise the general laws and customs of war', which it thus recognised to be then existing, but by 1939 these rules laid down in the Convention were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war which are referred to in Article 6 (b) of the Charter.

A further submission was made that Germany was no longer bound by the rules of land warfare in many of the territories occupied during the war, because Germany had completely subjugated those countries and incorporated them into the German Reich, a fact which gave Germany authority to deal with the occupied countries as though they were part of Germany. In the view of the Tribunal it is unnecessary in this case to decide whether this doctrine of subjugation, dependent as it is upon military conquest, has any application where the subjugation is the result of the crime of aggressive war. The doctrine was never considered to be applicable so long as there was an army in the field attempting to restore the occupied countries to their true owners, and in this case, therefore, the doctrine could not apply to any territories occupied after the 1st September, 1939. As to the war crimes committed in Bohemia and Moravia, it is a sufficient answer that these territories were never added to the Reich, but a mere protectorate was established over them.

..."

62. At point (a) of its Resolution no. 177 (II), the United Nations General Assembly directed the International Law Commission to "formulate the principles of international war recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal". At its second session in June and July 1950 the Commission formulated the seven fundamental principles that establish the basic principles of international law. Principle no. II states: "The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law".

2. The Charter of the International Military Tribunal for the Far East and its judgment

63. The Charter of the International Military Tribunal for the Far East (the Tokyo War Crimes Tribunal) was approved by a unilateral declaration of the Supreme Commander of the Allied Forces, General Douglas MacArthur, on 19 January 1946. The relevant part of Article 5 of the Charter provides:

> The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offenses which include Crimes against Peace.
>
> The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:
>
> ...
>
> (b) *Conventional War Crimes*: Namely, violations of the laws or customs of war;
>
> (c) ... Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan."

64. The relevant ground of the judgment of the Tokyo War Crimes Tribunal of 12 November 1948 is as follows (English translation):

> "... The effectiveness of some of the Conventions signed at The Hague on 18 October 1907 as direct treaty obligations was considerably impaired by the incorporation of a so-called 'general participation clause' in them, providing that the Convention would be binding only if all the Belligerents were parties to it. The effect of this clause, is, in strict law, to deprive some of the Conventions of their binding force as direct treaty obligations, either from the very beginning of a war or in the course of it as soon as a non-signatory Power, however insignificant, joins the ranks of the Belligerents. Although the obligation to observe the provisions of the Convention as a binding treaty may be swept away by operation of the 'general participation clause', or otherwise, the Convention remains as good evidence of the customary law of nations, to be considered by the Tribunal along with all other available evidence in determining the customary law to be applied in any given situation. ..."

C. Treaty law after the Second World War

1. Geneva Convention 1949 and the First Protocol Additional thereto

65. The Geneva Convention of 12 August 1949 relative to the Protection of Civilian Persons in Time of War, which entered into force on 21 October 1950, and the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), which was adopted on 8 June 1977 and entered into

force on 7 December 1978, provided more detailed codification of the rules of international humanitarian law. In addition to a number of general provisions that are identical in substance to those in The Hague Convention (such as total bans on pillaging, the unjustified destruction of civil properties and collective penalties; and the protection of private property and fundamental rights), they contained more detailed rules (such as a ban on torture and cruel treatment and on medical experiments not necessitated on medical grounds; special respect for pregnant women; and a ban on passing sentence without a previous judgment in proceedings affording minimum guarantees of fairness).

66. Article 5 of the Convention of 12 August 1949 reads as follows:

> Where in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.
>
> Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.
>
> In each case, such persons shall nevertheless be treated with humanity and, in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be."

67. Article 50 of Protocol I of 8 June 1977 provides:

> "1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 (A) (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.
>
> 2. The civilian population comprises all persons who are civilians.
>
> 3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character."

68. In a decision of 20 November 1991, the Supreme Council of Latvia ratified the State's accession to various Geneva Conventions and their additional protocols, including the Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 and the Protocol Additional relating to the Protection of Victims of International Armed Conflicts of 8 June 1977. Its ratification took effect on 24 June 1992.

2. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity

69. The relevant provisions of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, which was adopted by the United Nations General Assembly on 26 November 1968 and entered into force on 11 November 1970, read as follows:

Article 1

"No statutory limitation shall apply to the following crimes, irrespective of the date of their commission:

(a) War crimes as they are defined in the Charter of the International Military Tribunal, Nurnberg, of 8 August 1945 and confirmed by resolutions 3 (1) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, particularly the "grave breaches" enumerated in the Geneva Conventions of 12 August 1949 for the protection of war victims;

..."

Article 2

"If any of the crimes mentioned in article I is committed, the provisions of this Convention shall apply to representatives of the State authority and private individuals who, as principals or accomplices, participate in or who directly incite others to the commission of any of those crimes, or who conspire to commit them, irrespective of the degree of completion, and to representatives of the State authority who tolerate their commission."

Article 4

"The States Parties to the present Convention undertake to adopt, in accordance with their respective constitutional processes, any legislative or other measures necessary to ensure that statutory or other limitations shall not apply to the prosecution and punishment of the crimes referred to in articles 1 and 2 of this Convention and that, where they exist, such limitations shall be abolished."

70. The aforementioned Convention entered into force in respect of Latvia on 13 July 1992.

V. DOMESTIC PRACTICE: THE KRASNODAR AND KHARKOV TRIALS

71. At war with Nazi Germany since 22 June 1941, the Soviet Union immediately persuaded its allies in the West of the need to prosecute war criminals in the national courts. By a decree issued on 2 November 1942, the Presidium of the Supreme Soviet of the USSR established an "Extraordinary State Commission for ascertaining and investigating crimes perpetrated by the German-Fascist invaders and their accomplices, and the damage inflicted by them on citizens, collective farms, social organizations, State enterprises and institutions of the USSR" (*Чрезвычайная Государственная Комиссия по установлению и расследованию злодеяний немецко-фашистских захватчиков и их сообщников и причиненного ими ущерба гражданам, колхозам и общественным организациям, государственным предприятиям и учреждениям СССР*). The information gathered by this commission was used to try suspected war criminals, beginning with Soviet citizens accused of collaborating with the Germans and then, with the agreement of the Allies, the Germans themselves.

72. As to the substantive criminal law applicable to the aforementioned crimes, on 19 April 1943, the Presidium of the Supreme Soviet issued a decree laying down the sentences applicable to German fascist criminals responsible for the murder and ill-treatment of the Soviet civilian population and members of the Red Army who were taken prisoner, to spies and to Soviet traitors and their accomplices (*Указ "О мерах наказания для немецко-фашистских злодеев, виновных в убийствах и истязаниях*

советского гражданского населения и пленных красноармейцев, для шпионов и изменников Родины из числа советских граждан и их пособников"). The sentences prescribed by the decree were hanging for principals and forced labour for accomplices.

73. The first trial in which the provisions of the decree of 19 April 1943 were put into effect and the information obtained by the Extraordinary Commission was used took place at Krasnodar from 14 to 16 July 1943. Although the files compiled by the Commission referred to crimes committed by representatives of the Nazi occupying power (the summary executions of tens of thousands of civilians, including women, children, the elderly and prisoners of war), only eleven Soviet citizens – who had collaborated with or assisted the Germans – were charged and appeared before the Tribunal. Eight were sentenced to death for murder and high treason. The remaining three defendants were sentenced to forced labour for periods of up to 20 years.

74. The first trial of Nazi war criminals was held in Kharkov (now Kharkiv, Ukraine) from 15 to 18 December 1943. They were accused of a series of crimes: the gassing of thousands of people from Kharkov and the surrounding area in specially adapted vans, the ill-treatment and torture of prisoners of war and civilians, the destruction of villages, and the execution – in some instances by burning alive – of women, children, the elderly, the wounded and prisoners of war.

75. In his submissions, the prosecutor referred to the universally accepted provisions of international law and in particular the Hague Convention of 1907 on the laws and customs of war on land. He emphasised that thaat convention had been signed by Germany, which was therefore bound by its provisions. After admitting their own and their hierarchical superiors' guilt, the three accused were sentenced to death by hanging. The sentence was carried out the following day, 19 December 1943.

LAW

I. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

76. The applicant complained under Article 7 of the Convention that he had been the victim of the retrospective application of a criminal statute. He submitted, in particular, that the acts of which he was accused did not, at the time of their commission, constitute an offence under either domestic or international law, while the exception set out in the second paragraph of Article 7 could not apply in his case because the alleged offences manifestly did not come within its scope. Article 7 of the Convention provides:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
>
> 2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

A. The parties' submissions

1. The Government

77. The Government pointed out at the outset that the Court was not a court of fourth instance vis-à-vis the domestic courts and that, save in cases of manifest arbitrariness, it was not its role to call into question the factual findings of the domestic courts. The Court would therefore have to base its decision on the description of the events of 27 May 1944 set out in the decisions of the Latvian courts. The same applied to questions of law: since the Court's sole task was to interpret and apply the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto, it had no jurisdiction to rule on the interpretation of a domestic statute or international treaty, such as the Hague Convention of 1907. In the Government's submission, therefore, the Court was bound by the legal findings of the Latvian courts in the instant case, in particular as regards the classification of certain individuals as "combatants" or "civilians".

78. Turning to the facts, the Government did not categorically deny the applicant's assertion that the nine Mazie Bati villagers who were killed on 27 May 1944 had previously handed Major Chugunov's group of Red Partisans over to the Germans. However, in the Government's submission, even supposing the villagers had given the alert to officers of the *Wehrmacht*, that did not deprive them of their "civilian" status, especially as none of them had participated in the massacre of the Partisans hidden in the barn. Although the men from Mazie Bati had received weapons and munitions after the death of Chugunov's group, these had only been used to defend themselves and had not been carried openly. Lastly, the villagers had not organised any resistance against the applicant or his unit, despite being sufficiently armed and having enough time to set up their defences. It followed that the nine people killed by the applicant were indeed "civilians".

79. The Government also contested the applicant's assertion that the punitive expedition of 27 May 1944 was carried out on the orders of an *ad hoc* military tribunal organised by the Red Partisans. They cited the occasionally contradictory evidence that had been before the trial courts which, they said, showed either that no such body had existed or, if it had, that it was not operational. In any event, even supposing that judgment had been passed on the Mazie Bati villagers, it was manifestly unlawful as they were tried in their absence and in violation of the most fundamental rights of the defence.

80. As to the merits of the complaints under Article 7 of the Convention, the Government divided their submissions into answers to six consecutive questions which they submitted showed the absence of a violation of that provision in the instant case.

81. The first question was whether on 27 May 1944 there existed a definition of the concept of war crimes in international law and whether the applicant's acts fell within that definition? In order to answer that question, the Government began by recapitulating the history of that concept since the

American Civil War and its evolution through the First World War and the Treaty of Versailles of 1919. In that connection, they submitted that before the Nuremberg trials, a distinction had had to be drawn between a "violation of the laws and customs of war" and a "war crime". While international law had long since determined what constituted the laws and customs of war and, therefore, violations thereof, it did not lay down any penalties for individuals guilty of such violations. The *jus in bello* at the time only recognised the right of States to try and to punish their nationals or others for violations of the laws and customs of war committed on their territory. Issues regarding the exact nature of the responsibility (for instance, whether civil, criminal or disciplinary) and the applicable procedure (such as the relevant limitation periods and procedural safeguards and the competent authorities) remained within the exclusive jurisdiction of the States. The Hague Convention of 1907, on which the Latvian courts had relied in the instant case, was based precisely on the same logic. Although a marked tendency had since developed towards the criminalisation of such violations, it was only after the atrocities of the Second World War that the law in this sphere had evolved. The new treaties – the Geneva Conventions of 1949 and their additional protocols and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 1968 – had reduced the States' room for manoeuvre by imposing an obligation to criminalise the most serious violations of the laws and customs of war, to exclude them from statutory limitation, to investigate them and to try not only suspected principals, but also their accomplices.

82. In the instant case, the Government referred to the judgments of the Nuremberg and Tokyo Tribunals as evidence that by the beginning of the Second World War the substantive provisions of the Hague Convention of 1907 had been accepted in their entirety by the international community irrespective of whether or not individual States had acceded to that instrument. In other words, by 1939 the content of that Convention already formed part of the universal general international law. The acts committed by the applicant on 27 May 1944 very clearly constituted serious violations of the laws and customs set out in the Hague Convention. It was of little consequence whether they were also war *crimes* as, under international law at that time, the States were free to determine the nature of and responsibility for such acts in law. At all events, the domestic law applicable in 1944 characterised them as *crimes*. Lastly, by the time the applicant was charged, tried and convicted (from 1998 to 2004), the relevant provisions of international law characterised such acts as indisputably *criminal*, excluded the application of statutory limitation periods and imposed a clear, specific obligation on the States, including Latvia, to try and to punish offenders.

83. The second question posed by the Government was whether the applicant's conduct was criminal under the domestic law applicable on Latvian territory at the material time. The Government considered that it was. In their submission, the applicant's conduct constituted a "military crime" under Article 193-18 of the Soviet Criminal Code of 1926, an offence which carried the death penalty. The Code was in force on Latvian territory by virtue of the decree of 6 November 1940. It was therefore applicable to the

applicant both *ratione loci* and *ratione personae* (as a combatant in the Soviet army). Article 193-18 was sufficiently clear and precise to enable the applicant to understand and measure the consequences of his acts.

84. Further, the Government emphasised that the offence constituted by the impugned acts had remained on the statute book after the war and been incorporated into Article 256 of the Soviet Criminal Code of 1961. At no stage, therefore, could the applicant have considered that the legislature had decided to decriminalise them. Although it was true that continuity was temporarily suspended by a law of 10 September 1991 which repealed Article 256 so that war crimes were not formally a criminal offence for a time, shortly afterwards, on 6 April 1993, the legislature had inserted a new chapter on war crimes and crimes against humanity into the Code and the impugned acts were once again defined and made a criminal offence. In the Government's submission, that gap in the continuity did not in any way mean that the Latvian State had abandoned its resolve to bring guilty parties to justice, especially as it had a duty to do so under the international conventions.

85. Lastly, the Government pointed out that that there had been continuity with regard not only to the legal characterisation of the acts in question, but also to the exclusion of statutory limitation. The 1926 Code had already contained exceptions to the statutory-limitation rule which the 1961 Code had extended to all offences carrying the death penalty, including, therefore, the crime committed by the applicant. Further, during the period of Soviet annexation between 1940 and 1991, the legitimate authorities of the Latvian State had been objectively prevented from exercising their sovereign powers on the national territory. They had therefore been unable to bring criminal proceedings against the applicant or to apply a statutory-limitation rule in his case. Conversely, as soon as its independence was restored, Latvia had begun the process of investigating and punishing war crimes and crimes against humanity.

86. The third question according to the Government was whether the acts committed by the applicant on 27 May 1944 were "criminal according to the general principles of law recognised by civilised nations". On this point too, the Government observed that the fundamental provisions of the *jus in bello*, as codified by the Hague Convention of 1907, had become an integral part of customary international law before 1939. Consequently, it was the first paragraph of Article 7 of the European Convention on Human Rights which came into play in the instant case, rather than the second. However, were the Court not to accept that view, the Government submitted that the applicant's conviction fell within the exception set out in Article 7 § 2.

87. The fourth question was whether the applicant should have been aware on 27 May 1944 that his conduct was, objectively speaking, criminal. The Government argued that he should. Firstly, in the light of the "average individual" criterion, everyone was aware that torturing and killing unarmed people – the mother and father of young children and an elderly woman – and burning a pregnant mother alive were criminal acts and contrary to the most fundamental principles of humanity. Secondly, as the unit commander,

he should have been aware that he was responsible for the conduct of his men and under a duty to supervise them and punish any abuse.

88. Thirdly and lastly, the Government referred to certain measures that had been taken by the Soviet authorities from the onset of war in order to bring to trial and punish individual German war criminals, especially the Kharkov trial that had been held some six months before the acts of which the applicant was accused (see paragraphs 71-75 above). All these measures had received widespread media coverage both in the USSR and abroad, including in the official gazette of the Red Army. The applicant could not, therefore, have been unaware that he was engaging in the same type of misconduct as that for which a number of Germans had already been tried and convicted.

89. The Government said that the applicant's argument that he could not have foreseen that one day, owing to a turn in events, he would be called to account before the criminal courts had been refuted by the Court's judgment in the case of *Streletz, Kessler and Krenz v. Germany* ([GC], nos. 34044/96, 35532/97 and 44801/98, §§ 79-83 and 88-89, ECHR 2001-II). In any event, the applicant's hope or certainty that, for political reasons, he would go unpunished did not constitute sufficient reason for not convicting him. Referring in this connection to the German legal theorist Rudolf von Ihering, the Government submitted that the rule of law was founded upon the formal meaning of legal wording. If the rule of law was to be preserved, that objective meaning had to remain independent and in the last analysis be strictly separate from any subjective and arbitrary interpretation, no matter how prevalent it was as a "State practice" – all the more so if this prevalent arbitrary interpretation of the "law in (in)action" contradicting the law on the statute book was the result of collusion between the executive, legislative and judicial branches of the State. To maintain the separation of the objective and the subjective in law was the only way of ensuring that nobody was above the law.

90. The fifth question posed by the Government was whether it was possible in the sphere of war crimes to engage an individual's responsibility without also engaging the State's. Here, too, the answer was in the affirmative. In the Government's submission, while State responsibility and individual responsibility were not mutually exclusive, they were not interdependent either, for they pursued two different objectives: the former being to repair wrongs and reconcile nations, and the latter to ensure lawfulness and avoid impunity. The Government pointed out that it was precisely the principle of individual – as opposed to State – responsibility that had served as the basis for the establishment of the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda and the International Criminal Court.

91. Lastly, the sixth and final question put by the Government was whether Latvia had the right to try the applicant for violations of the laws and customs of war? In that connection, the Government cited the judgment delivered by the Permanent Court of International Justice on 7 September 1927 in the case of "*the S.S. Lotus*" (*Collection of Judgments of the PCIJ*, Series A.–No. 10), which indicated that the question was not whether the

State was authorised to exercise criminal jurisdiction but whether there were any obstacles to prevent it from doing so. In the instant case, there had been nothing to prevent Latvia from prosecuting and trying one of its own nationals for an offence committed on its own territory. Further, the Latvian State not only had a right but also an obligation – both legal and moral – to try persons guilty of war crimes against its own nationals.

92. The Government also stressed the importance of such trials in restoring democracy, establishing the historical truth and guaranteeing justice for the victims of crimes against humanity and war crimes. They referred in that connection to the Court's findings in the case of *Kolk and Kislyiy v. Estonia* (dec., nos. 23052/04 and 24018/04, ECHR 2006-I). In their submission, despite all the practical problems with which the Latvian authorities were faced, these trials were very important as they helped to make up for the inadequacies of the Nuremberg trial, a trial that had to a large extent been an example of justice for the victors, punishing crimes perpetrated by the Nazis, while allowing notorious criminal acts by the Allies to go unpunished.

93. In the light of these arguments, the Government considered that the acts committed by the applicant on 27 May 1944 constituted "a criminal offence under national [and] international law" within the meaning of Article 7 § 1 of the Convention and that, in any event, the acts "[were] criminal according to the general principles of law recognised by civilised nations", within the meaning of Article 7 § 2. There had therefore been no violation of Article 7 in the instant case.

2. The applicant's submissions

94. The applicant contested the Government's arguments. He stated at the outset that the characterisation of his acts by the Latvian courts had been based on the erroneous belief that Latvia was at that time illegally occupied by the USSR and that he represented the occupying forces. In his submission, Latvia had lawfully become a part of the Soviet Union in 1940 and the inhabitants of that territory – including himself and the villagers of Mazie Bati – had accordingly become citizens of the USSR. Conversely, in 1941 Latvia had been occupied by Nazi Germany and the applicant, as a Soviet citizen, had merely been defending his country on his own soil against the occupier. Even viewed subjectively, he had acted as a defender of his homeland, not as an invader. Indeed, at that time there was no separate Latvian army fighting the Soviet Union. The applicant therefore rejected the "dual occupation" theory that had been upheld by the Latvian authorities. In his observations lodged after the decision on the admissibility of the application, he added that he considered these issues to be of no real relevance to the instant case.

95. The applicant considered his conviction contrary to the requirements of Article 7 of the Convention as it did not fall into any of the three exceptions laid down therein. His conduct towards the villagers of Mazie Bati did not constitute an offence under either international or national law at the time, nor was it "criminal according to the general principles of law recognised by civilised nations".

96. In that connection, the applicant argued that the provisions of international law relied on by the Government were inapplicable to his case. Although he acknowledged that he and the men from his unit fit the definition of "combatant" as understood in international law, he also considered, unlike the Government, that the nine villagers from Mazie Bati killed on 27 May 1944 were also "combatants" and not "civilians". It was apparent from the Latgale Regional Court's judgment of 3 October 2003 that the nine villagers had collaborated with the German military administration and supported the Nazi occupying regime, which had supplied them with weapons and munitions (see paragraphs 41-42 above). There could be no other explanation, as ordinary civilians living in Nazi Germany occupied territory were liable to immediate execution if found in the possession of firearms. In any event, the villagers' collaboration with the Nazis had deprived them of their "civilian" status and immunity. Since they were armed, the men from Mazie Bati had constituted a real danger to the Red Partisans and their number was close to that of a section or small unit in the regular army.

97. The applicant acknowledged that in 1944 the Regulations appended to the Hague Convention of 1907 on the laws and customs of war on land formed part of the international law universally accepted by the international community. However, that instrument used terms such as "enemy" and the "enemy nation or ... army". The villagers of Mazie Bati, who had the same Soviet nationality as the applicant and his comrades, were not their "enemies". In other words, neither the Regulations referred to above, nor the Charter of the Nuremberg Tribunal applied to the acts of the members of an armed group perpetrated against fellow citizens. Further, Article 6 of the Charter of the Nuremberg Tribunal restricted its application to war criminals "from the European countries of the Axis" who had maltreated "civilian populations in the occupied territories". That clearly did not correspond to the applicant's situation. Lastly, the Geneva Convention of 1949 relative to the Protection of Civilian Persons in Times of War could not be applied retrospectively. Even supposing it could, the position was the same as with regard to the Hague Convention. In sum, the applicant considered that he had been the victim of the application of a provision of criminal law by analogy, which was unacceptable.

98. Secondly, unlike the Government, the applicant considered that his acts did not constitute an offence under the internal law applicable in 1944. The Criminal Code of Soviet Russia of 1926 – which was then in force – was completely silent on war crimes. Article 193-18, on which the Government had relied, in fact dealt with the notion of "military crime" (*воинское преступление* in Russian) and was included in a chapter of the same name. There was an important difference between war crimes and "military crimes" as the latter were ordinary violations of the established order of military service and were subject to statutory limitation. Moreover, on 27 May 1944 the applicant had merely been carrying out orders from his command. Had he not obeyed, he would himself have been at risk of the death penalty for insubordination. The applicant also pointed out that while he was not liable to any punishment under the 1926 Code, the nine villagers killed at Mazie Bati had been guilty of the crime of high treason against their State (the USSR).

99. In the applicant's submission, the fact that after the war, far from being prosecuted for the alleged offences he had, on the contrary, been decorated with the Order of Lenin, the highest Soviet distinction, showed that he had not committed any offence under the domestic criminal law at that time.

100. The applicant argued, thirdly, that his conduct on 27 May 1944 was not "criminal according to the general principles of law recognised by civilised nations". In that connection, he explained that he had been fighting against the Nazi occupiers as a member of the armed forces of a State that was part of the anti-Hitler coalition and that his victims were not civilians but combatants who had been armed by the enemy. In his submission, "one cannot reasonably call into doubt the legitimate right of the Partisans, acting against the rearguard of a ferociously cruel enemy that did not respect any of the laws and customs of war, to punish by death the armed accomplices of the Nazis". The applicant also stressed that he and his men had not pillaged Mazie Bati. The seizure of the weapons and munitions which the villagers had received from the Germans constituted a legitimate war chest.

101. The applicant considered, generally, that he had been the victim of historical political changes beyond his control. Firstly, contrary to what had been asserted by the Government, he could not have foreseen at the material time that he would one day be held accountable for his acts. While acknowledging that he had been aware of the convictions of German war criminals, he could never have imagined that he himself would face trial for fighting against the German Army. Secondly, in 1944 he had sincerely believed in good faith that the incorporation of Latvia by the USSR four years previously was perfectly legitimate, that there had never been a "Soviet occupation", that he had thus become a Soviet citizen and that he was defending his country, the USSR, against the Nazi invader. It was only in 1990 – well after the alleged offences – that the Supreme Council had adopted the Declaration on the Restoration of Independence which had declared the incorporation of Latvia by the USSR unlawful and null and void. And it was not until six years later that the Latvian Parliament had adopted the Declaration on the Occupation of Latvia, thereby confirming the theory of "dual occupation". The applicant had not been in a position to foresee the adoption of these declarations. In his submission, the only real basis for his convictions were these two political texts which manifestly did not possess the quality of "law", in breach of the fundamental requirements of the Convention.

102. The applicant also contested the Government's argument that the responsibility of an individual for war crimes could be independent of the responsibility of the State concerned. In his submission, "before trying those carrying out the wishes of the State as war criminals, it had to be established that the State had had criminal designs". Since it had not been established by any international body similar to the Nuremberg Tribunal that the actions of the USSR on Latvian territory were illegal, the applicant submitted that the Latvian courts had had no right to reach such conclusions in their decisions.

103. In conclusion, the applicant said that since he had not been acting "on enemy occupied territory" he could not, by definition, have been guilty of a war crime. In the alternative, even supposing that he had committed one

or more offences under the general law, their prosecution had long since become statute barred. There had accordingly been a violation of Article 7 of the Convention in his case.

3. *Submissions of the third party intervener*

104. The Russian Government agreed in substance with the applicant's arguments. The thrust of their submission was that the Latvian courts should not have applied by analogy the Charter of the Nuremberg Tribunal – whose purpose was to punish crimes committed by the Axis powers in the occupied territories – to the applicant, who had fought alongside the anti-Hitler coalition in his own country, the USSR. Such an extension was unacceptable and manifestly contrary to the judgment of the Nuremberg Tribunal on which the entire post-war legal and political system was based.

105. The Russian Government joined the applicant in stressing the difference between war crimes (within the meaning of the Charter of the Nuremberg Tribunal) and "military crimes" (as understood in Soviet law). Thus, the Soviet Criminal Code of 1926 did not contain any provision similar to Article 68-3 of the Latvian Criminal Code, on which the applicant's conviction was based. Even supposing the applicant had committed an offence under the Latvian Criminal Code, its prosecution had, in any event, long since become statute barred by virtue of Article 14 of that Code. Since the limitation period for the most serious offences was ten years, it had to be deemed to have expired in 1954 and the applicant accordingly could no longer be tried for his acts. His conviction under Article 68-3 of the Latvian Criminal Code was the result of the retrospective application of a criminal statute.

106. The Russian Government agreed with the applicant's assertion that his nine victims were not "civilians" but "combatants". At all events, they had seriously abused their "civilian" status by offering active support to one of the belligerents and receiving weapons. When the members of Major Chugunov's unit entered Meikuls Krupniks' barn, the villagers could have driven them away and refused them refuge if they feared for their own safety. Instead, they had chosen to betray them. This was also true of the three women who had participated in the treachery. The assertion that the Mazie Bati villagers had the right to receive weapons from the Hitlerian invaders for use in "self-defence" against the anti-Nazi Partisans was illogical as the Partisans had the same Soviet nationality as them, and unacceptable, since it went against the tenor of the Nuremberg judgment. No legitimacy whatsoever could attach to collaboration with the Nazi criminal regime.

107. The Russian Government emphasised that the villagers had not been "massacred", but "executed", following their conviction by a military tribunal established in accordance with the laws of war, and that the punishment they had received was just and proportionate to their crime. Consequently, the operation of 27 May 1944 had, by its very nature, been highly selective, as it had been directed against nine specific individuals guilty of high treason, not against the other villagers who were rightly spared.

B. The Court's assessment

1. The facts of the case and their characterisation in law

108. As a preliminary point, the Court notes that the respondent Government contests its jurisdiction to question the Latvian courts' factual and legal findings. In that connection, the Court reiterates that, in accordance with Article 19 of the Convention, its sole duty is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. Consequently, in accordance with the principle of subsidiarity that is inherent in the system of individual rights protection set up by the Convention, it is in principle solely for the domestic courts to establish the facts of the case and to interpret domestic law. The Court cannot question the domestic authorities' assessment unless it is flagrantly and manifestly arbitrary (*García Ruiz v. Spain* [GC], no. 30544/96, §§ 28-29, ECHR 1999-I). This general rule, which was initially formulated with respect to the right to a fair hearing under Article 6 § 1 of the Convention, applies to all the substantive provisions of the Convention (see, among other authorities, *Sisojeva and Others v. Latvia* [GC], no. 60654/00, § 89, ECHR 2007-..., and *a/s Diena and Ozoliņš v. Latvia*, no. 16657/03, § 66, 12 July 2007).

109. The rule also applies where domestic law refers to rules of general international law or international agreements. In cases in which the domestic courts have interpreted these provisions, the Court's role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention (see *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 54, ECHR 1999-I).

110. However, the position is different when it is not the domestic legislation but the Convention itself which expressly refers to the domestic law. In such cases, a failure to comply with the domestic legislation may in itself entail a violation of the Convention. Accordingly, by virtue of the *jura novit curia* principle the Court can and should exercise a power to review whether the law has been complied with (see, among many other authorities, *Benham v. the United Kingdom*, judgment of 10 June 1996, *Reports of Judgments and Decisions* 1996-III, p. 753, § 41, and *Gusinskiy v. Russia*, no. 70276/01, § 66, ECHR 2004-IV). Exactly the same principle applies to Article 7, as the application of a provision of municipal penal law to an act not covered by the provison in question directly results in a conflict with the Convention. In such circumstances, the Court must have jurisdiction to decide whether the provision of criminal law concerned has been complied with as otherwise Article 7 would be rendered devoid of purpose (see, among other authorities, *X. v. Federal Republic of Germany*, no. 1169/61, Commission decision of 24 September 1963, Yearbook 6, p. 520, and *X. v. Austria*, no. 1852/63, Commission décision of 22 April 1965, Yearbook 8, p. 198). The Court considers that exactly the same principle applies to situations where, as in the present case, the domestic courts have applied international law.

111. Further, a careful distinction needs to be drawn in the present case between the existence of the facts and their characterisation in law. As regards the factual findings by the Latvian courts, the Court has already found that the procedure that led to the applicant's conviction complied with

the fair-trial requirements laid down in Article 6 § 1 of the Convention (see the admissibility decision of 20 September 2007). In the circumstances, it has no reason to contest the factual description of the events in Mazie Bati as set out in the final decision of the trial court – this being the judgment of the Criminal Affairs Division dated 30 April 2004 – which was upheld by the Supreme Court Senate. Conversely, the Court can and must consider the characterisation of these events under domestic and international law in order to determine whether the guarantees contained in Article 7 of the Convention were applied in the applicant's case. In performing that task, it is free to attribute to the facts of the case, as found to have been established on the evidence before it, a characterisation in law different from that given by the applicant or, if need be, to view the facts in a different manner. Furthermore, it has to take account not only of the original application but also of the additional documents intended to complete it by eliminating initial omissions or obscurities (see, among other authorities, *Foti and Others v. Italy*, judgment of 10 December 1982, Series A no. 56, p. 15, § 44, and *Rehbock v. Slovenia*, no. 29462/95, § 63, ECHR 2000-XII).

112. The Court notes, lastly, that the parties and the third-party intervener attach considerable importance to certain questions of a general nature, in particular, whether Latvia's incorporation into the Soviet Union in 1940 was lawful under public international law and constitutional law and the extent to which its incorporation affected the legal status of the applicant and the villagers of Mazie Bati on 27 May 1944. In this connection, the Court reiterates that it will abstain, as far as possible, from pronouncing on matters of purely historical fact, which do not come within its jurisdiction; however, it may accept certain well-known historical truths and base its reasoning on them (*Ždanoka v. Latvia* [GC], no. 58278/00, § 96, ECHR 2006-...). In the instant case, however, there is no need for it to deal with these issues as they are neither decisive nor even relevant.

2. *Merits of the complaint*

(a) General principles

113. The guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment (see *S.W. v. the United Kingdom*, judgment of 22 November 1995, Series A no. 335-B, p. 41, § 34, and *C.R. v. the United Kingdom*, judgment of 22 November 1995, Series A no. 335-C, p. 68, § 32).

114. The general principles regarding the interpretation of Article 7 § 1 established in the settled case-law of the Court are as follows:

(a) Article 7 embodies, *inter alia*, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*). The Court's first task is therefore to verify that at the time when an accused person performed the act which led to his being prosecuted and convicted there was in force a provision of national or international law

which made that act punishable. By the same token, Article 7 prohibits, firstly, the extension of the scope of existing offences to acts which previously were not criminal offences and, secondly, an extensive construction of the criminal law to the accused's detriment, for instance by analogy (see, among other authorities, *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 145, ECHR 2000-VII).

(b) Offences and the relevant penalties must be clearly defined by law (*Achour v. France* [GC], no. 67335/01, § 41, ECHR 2006-...). This requirement is satisfied where the individual is able to determine from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable (*Cantoni v. France*, judgment of 15 November 1996, *Reports* 1996-V, p. 1627, § 29). When speaking of "law" Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises statute law as well as case-law and implies qualitative requirements, including those of accessibility and foreseeability (see *Coëme and Others*, judgment cited above, loc. cit.).

(c) However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the Convention States, the progressive development of the criminal law through judicial law-making is a well entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen (*Streletz, Kessler and Krenz*, judgment cited above, § 50).

(d) The scope of the concept of foreseeability depends to a considerable degree on the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed. A law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. This is particularly true in relation to persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can on this account be expected to take special care in assessing the risks that such activity entails (*Pessino v. France*, no. 40403/02, § 33, 10 October 2006).

(e) According to the general principles of law, defendants are not entitled to justify the conduct which has given rise to their conviction simply by showing that such conduct did in fact take place and therefore formed a practice. Consequently, a State practice of tolerating or encouraging certain acts that have been deemed criminal offences under national or international legal instruments and the sense of impunity which such a practice instils in the perpetrators of such acts does not prevent their

being brought to justice and punished (*Streletz, Kessler and Krenz*, judgment cited above, §§ 74, 77-79 and 87-88).

(f) In the event of State succession or a change of political regime on the national territory, it is entirely legitimate for a State governed by the rule of law to bring criminal proceedings against persons who have committed crimes under a former regime; similarly, the courts of such a State, having taken the place of those which existed previously, cannot be criticised for applying and interpreting the legal provisions in force at the material time in the light of the principles governing a State subject to the rule of law (ibid., § 81, and *K.-H.W. v. Germany* [GC], no. 37201/97, § 84, ECHR 2001-II (extracts)).

115. With regard to Article 7 § 2, the Convention institutions have commented as follows:

> (a) The second paragraph of Article 7 of the Convention relating to "the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations" constitutes an exceptional derogation from the general principle laid down in the first. The two paragraphs are thus interlinked and must be interpreted in a concordant manner (*Tess v. Latvia* (dec.), no. 34854/02, 12 December 2002).
>
> (b) The preparatory works to the Convention show that the purpose of paragraph 2 of Article 7 is to specify that Article 7 does not affect laws which, in the wholly exceptional circumstances at the end of the Second World War, were passed in order to punish war crimes, treason and collaboration with the enemy; accordingly, it does not in any way aim to pass legal or moral judgment on those laws (*X. v. Belgium*, no 268/57, Commission decision of 20 July 1957, Yearbook 1, p. 241). This reasoning also applies to crimes against humanity committed during this period (*Touvier v. France*, no. 29420/95, Commission decision of 13 January 1997, Decisions and Reports (DR) 88, p. 148; and *Papon v. France (no. 2)* (dec.), no. 54210/00, ECHR 2001-XII (extracts)).

(b) Application of the above principles to the instant case

(i) Article 7 § 1

116. In the light of the aforementioned principles, the Court observes that it is not its task to rule on the applicant's individual criminal responsibility, that being primarily a matter for the assessment of the domestic courts. Its sole task is to consider, from the standpoint of Article 7 § 1 of the Convention, whether on 27 May 1944 the applicant's acts constituted offences that were defined with sufficient accessibility and foreseeability by domestic law or international law (see *K.-H.W. v. Germany*, cited above, § 46).

α. International law

117. The Court notes that the applicant was given a prison sentence pursuant to Article 68-3 of the former Latvian Criminal Code, a provision introduced by the Law of 6 April 1993 on War Crimes. Although that

provision contained a summary list of the outlawed acts – such as murder, torture and pillage – it referred directly to the "relevant legal conventions" for a precise definition of such acts (see paragraph 53 above). The impugned conviction was, therefore, based on international rather than domestic law and must, in the Court's view, be examined primarily from that perspective.

118. The next point to note is that, in its judgment of 13 April 2004, which was upheld on appeal on points of law, the Criminal Affairs Division of the Supreme Court characterised the applicant's acts by reference to three international instruments: the Hague Convention of 1907 concerning the law and customs of war on land (or, more precisely, the Regulations appended thereto), the Geneva Convention of 1949 relative to the Protection of Civilian Persons in Time of War and, lastly, the Protocol Additional to that Convention, which was adopted in 1977. Of these three instruments, only the Hague Convention existed and was in force at the time the alleged offences were committed in 1944. The other two came into being at a later date and did not contain any provisions affording them any retrospective effect.

119. On that subject, the Court would note in passing that it has difficulty in understanding the assertion made by the Supreme Court Senate that the retrospective application of the latter two instruments was authorised by the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (see paragraph 69 above), as that convention deals only with the question of statutory limitation and is silent on the question of retrospective effect. Indeed, the Court considers that in cases such as the applicant's, in which domestic criminal law refers to international law for the definition of the offence, the domestic and international provisions form, in practice, a single criminal norm that is attended by the guarantees of Article 7 § 1 of the Convention. Accordingly, that provision operates to preclude the retrospective application of an international treaty to characterise an act or an omission as criminal.

120. The Court observes that neither the USSR nor Latvia were signatories to the Hague Convention of 1907. Consequently, in accordance with the "general participation" clause contained in Article 2, that Convention was not formally applicable to the armed conflict in question. However, as the International Military Tribunal for Nuremberg stated in its judgment of 1 October 1946, the text of that Convention constituted codification of the customary rules which, in 1939 – by the time the war broke out – "were recognised by all civilised nations" (see paragraph 61 above). Likewise, in its judgment of 12 November 1948 the International Military Tribunal for the Far East noted: "the Convention remain[ed] as good evidence of the customary law of nations" (see paragraph 64 above). The Court further notes that the 1907 Convention reproduced almost word for word the text of the 1899 Hague Convention, which, according to the intention expressed in the preamble by its authors constituted, at least in part, codification of certain pre-existing principles in the law of nations. These principles were already widely recognised at the end of the nineteenth century and there is no reason to doubt their universal character by the middle of the twentieth century, during the Second World War. It should also be noted that the Court has stated that, for the purposes of Article 7 § 1

of the Convention, the notion of "law" includes, in principle, written law as well as unwritten law (*K.-H.W. v. Germany*, judgment cited above, § 52).

121. The applicant submitted that the provisions of the Hague Convention were inapplicable *ratione personae* to the events in Mazie Bati because the Convention uses the term "enemy" whereas the villagers who were killed on 27 May 1944 were his fellow citizens. The Court cannot accept that argument. On the aforementioned date, the region in which the village concerned was located was occupied by the armed forces of Nazi Germany, one of the belligerents in the Second World War, was under German military administration and in a combat area close to the front. Further, it is not disputed that the applicant and the men from his unit were members of the Soviet army and, as such, "combatants" within the meaning of international law. They were therefore expected to be aware of the universally accepted rules of *jus in bello* and to comply with them in all circumstances. This, in the Court's view, is sufficient to justify the conclusion that the substantive rules contained in the Regulations appended to the Hague Convention of 1907 were applicable to the impugned events.

122. The Court considers it unnecessary to carry out a separate analysis of the accessibility of the provisions of the Regulations as at 27 May 1944. Alhough the USSR had not ratified it, the Hague Convention merely reproduced the fundamental customary rules that were firmly recognised by the community of nations at the time. The Court therefore presumes that the applicant, as a serviceman, must have been aware of these rules. Nor is it the Court's role to provide an authoritative interpretation of the Hague Convention or to establish the precise content of the notion of a "war crime" as that term was understood in 1944 (see, *mutatis mutandis*, *Behrami and Behrami v. France* (dec.) [GC], no. 71412/01, and *Saramati v. France, Germany and Norway* (dec.) [GC], no. 78166/01 (joined cases), § 122, ECHR 2007-...). Conversely, it is necessary for the Court to examine the criterion of foreseeability in the present case. More specifically, it must determine objectively whether a plausible legal basis existed on which to convict the applicant of a war crime and, subjectively, whether at the material time the applicant could reasonably have foreseen that his conduct would make him guilty of such an offence.

123. In performing this task, the Court considers it necessary briefly to recapitulate the impugned events as definitively established by the competent Latvian courts. During the daytime on 27 May 1944 an armed unit of Red Partisans in German uniform led by the applicant entered the village of Mazie Bati, certain of whose inhabitants were suspected of having betrayed and turned in to the Germans another group of Red Partisans. The applicant's men burst into and searched six houses belonging to Modests Krupniks, Meikuls Krupniks, Ambrozs Buļs, Vladislavs Šķirmants, Juliāns Šķirmants and Bernards Šķirmants respectively. After finding rifles and grenades supplied by the German military administration in each of the houses the Partisans executed the six heads of family concerned. Of these, only one, Meikuls Krupniks, did not immediately succumb to his injuries, but was seriously wounded. The Partisans also wounded two women: Meikuls Krupniks' mother and Bernards Šķirmants' wife. They then set fire to two houses and

the adjoining buildings belonging to the two farmers. Four people who were still alive at that point perished in the flames. In all, nine villagers were killed: six men and three women, one of whom was in the final stages of pregnancy. The Court notes, in particular, that in the final domestic decision the episode involving the alleged pillaging of Mazie Bati was not found to have been substantiated. It must therefore proceed on the assumption that none of the villagers' food or personal belongings were stolen. Conversely, it is not disputed that on leaving the village the Partisans took with them the weapons they had seized from the farmers they had executed.

124. The Court notes that the decisions of the domestic courts are almost completely silent on the question whether the applicant was personally and directly implicated in the events of Mazie Bati, that is to say as to his exact acts and movements while the events unfolded. Although he was initially charged with the murder of Ambrozs Buļs and Bernards Šķirmants, and, so it would seem, with acts of torture on the villagers, he was subsequently acquitted in relation to those incidents which were withdrawn from the charges (see paragraph 45 above). Having regard to the right to be presumed innocent enshrined in Article 6 § 2 of the Convention, the Court therefore accepts that the applicant did not commit the acts in question. In these circumstances, and in the absence of more detailed particulars of the applicant's personal involvement in the relevant acts, it concludes that the only genuine accusation against him was that he led the unit which carried out the punitive expedition on 27 May 1944. Accordingly, the Court must determine whether that operation could, in itself, reasonably be regarded as having contravened the laws and customs of war as codified by the Hague Convention of 1907.

125. In order to answer that question, the Court must take into account, firstly, the conditions obtaining in the Mazie Bati region in 1944 and, secondly, the conduct of the villagers who were killed by the applicant's unit. As regards the general background to the events of 27 May 1944, the Court accepts that they did not take place in a combat situation. However, it notes that the village of Mazie Bati was at that time approximately 80 kilometres from the front in a region occupied by Nazi Germany that had been invaded by the *Wehrmacht*, that Red-Partisan units carried out guerrilla attacks on Germans and that there were armed skirmishes even within the village itself (see paragraphs 14 and 22 above). In sum, the locality and the entire surrounding area were prey to hostile engagement. Further, the documentary evidence from the archives produced by the Government showed that in addition to the German and Soviet forces a Latvian auxiliary police in the service of the Germans was present in the region. In at least one of the villages within the same district, the auxiliary police had formed an armed "defence group" composed of local "trustworthy men" and that other "trustworthy men" had been appointed in some of the other villages to oversee suspects and unmask and denounce members of the Red Partisans (see paragraphs 27 and 28 above).

126. As regards the nine victims of the applicant's units, the Court notes that the parties could not agree on their precise status under the international law applicable at that time. The respondent Government concurred with the Latvian courts that the villagers had to be regarded as "civilians" with all

the guarantees such status afforded. The applicant and the Russian Government contested that characterisation. For its part, the Court considers that the situation of the six men and three women who died during the events in question must be examined separately.

127. As to the male victims, the Court notes at the outset that there is nothing in the case file to indicate that they were members of the Latvian auxiliary police (*Schutzmänner*). The applicant's allegations to that effect must therefore be rejected. On the other hand, it is common ground that these men had received rifles and grenades from the German military administration. The fact that they were not openly carrying them at the time of the assault by the Red Partisans is of no relevance in the present case. It appears from the case file that it is no longer possible to establish the precise reason why the Germans had armed these six farmers (see paragraph 27 above). The Court notes, however, a number of concordant factors which could help to shed some light on this subject.

128. The parties agree that in February 1944, in other words approximately three months before the events in question took place, the *Wehrmacht* had attacked a barn within the boundaries of Mazie Bati in which a group of Red Partisans led by Major Chugunov had taken refuge. The group was wiped out during the attack. The respondent Government have not really contested the applicant's assertion that it was the villagers who informed the Germans of the Partisans' presence in the barn and, more specifically, that it was Meikuls Krupniks (the owner of the barn), Bernards Šķirmants and the three women who were responsible for the betrayal. Moreover, this was expressly acknowledged by the courts of first instance and appeal either with respect to all the men concerned, or, at least, with respect to Meikuls Krupniks (see paragraphs 42 and 44 above). Lastly, neither the domestic courts in their decisions nor the Government in their observations refuted the allegations that the villagers concerned had been rewarded by the German military command for their act (see paragraph 22 above).

129. In the same judgment, the Criminal Affairs Division mentioned the night watch regularly kept by the Mazie Bati villagers. That practice bears a resemblance to the practice – which has already been referred to – of the Latvian auxiliary police in neighbouring villages and which was recorded, for example, in the written order issued by the local commanding officer of the police on 25 February 1944 (see paragraph 27 above). For present purposes, it suffices for the Court to say that, in view of the conduct of these men and the conditions obtaining at the time in the region in question, the applicant and the other Red Partisans had legitimate grounds for considering these farmers not as "peaceable inhabitants" – the term employed in the present case by the Supreme Court Senate – but as collaborators of the German Army.

130. In its judgment of 30 April 2004, the Criminal Affairs Division attempted to justify that collaboration by the need for the persons concerned to defend themselves and to protect their families against the Red Partisans. The Court cannot accept that argument. Firstly, it reiterates that National Socialism is in itself completely contrary to the most fundamental values underlying the Convention so that, whatever the reason relied on, it cannot

grant any legitimacy whatsoever to pro-Nazi attitudes or active collaboration with the forces of Nazi Germany (see, *mutatis mutandis*, *Lehideux and Isorni v. France*, judgment of 23 September 1998, *Reports of Judgments and Decisions* 1998-VII, p. 2886, § 53, and also *Marais v. France*, no. 31159/96, Commission decision of 24 June 1996, DR 86, p. 184, and *Garaudy v. France* (dec.), no. 65831/01, ECHR 2003-IX). Secondly, the villagers must have known that by siding with one of the belligerent parties they would be exposing themselves to a risk of reprisals by the other.

131. In the light of the foregoing, the Court is not satisfied that the six men killed on 27 May 1944 could reasonably be regarded as "civilians". In that connection, it notes that the Regulations appended to the Hague Convention of 1907 do not define the notions of "civilian" or "civil population". In characterising the Mazie Bati victims as civilians in the present case, the Criminal Affairs Division relied on Article 50 of the Protocol Additional to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts, which was adopted in 1977. It is true that that provision contains a presumption that any person not belonging to one of the predefined categories of combatants or in respect of whom there is a doubt on that point must be considered a "civilian" (see paragraph 67 above). However, as the Court has already stated, this Protocol, which was drawn up and adopted more than 30 years after the events in question, cannot be applied retrospectively to characterise the acts the applicant was alleged to have committed. Furthermore, on the assumption that the aforementioned conventions represented progress and not a regression in humanitarian international law, the fact that no such presumption was included in the Geneva Convention of 1949 indicates that there is no reason to consider that it was already recognised in customary law in 1944. Moreover, Article 5 of the 1949 Convention itself provided exceptions which enabled persons who had abused their "civilian" status to be deprived of their special rights and privileges (see paragraph 66 above). In sum, there is nothing to show that under the *jus in bello* as it existed in 1944 a person who did not satisfy the formal conditions to qualify as a "combatant" had automatically to be assigned to the category of "civilians" with all its attendant guarantees.

132. The Court notes, further, that the operation of 27 May 1944 was selective in character. The case file clearly shows that the Red Partisans at no stage intended to attack the village of Mazie Bati itself – for instance, with a view to eliminating all its inhabitants and burning down the buildings. The Court considers that there is no need for it to resolve the dispute between the parties as to whether a judgment had been delivered by an *ad hoc* military tribunal organised from among the detachment of Partisans. It would merely note that the impugned operation was carried out against six specific, identified men who were strongly suspected of having collaborated with the Nazi occupier. After arriving at the homes of each of the six heads of family and searching their homes, the Partisans executed them only after rifles and grenades supplied by the Germans – tangible evidence of their collaboration – were found. Conversely, with the exception of the three women whose situation the Court will examine below, all the villagers were spared. In particular, no young children in the village at the time of the attack –

including the children of those who were executed – suffered (see paragraphs 16 and 36(a) above). Lastly, only two houses, those belonging to Meikuls Krupniks and Bernards Šķirmants, were burnt down.

133. The Court considers it necessary to analyse the specific provisions of the Regulations appended to the Hague Convention of 1907 in order to determine whether a plausible legal basis existed for convicting the applicant of at least one prohibited act. In this connection, it notes that the Latvian courts omitted in their decisions to carry out a detailed and sufficiently thorough analysis of the aforementioned text, but simply referred to certain of its articles without explaining how they came into play in the applicant's case. In the circumstances, and in the absence at the material time of settled national or international case-law or practice for interpreting the Hague Convention and appended Regulations, the Court considers it necessary to apply the literal and universally accepted meaning of the wording used.

134. In its judgment of 30 April 2004, the Criminal Affairs Division cited three articles of the Regulations in question: Article 23, sub-paragraph 1, point (b), which makes it illegal "to kill or wound treacherously individuals belonging to the hostile nation or army"; Article 25, which prohibits attacks on "towns, villages, dwellings, or buildings which are undefended"; and, lastly, Article 46, sub-paragraph 1, which provides that certain fundamental rights such as "family honour and rights, the lives of persons, and private property" must be respected. The instant case concerned a targeted military operation consisting in the selective execution of armed collaborators of the Nazi enemy who were suspected on legitimate grounds of constituting a threat to the Red Partisans and whose acts had already caused the deaths of their comrades. Accordingly, the Court is not persuaded by the respondent Government's assertion that the case concerned "an undefended village". In point of fact, the operation was scarcely any different from those carried out at the same period by the armed forces of the Allied powers or by local Resistance members in many European countries occupied by Nazi Germany. Furthermore, the domestic courts failed to explain in what respect the operation was considered to have been performed "treacherously" within the meaning of Article 23 of the Hague Regulations and not as a legitimate "ruse of war", as authorised by Article 24.

135. Lastly, with respect to the offence of "pillaging" of which the applicant was also accused in the domestic courts and which is strictly prohibited by Articles 28 and 47 of the Regulations, the Court again notes that the applicant was not convicted of this offence and that the charge of theft of personal belongings or food from the villagers was ultimately not upheld. Nor can the Red Partisans' seizure of the weapons that had been supplied to the Mazie Bati villagers by the German military administration be characterised as "pillage" within the meaning normally ascribed to that term as weapons do not come within the category of "private property".

136. The Government submitted that on 27 May 1944 the applicant should have known that he was committing a war crime as prior to that date the Soviet authorities had already tried and sentenced to death a number of German servicemen for abuses similar to those being perpetrated by his

unit. In that connection, the Government referred in particular to the Kharkov trial which had taken place some six months previously (see paragraphs 71-75 above). However, the Government have failed to explain in what respect the conduct of the unit engaged in the Mazie Bati operation was identical or similar to the acts committed by the Germans who were tried at Kharkov. The decisions of the domestic courts were silent on this point. Accordingly, this argument by the Government cannot be accepted.

137. In the light of the foregoing, the Court considers that it has not been adequately demonstrated that the attack on 27 May 1944 was *per se* contrary to the laws and customs of war as codified by the Regulations appended to the Hague Convention of 1907. Accordingly, in view of the summary nature of the reasoning of the Latvian courts, it concludes that there was no plausible legal basis in international law on which to convict the applicant for leading the unit responsible for the operation.

138. There remains the issue of the three women killed at Mazie Bati, namely Meikuls Krupniks' mother and wife, who was nine months pregnant, and Bernards Šķirmants' wife. In this instance, the Court considers that the characterisation in law of the circumstances in which they died essentially depends on two questions: firstly, whether and to what extent they had participated in the betrayal of Major Chugunov's group in February 1944 and, secondly, whether their execution was planned by the Red Partisans from the start or whether the members of the unit were in fact acting beyond their authority. Here again, the Court can but regret the overly general and summary nature of the domestic courts' reasoning, which does not allow any definite answers to be given to these two questions. For its part, it considers that there are two possible explanations for what happened.

139. The first was that the three women concerned played a role in the betrayal of Chugunov's men, and their execution during the operation carried out on 27 May 1944 was planned from the start. The Court notes that the Government have not refuted the applicant's assertion that the three women had escaped the vigilance of the Red Partisans who had taken refuge in Meikuls Krupniks' barn and had kept watch while the men had gone to the neighbouring village to alert the German garrison, and that after the Partisans had been killed, Krupniks' mother had removed the coats from the bodies (see paragraph 22 above). This version appears to be supported by the fact that only these women were killed whereas, for example, Vladislavs Šķirmants' wife was spared (see paragraph 18 above). If this account is true, the Court is bound to conclude that the three women were also guilty of abusing their status of "civilians" by providing genuine, concrete assistance to the six men from Mazie Bati who collaborated with the Nazi occupier. In such circumstances, the Court's finding with respect to the men who were executed during the operation on 27 May 1944 is in general equally applicable to the three women.

140. The second explanation is that the women's execution was not initially planned by the applicant's men and their commanding officers and that their deaths resulted from an abuse of authority. Having regard to all the relevant circumstances of the case, the Court considers that neither such abuse of authority nor the military operation in which it took place could

reasonably be regarded as a violation of the laws and customs of war as codified in the Hague Regulations. Under this scenario, the Court accepts that the acts committed by the members of the applicant's unit against the three women concerned could prima facie constitute offences under the general law, whether of murder, involuntary homicide, wounding causing death or failure to assist a person in danger, or one of the "military crimes" to which the applicant has referred (see paragraph 98 above). As offences under the general law, these must be examined by reference to the domestic law applicable at the material time.

(β) Domestic law

141. On the assumption that the deaths of the three women from Mazie Bati were the result of an abuse of authority by the Red Partisans, the Court notes that, as with the six men, the decisions of the Latvian courts contain no indication of the exact degree of implication of the applicant in their execution. It has never been alleged that he himself killed the women or that he ordered or incited his comrades to do so. In any event, the Court considers that even if the applicant's conviction was based on domestic law, it was manifestly contrary to the requirements of Article 7 of the Convention for the following reason.

142. In the instant case, the parties and the third party intervener agreed that the applicable domestic criminal legislation applicable to the events of 27 May 1944 was the Criminal Code of Soviet Russia, which was adopted in 1926 and became applicable to the Latvian territory by virtue of the decree of 6 November 1940. Article 14 of that Code prescribed limitation periods of three, five or ten years, depending on the length of sentence faced. Although that provision also provided for two specific exceptions to the limitation rule, it is evident that neither was relevant to the applicant's situation (see paragraph 50 above). In this connection, the Court observes that the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity only applies to the specific offences defined in Article 1 of that Convention and not to offences under the general law, which remain subject to statutory limitation. Consequently, even supposing that the applicant committed one or more serious offences under the 1926 Code during the Mazie Bati operation, the Court can but note that the corresponding statutory limitation periods expired definitively ten years after the commission of the offences, that is to say in 1954.

143. The Government questioned the applicability of the limitation period and cited the 1961 Criminal Code, which extended be non-applicability of limitation periods to all offences carrying the death penalty. In that connection, they referred to "continuity" in the criminalisation of the impugned acts which, they said, had existed since 1944. The Court cannot accept that argument. The aforementioned Code was adopted in 1961, by which time the prosecution of the offences the applicant is alleged to have committed had, under the preceding Code, been statute-barred for seven years. While it is true that Article 45 of the 1961 Code stipulated that statutory limitation did not automatically apply to offences carrying the death penalty (see paragraph 52 above), it did not contain any retroactive clause enabling the aforementioned exception to be applied to offences

committed in the past or to call into question limitation that had already crystallised. The applicant could not, therefore, have foreseen either in 1961 or at any later date that the offences whose prosecution had already definitively become statute barred would one day again become liable to prosecution (see, by converse implication, *Achour*, cited above, § 53).

144. Admittedly, the Court has held in a previous case that Article 7 of the Convention does not prohibit an extension of limitation periods through the immediate application of a procedural law where the relevant offences have never become subject to limitation (*Coëme and Others*, judgment cited above, § 149). However, where one is dealing with offences under the general law, it considers that that provision in principle prevents any restoring of the possibility of punishing offenders for acts which were no longer punishable because they had already become subject to limitation. It is clear from the Government's submissions that that is precisely what happened in the instant case. In this connection, the Court reiterates that limitation periods, which are a common feature of the domestic legal systems of the Contracting States, serve several purposes, which include ensuring legal certainty and finality and preventing infringements of the rights of defendants, which might be impaired if courts were required to decide on the basis of evidence which might have become incomplete because of the passage of time (see *Stubbings and Others v. the United Kingdom*, judgment of 22 October 1996, *Reports* 1996-IV, pp. 1502-03, § 51, and *Coëme and Others*, judgment cited above, § 146).

145. Likewise, the Court does not dispute that it was only from the restoration of Latvian independence in 1991 that the authorities of that State were able to bring criminal proceedings against those suspected of having committed offences between 1940 and 1991. It notes, however, that there is not and never has been any provision in Latvian law which would make it possible to suspend or extend limitation periods solely on account of the offences in question being committed at a time when the country was under foreign domination. This argument by the Government must therefore be rejected.

146. In sum, even supposing that the applicant committed one or more offences under the general law on 27 May 1944, the Court finds that their prosecution has been definitively statute barred since 1954 and that it would be contrary to the principle of foreseeability inherent in Article 7 of the Convention to punish him for these offences almost half a century after the expiry of the limitation period.

(ii) Article 7 § 2

147. The Government submitted in the alternative that the applicant's conduct during the attack on Mazie Bati "was criminal according to the general principles of law recognised by civilised nations", within the meaning of the second paragraph of Article 7 of the Convention. In that connection, the Court notes that on virtually every occasion the Convention institutions have examined a case under the second paragraph of Article 7, they have not considered it necessary also to examine it under the first paragraph (*De Becker v. Belgium*, no. 214/56, Commission decision of 9 June 1958, Yearbook 2, p. 214; *X. v. Norway*, no. 931/60, Commission decision of 30 May 1961, Collection of Decisions of the European

Commission on Human Rights no. 6, p. 41; *X. v. Belgium*, no. 1028/61, Commission decision of 18 September 1961, Yearbook no. 4, p. 325; and *Naletilić v. Croatia* (dec.), no. 51891/99, ECHR 2000-V, as also the decisions of *X. v. Belgium* (no. 268/57), *Touvier* and *Papon (no. 2)* cited above; for more extensive reasoning, see *Penart v. Estonia* (dec.), no. 14685/04, 24 January 2006, and the *Kolk and Kislyiy* decision cited above). The Court sees no reason to deviate from that approach in the present case. Since it has examined the case under the first paragraph of Article 7, it does not consider it necessary also to examine it under the second paragraph. In any event, even supposing that that paragraph was applicable in the instant case, the operation of 27 May 1944 cannot be regarded as "criminal according to the general principles of law recognised by civilised nations".

(c) Conclusion

148. In the light of the foregoing, the Court considers that the applicant could not reasonably have foreseen on 27 May 1944 that his acts amounted to a war crime under the *jus in bello* applicable at the time. There was, therefore, no plausible legal basis in international law on which to convict him of such an offence. Even supposing that the applicant has committed one or more offences under the general domestic law, their prosecution has long since become statute barred. Accordingly, domestic law could not serve as the basis for his conviction either.

149. There has consequently been a violation of Article 7 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

150. 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

151. The applicant claimed the following sums without making any precise distinction between pecuniary and non-pecuniary damage:

(a) 687,000 euros (EUR) for the turmoil and anxiety she had suffered during the criminal proceedings;

(b) an additional EUR 3,000,000 for the suffering he had endured in pre-trial detention;

(c) EUR 500,000 for the trauma of not being able to attend the funerals of his son and two brothers while he was in prison;

(d) 5,000 US dollars (USD) as compensation for a plot of land he had been forced to sell to pay for his defence before the domestic courts;

(e) USD 30,000 as compensation for a flat he had been forced to sell to cover his medical expenses;

(f) EUR 7,000 for the remuneration of M. K., an investigator at the Constitution Protection Bureau, while he was handling the applicant's case;

(g) EUR 680,000 for the remuneration received by the public prosecutors while dealing with the applicant's case;

(h) EUR 1,000,000 in compensation for the damage done to his honour and reputation by his trial and conviction;

(i) EUR 5,187,000 for his "unlawful conviction".

152. The Government observed that only damage sustained as a result of one or more Convention violations found by the Court could give rise to an award of just satisfaction under Article 41 of the Convention. Most of the heads of damage alleged by the applicant related to complaints which had already been dismissed by the Court in its admissibility decision of 27 December 2007 and accordingly had no link with the alleged violation of Article 7. In particular, the Government saw no reason why they should be required to pay the applicant sums corresponding to the remuneration of members of the prosecution service when this had been paid by the State and not by the applicant.

153. As for the remainder of the aforementioned claims, the Government contended that they were unrealistic and excessive. In their submission, since the applicant's guilt in the murder of the nine villagers "had been established beyond all reasonable doubt", the applicant himself had "caused suffering to the Mazie Bati villagers" and had not paid any financial compensation to the survivors or made any apology, the Court should not award him anything in respect of non-pecuniary damage. A finding of a violation would therefore in itself constitute sufficient reparation for any non-pecuniary damage sustained by the applicant.

154. The Court reiterates that it is an essential condition for an award of reparation in respect of pecuniary damage under Article 41 of the Convention for a causal link to exist between the alleged damage and the violation which has been found (*Nikolova v. Bulgaria* [GC], no. 31195/96, § 73, ECHR 1999-II, and *Podkolzina v. Latvia*, no. 46726/99, § 49, ECHR 2002-II). Exactly the same rule applies to non-pecuniary damage (*Kadiķis v. Latvia (no. 2)*, no. 62393/00, § 67, 4 May 2006). In the instant case, most of the sums claimed by the applicant have no causal link with the violation of Article 7 of the Convention which the Court has found. However, the Court considers that the non-pecuniary damage sustained by the applicant as a result of that violation is indisputable, although the amounts he has claimed under that head are clearly excessive. Consequently, ruling on an equitable basis in accordance with Article 41 of the Convention and having regard to the other specific circumstances of the case, the Court awards the applicant EUR 30,000 in respect of non-pecuniary damage together with any taxes that might be payable.

B. Costs and expenses

155. The applicant claimed 3,000 lati (LVL), equivalent to EUR 4,200, for his costs and expenses before the Court. He did not produce any documentary evidence in support of his claims.

156. The Government submitted that the applicant's claim, which was unsupported by any documentary evidence, did not meet the fundamental requirements established by the Court's case-law in this sphere.

157. The Court reiterates that, for an award of costs and expenses to be made under Article 41 of the Convention, they must have been actually and necessarily incurred by the injured party. In particular, by Rule 60 § 2 of the Rules of Court, itemised particulars of any claim made under Article 41 must be submitted, together with the relevant supporting documents or vouchers, failing which the Chamber may reject the claim in whole or in part. Costs and expenses are only recoverable to the extent that they relate to the violation that has been found (see, among other authorities, *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 54, ECHR 2000-XI; *Beyeler v. Italy* (just satisfaction) [GC], no. 33202/96, § 27, 28 May 2002; and *Svipsta v. Latvia*, no. 66820/01, § 170, ECHR 2006-... (extracts)). The applicant's claim under this head, which is made in very general terms, is not supported by any documentary evidence and is, accordingly, dismissed.

C. Default interest

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

FOR THESE REASONS, THE COURT

1. *Holds* by four votes to three that there has been a violation of Article 7 of the Convention;

2. *Holds* by four votes to three

   (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, EUR 30,000 (thirty thousand euros) in respect of non-pecuniary damage, to be converted into lati at the rate applicable at the date of settlement, together with 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 amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

3. *Dismisses* unanimously the remainder of the claim for just satisfaction.

Done in French, and notified in writing on 24 July 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago QUESADA — Registrar

Boštjan M. ZUPANČIČ — President

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

(a) Concurring opinion of Judge Myjer;

(b) Joint dissenting opinion of Judges Fura-Sandström, David Thór Björgvinsson and Ziemele;

(c) Dissenting opinion of Judge David Thór Björgvinsson.

B.M.Z.
S.Q.

CONCURRING OPINION OF JUDGE MYJER

1. I am keenly aware that the outcome of this case will be emotional, not only for the applicant and for people who, like the applicant, have been members of Red Army commando and Partisan groups during the Second World War, but also for the descendants of the men and women who died on 27 May 1944 in Mazie Bati and more generally for those people who sincerely believed that the outcome of the domestic proceedings against the applicant was the right one. That is the reason why I have decided, exceptionally, to write a concurring opinion in which I hope to explain my own reasons for voting with the majority in this case. A judge should not normally express his private thoughts in relation to a judgment on which he has voted. In this exceptional case, however, I think that my comments may at least clarify that there are many ways of thinking behind the legal wording in which this Strasbourg judgment has been drafted.

2. When I first read the file in this case, my almost immediate reaction was that what happened in Mazie Bati on 27 May 1944 was atrocious. Imagine what would have been your own reaction if you witnessed the killing of your loved ones or fellow villagers. But I also felt that it could not be right for the applicant to be prosecuted for these events 54 years later. That seemed to me a flagrant injustice, unless he was actually wanted in connection with these events immediately after they occurred (or became public knowledge) and had managed to evade prosecution. But that was not the case. On the contrary, what happened that day seems to have been widely known and after the Second World War the applicant was actually decorated as a war hero for his activities as a Partisan. And even assuming that the events (and his part in them) were not known, he could only have been prosecuted if the offences of which he was suspected were not subject to statutory limitation – unless humanitarian international law demanded otherwise.

3. In that respect I was tempted at first to consider if – in the very specific circumstances of the case – the prosecution of the applicant was, *per se*, so unfair as to make the whole trial unfair. On second thoughts I agreed that the case should be dealt with under Article 7 alone. Thus I voted with my colleagues to declare inadmissible the complaints raised under Article 6 (admissibility decision of 20 September 2007).

I am convinced that the domestic proceedings were attended with the guarantees of Article 6. From the way the case was handled at the domestic level it appears that the national judges also had different views as to the legal consequences which should be drawn from the actual facts. Since these facts are very much linked to the legal questions which need

answering in relation to Article 7, I agree with the general reasoning in the judgment as expressed in paragraphs 108-112.

4. In principle it is not the task of this Court to substitute its view for that of the domestic courts and tribunals. It is primarily for the national authorities, notably the courts, to establish the facts and to resolve problems of interpretation of domestic legislation. 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 (see *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 54, ECHR 1999-I, and *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, § 90, ECHR 2001-II). Nevertheless, in a case like this where the facts and the interpretation of the domestic and international law are so interlinked, there is also reason to ascertain whether domestic and international law were applied in relation to these facts in a way that cannot be considered arbitrary. The Court has jurisdiction to review the circumstances complained of by an applicant in the light of the entirety of the Convention's requirements. In the performance of that task it is, notably, free to attribute to the facts of the case, as found to be established on the evidence before it, a characterisation in law different from that given by one of the parties or, if need be, to view the facts in a different manner (see *Streletz, Kessler and Krenz*, cited above, § 111).

5. To my knowledge this is the first case before this Court relating to events which took place during the Second World War in which the person on trial was not associated with the Nazis or their allies and collaborators, but was on the side of the Allied powers fighting the Nazis.

Article 6 of the Charter of the International Military Trial (Nuremberg) made it clear that "*The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries [should] have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.*"

It then enumerated these crimes in the following terms:

"*The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:*

(a) Crimes against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a Common Plan or Conspiracy for the accomplishment of any of the foregoing;

(b) War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private

property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity;

(c) Crimes against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated.

Leaders, organizers, instigators, and accomplices participating in the formulation or execution of a Common Plan or Conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan."

And although right from the beginning comments were made that the Nuremberg Trials should be considered no more than biased "victors' justice", because after the Second World War war crimes and crimes against humanity committed by the Allies were never tried at the (inter)national level, that – as far as I am aware – was intended to put an end to the matter: the Nuremberg trials and the subsequent trials of the Nazis and their henchmen at the international and national level were to be the final "judicial settlement" under criminal law of what had happened during the Second World War. After that, all States could start with a clean slate.

6. In that respect this case differs from cases like, for instance, *Papon v. France*. People like Papon were Nazi collaborators and had no right to complain about the fact that they were tried for war crimes or crimes against humanity many years after the end of the Second World War. In the admissibility decision of 15 November 2001, Papon's complaint of a violation of Article 7 § 2 was declared inadmissible on the following grounds:

"*... The Court points out that paragraph 2 of the above-mentioned Article 7 expressly provides that that Article must not prejudice the trial and punishment of a person for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognised by civilised nations. This is true of crimes against humanity, in respect of which the rule that they cannot be time-barred was laid down by the Statute of the Nuremberg International Tribunal annexed to the Inter-Allied Agreement of 8 August 1945 and a French law of 26 December 1964, referring expressly to that agreement when providing that the prosecution of crimes against humanity cannot be time-barred (see* Touvier v. France, *no. 29420/95, Commission decision of 13 January 1997, Decisions and Reports (DR) 88-B, pp. 148, 161).'*

7. The case therefore also differs from cases concerning people tried for crimes against humanity or war crimes committed *after* the Second World War and the Nuremberg trials. No person who committed crimes against humanity or war crimes after Nuremberg could reasonably say that he was not aware of the nature of his acts. I refer in that respect also to the reasoning of this Court in the admissibility decision of 4 January 2006 in the case of *Penart v. Estonia*, no. 14685/04:

"... Although the Nuremberg Tribunal was established for trying the major war criminals of the European Axis countries for the offences they had committed before or during the Second World War, the Court notes that the universal validity of the principles concerning crimes against humanity was subsequently confirmed by, inter alia, *Resolution No. 95 of the General Assembly of the United Nations Organisation (11 December 1946) and later by the International Law Commission. Accordingly, responsibility for crimes against humanity cannot be limited only to the nationals of certain countries and solely to acts committed within the specific time frame of the Second World War. In this context the Court would emphasise that it is expressly stated in Article I (b) of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity that no statutory limitations shall apply to crimes against humanity, irrespective of the date of their commission and whether committed in time of war or in time of peace. ...*"

8. I note that the Latvian Government admitted (see paragraph 92) that the Kononov trial can be considered as a kind of belated victor's justice as well and that trials of this kind "helped to make up for the inadequacies of the Nuremberg trial." I will however refrain from commenting on that specious argument.

9. Before elaborating on some of these points, I must explain that my perception is somehow tainted by my own national background. I was born in the Netherlands just after the Second World War and grew up with the perception that the Nazis and their collaborators were entirely in the wrong and those who fought against the Nazis (including members of resistance groups) were completely in the right. Whatever acts the resistance groups had committed against the occupying German forces or against Netherlands nationals who had collaborated with them, it had always been for the right cause. If resistance groups had silenced collaborators who had informed on Jews or persons in hiding, they had done the right thing. And in the event that, after the war, a person who had been a member of a resistance group was found guilty of a crime committed during the war, it certainly had nothing to do with his or her underground work, but only with the settling of personal scores or with ordinary crime.

As far as I know, there were no instances in the Netherlands in the Second World War of occupying forces supplying weapons to Netherlands "citizens" who feared reprisals from resistance groups.

10. I am convinced that during the Second World War the situation in Latvia was more complicated than in the Netherlands. Without having to take a stand on the "double *occupation*" viewpoint of the Latvian Government, what is clear is that in 1940 Latvia was incorporated into the USSR, and that on 22 June 1941 Nazi Germany launched its attack against the USSR and in that context occupied Latvian territory in order to incorporate Latvia into the German Reich. The occupation of Latvia was effected on 5 July 1941. Later on the Red Army tried to reconquer the territory lost by the USSR. On the occupied territory of Latvia itself, acts of sabotage against the Germans were performed by special Red Army commandos and Red Partisans.

I must admit that for a moment I did consider the possibility that there might have been a difference between the behaviour of the German occupiers in countries like Latvia and their behaviour elsewhere, if it could be assumed that, unlike in other occupied countries, they did not commit war crimes or crimes against humanity in Latvia. If that had been the case then some inhabitants of Latvia might have been forgiven for finding it legitimate to collaborate with these occupying forces. However, having read the chapter '*The aggressive war against the Union of Soviet Socialist Republics*' in the judgment of the International Military Tribunal for the Trial of German Major War Criminals (the Nuremberg judgment, 1 October 1946) and additional information on the mass killings of especially men, women and children of Jewish or Roma descent which took place in Latvia during the German occupation, I am fully convinced that this was not at all the case. In that respect I agree with the reasoning in the judgment (paragraph 130) that there was no justification for a pro-Nazi attitude or active collaboration with the Nazis in Latvia either.

11. The applicant Kononov – who was born in Latvia and lived there until the German occupation – was a member of one of the special USSR commando groups.

In February 1944 a Partisan group under the command of one Major Chugunov stayed in the village of Mazie Bati. According to the judgment of 30 April 2004 of the criminal chamber of the Latvian Supreme Court, one of the villagers of Mazie Bati gave them away to the Germans, who then murdered them. According to the applicant many more villagers were involved in this act of treachery. Be that as it may, after these events the Germans provided a certain number of villagers with a rifle, ammunition and two grenades. Another group of Partisans were sent to Mazie Bati under the command of the applicant. On 27 May 1944 they entered the village, searched several houses and killed the men and women – including a pregnant woman – in whose house weapons provided by the Germans were found.

12. I have no doubt that – with hindsight – the killing of the men and women on 27 May 1944 in Mazie Bati can be considered a criminal act. Understandable as it may seem that the Partisans wanted to take revenge for the betrayal and subsequent massacre of their fellow Partisans – or even wanted to set an example to other Latvian villages who might otherwise be willing to collaborate with the occupying German forces – they should not have resorted to an “eye for an eye” approach and should have chosen other means. Even in a situation of war, and even allowing for the difficulties facing a Partisan group having to take collaborators prisoner and transport them to a safe place to stand trial, they ought not to have killed these people on the spot. Besides, some of the killings were particularly gruesome. And although the applicant was not found guilty by the Latvian courts of having carried out the killings himself, since the acts happened under his command he seems to have borne responsibility as the field commander in charge of events.

13. Should the applicant at that time have been aware that what he did was criminal?

I am a little bit more hesitant to answer that in the affirmative. As I pointed out above, it is understandable that the Partisans did not want the

betrayal and massacre of their fellow Partisans to remain unpunished. It is also clear from the facts that Kononov's commandos only reacted against those villagers in whose homes weapons supplied by the Germans had been found – a fact which made it altogether reasonable to consider them as collaborators. And yes, as a member of the Partisans – someone who must be considered a combatant – he should have been aware of the applicable *jus in bello* rules, as is explained in paragraph 121 of the judgment. One of these rules expressly requires the rights of the civilian population, which is *not* engaged in the hostilities itself, to be respected. But what if one has strong reasons to believe that certain civilians have actively collaborated with the enemy to such an extent that they have betrayed fellow Partisans and thus caused their cruel deaths? And what if these civilians – who, what is more, are one's own compatriots – are armed by the selfsame enemy one is fighting as a Partisan? Are they still entitled to the same level of protection as *real* non-combatants? Or can they be equated with the enemy itself, that is, considered enemy combatants? To carry this argument further, can the applicant still argue, as he did, that the villagers were not the enemy but his compatriots? Are there acceptable, or indeed common-sense answers to these questions? With some hesitation I come to the conclusion that – whatever the status of the villagers who had betrayed the first Partisan group and who had accepted weapons from the German occupying forces – the applicant should have been aware that, even in the very specific circumstances of the case, the reprisals and the way they were performed could not be justified.

14. Can what happened in Mazie Bati be seen as a crime against humanity or a war crime, and if so, does that imply that the Latvian authorities were right to prosecute the applicant as late as 54 years after the events? In this respect, I wish to emphasise that not all crimes committed during the war can be considered war crimes. The reasons for committing specific crimes and the scale on which this happened are relevant considerations.

In this connection, I accept that, as was pointed out in the judgment, in 1944 the only pertinent positive international law was constituted by the Hague Conventions of 1899 and 1907. The Nuremberg trials took place after these events. Later on new conventions on international humanitarian law were adopted (the 1949 Geneva Conventions and the Protocol of 1977). The most recent development is the establishment of international criminal tribunals, special ones – the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone – and more recently a general one, the International Criminal Court. There can be no clearer affirmation that the most serious crimes concern humanity as a whole and must not go unpunished. But all that came later. Although the Nuremberg judgment referred to the same Hague Conventions to reach its conclusions that the Nazis and their allies who stood trial before it had committed war crimes, it was that trial which for the first time made it clear to the outside world that anyone who might commit similar crimes in future could be held personally responsible.

15. With the majority I am of the opinion that what happened in Mazie Bati on 27 May 1944, both according to international standards then applicable and according to domestic standards, cannot be seen as a crime for which no statutory limitation should apply. Accordingly, in my opinion Article 7 was violated.

16. In the circumstances of the case I consider the amount of compensation afforded by the Court quite equitable.

JOINT DISSENTING OPINION OF JUDGES FURA-SANDSTRÖM, DAVÍD THÓR BJÖRGVINSSON AND ZIEMELE

We do not share the view of the majority that there has been a violation of Article 7 as concerns the prosecution and conviction of the applicant in Latvia for war crimes committed during the Second World War.

I.

1. The case raises the following questions of principle: (1) In view of the *travaux préparatoires* of the Convention and the existing case-law should the cases concerning trials for war crimes committed during the Second World War be dealt with under Article 7 § 1 or 7 § 2? (2) What is the standard of legality and foreseeability in such cases? (3) What effect does the time element have for the purposes of the application of the relevant international law, general principles and the Convention?

2. The Court describes its task in the present case as follows: "[I]t is necessary for the Court to examine the criterion of foreseeability in the present case. More specifically, it must determine objectively whether a plausible legal basis existed on which to convict the applicant of a war crime and, subjectively, whether at the material time the applicant could reasonably have foreseen that his conduct would make him guilty of such an offence" (see paragraph 122 of the judgment). In so doing, it treats the case as being within the ambit of Article 7 § 1. It does not explain that choice and makes no comparison with the existing case-law or attempt to distinguish this case from other similar cases. It advances a rather circular explanation, saying that because the Court has chosen to examine the case under Article 7 § 1 it does not need also to examine it under Article 7 § 2 (see paragraph 147 of the judgment). As the judgment recognises, until now the Court has always dealt with cases involving international crimes under Article 7 § 2. In the past, the Court has always held that, in principle, the prosecution and punishment of international crimes committed many years ago is not contrary to the Convention where Article 7 § 2 rule applies. The standard was explained in the case of *Touvier* (see *Touvier v. France*, no. 29420/95, Commission decision of 13 January 1997, Decisions and Reports (DR)) in which the Commission explained:

> "The Commission notes that the applicant was sentenced to life imprisonment ... on 20 April 1994 for aiding and abetting a crime against humanity. ... The Commission considers it unnecessary to rule on whether the offence with which the applicant was charged could, at the time it was committed, be classified as such.

The Commission must now examine whether the exception provided for in paragraph 2 of Article 7 is applicable to the circumstances of this case.

The Commission recalls that it transpires from the preparatory work to the Convention that the purpose of paragraph 2 of Article 7 is to specify that this Article

does not affect laws which, in the wholly exceptional circumstances at the end of the Second World War, were passed in order to punish war crimes, treason and collaboration with the enemy and does not in any way aim to pass legal or moral judgment on those laws (see No. 268/57, Dec. 20.7.57, Yearbook 1, p. 241). ...

The Commission recalls, lastly, that it is not its function to deal with errors of fact or of law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention (see, for example, No. 13926/88, Dec. 4.10.90, D.R. 66, p. 209, at p. 225; No. 17722/91, Dec. 8.4.91, D.R. 69, p. 345, at p. 354). The Commission recalls further that the interpretation and application of national law are, as a general rule, matters for the national courts (see, among other authorities, No. 10153/82, Dec. 13.10.86, D.R. 49, p. 67)."

As far as we can see, the *Touvier* standard is different from the one adopted in the instant case. Until now the Court limited itself to an overall assessment of whether the application and interpretation of international law is compatible with the Convention and not arbitrary.

3. Judge Myjer in his concurring opinion argues that the Court is justified in its approach in applying Article 7 § 2 in cases in which the applicants had links with Nazi crimes and thus fell within the scope of the Nuremberg principles. This case is allegedly different since the applicant belonged to the Allied powers fighting against the Nazis. The legal basis for such an approach is unclear. Why should criminal responsibility depend on which side those guilty of war crimes were fighting on? There is certainly nothing in the Convention itself to limit the application of Article 7 to Nazi crimes alone. On the contrary the Article is drafted broadly and with a specific purpose as the *travaux préparatoires* amply show. True enough, today the Convention covers many more States then at the time of its drafting. However, now that this expansion has taken place, does that mean that more recent States Parties have different rights and obligations under Article 7? Or, in other words, that the Convention should operate with double standards? We do not think so. In the case of *Kolk and Kislyiy v. Estonia* (dec.), nos. 23052/04 and 24018/04, ECHR 2006-I, the Court clearly ruled that the Nuremberg principles had universal validity despite the limited scope of the Tribunal's jurisdiction *ratione personae* at the time (pp. 8-9).

4. However, the idea could be developed that the Court from now on and contrary to the intention of the States when drafting the Article will examine the prosecution of international crimes within the ambit of Article 7 § 1. This paragraph does refer to international law. The assessment of legality and foreseeability, however, should still be compatible with the understanding of those principles in international criminal law. There are obvious differences between the understanding of legality and foreseeability in domestic penal law and international criminal law, not least because international law is a different legal system from national legal systems (the differences between the common-law and civil-law systems in the definition

of these principles should also be noted) in terms of how the rules come into existence and are related to each other.[1]

5. It could be argued that under the Convention the Court can develop new standards regarding legality and foreseeability where trials of international crimes are concerned. The majority in this case does not seem to suggest such a role for the Court. This in any event is a fundamental judicial-policy issue in a case where the application of equally important areas of international law is concerned.[2] Of relevance in this connection is the following comment by the International Court of Justice (ICJ) on the purpose of international humanitarian law: "... a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity'".[3] It appears that both human-rights and humanitarian law share the same commitment, but often at different times and in different contexts. The ICJ went further and explained the relationship between international humanitarian law and human-rights law as follows: "In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities."[4] The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. In the Advisory Opinion on the 'Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory', the ICJ expanded as follows: "More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation ... As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law."[5]

In other words, a special body of law has been developed to deal with situations of armed hostilities which is adapted to the special features of such situations. It entails different rights, obligations and responsibilities for different parties. Before the European Court of Human Rights decides to apply its own standard to such situations, it should make a careful

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[1] Cf. M. Ch. Bassiouni, *Introduction to International Criminal Law*, Ardsley, New York: Transnational Publishers, Inc., 2003, pp.198-204.

[2] It is to be recalled that so far the approach by the Court is as defined in the *Al-Adsani v. the United Kingdom* case, which stated that the Convention "has to be interpreted in the light of the rules set out in the Vienna Convention on the Law of Treaties" and, in particular, that account is to be taken of "any relevant rules of international law applicable in the relations between parties" (§ 55). See L. Wildhaber, "The European Convention on Human Rights and International Law", International and Comparative Law Quarterly, 2006, pp. 230 – 231.

[3] 'Threat or Use of Nuclear Weapons', Advisory Opinion, *ICJ Reports 1996*, § 79.

[4] Ibid., p. 240, § 25.

[5] 'Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory', Advisory Opinion, *ICJ Reports 2003*, § 106.

assessment of what is at stake. In any event, the Court has always been mindful of global trends and aims that developments in international humanitarian law and international criminal law represent. If through the instant case the Court not only decides to develop a new approach but also to apply it retroactively, its decision should be based on weighty legal arguments. Such arguments in the Convention system are typically formulated by the Grand Chamber.

6. The difficulty with the case lies mainly in the fact that the trial took place almost sixty years after the alleged facts. As noted by the majority, the international legal regulation of armed conflict has indeed evolved in the meantime. The Court does not say, however, that the respondent State is prohibited from trying war criminals. The question then becomes much more technical and has to do with the application of law in time or in our case more specifically with the rule of inter-temporal law.[6] The widely cited *dicta* by Judge Huber in the *Island of Palmas* case states the rule as follows: "A judicial fact must be appreciated in the light of the law contemporary with it, and not of the law at the time such a dispute in regard to it arises or falls to be settled."[7]

The ICJ explained in the *Namibia* Advisory Opinion that in some cases the evolution of the concepts have to be taken into consideration, "Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into account the fact that the concepts ... were not static, but were by definition evolutionary ... . That is why, viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation".[8] This in fact is part of the rules of interpretation of international treaties, as set forth in the Vienna Convention on the Law of Treaties which codified the relevant rules of customary international law at the time. In addition to the ordinary meaning to be given to the terms in their context and the object and purpose methods, the Court should also bear in mind *inter alia* "any relevant rules of international law applicable in the relations between the parties".[9] The Court has consistently held that the Convention has to be interpreted in the light of the rules set out in the Vienna Convention.

7. The majority states that the Latvian Supreme Court has applied two international instruments retroactively (§§ 118–119 and 131). The problem would indeed arise both under the Convention and in terms of international criminal law if the *post facto* law was applied by the national courts in such a

[6] See R. Higgins, 'Time and Law: International Perspectives on an Old Problem' *International and Comparative Law Quarterly*, vol. 46, 1997.
[7] Cited, ibid., p. 515.
[8] 'Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276' (1970), Advisory Opinion, *ICJ Reports 1971*, § 53.
[9] For such a reading of the rule, see also Higgins, op cit.

way as to broaden the scope of the war crimes the applicant was convicted of.[10] However, the majority has not examined or discussed this question properly. Where the Court states in its judgment that the national court relied on Article 50 of Additional Protocol to the Geneva Conventions of 12 August 1949 (Protocol I) but should not have done so since the Protocol was adopted 30 years later, the proper course for establishing a relevant international-law fact would have been for the Court to at least attempt to determine whether Article 50 represented a new development in international humanitarian law or whether it was a codification of customary international law.

II.

8. The majority concludes that the applicant could not have foreseen that his acts constituted a war crime in the *jus in bello* sense at the time because, *inter alia*, nine villagers should have foreseen that their behaviour invited reprisals (see paragraph 130 of the judgment) and that they represented a legitimate danger to the Soviet Partisans in view of their pro-Nazi views and collaboration (paragraphs 130 and 134). In the view of the majority, the national courts did not sufficiently show that the 27 May 1944 attack on the village of Mazie Bati in Latvia was contrary to the laws of war and thus that there was a legal basis in international law on which to convict the applicant for commanding his Partisans to kill the six men and three women, one of whom was pregnant (paragraph 138).

9. In overruling the findings of the national courts on the status of the inhabitants of the village, the majority relies on the following understanding of the 1907 Hague Convention and the regulations annexed to it (hereafter "the Hague Regulations"). According to the Court, the Hague Regulations do not define the notions of 'a civilian' and 'civilian population. *Jus in bello* at the time did not provide that if a person did not qualify as a combatant he/she should be afforded the guarantees enjoyed by civilians (see paragraph 131).

10. This is a mistake in terms of the international humanitarian law applicable at the time. First of all, it is true that the regulation concerning the protection of civilians was in a relatively rudimentary state at that time, but it did exist. It is well-known that: "A central feature of the laws of armed conflict ever since the eighteenth century has been the distinction between combatants and civilians".[11] Where the text of the Hague Regulations was not sufficiently clear to the majority and since it considered that the reasoning of the national courts was insufficient, it should have resorted to all the other means available in international law to establish the scope of the relevant regulations in order to assess whether the national courts had arrived at arbitrary findings. This would have led the Court to

[10] For challenges that face the Court once it enters into the assessing the scope of international offence, see *Jorgic v. Germany*, no. 74613/01, ECHR 2007 … (extracts). ,

[11] See Ch Greenwood, 'The law of war (International Humanitarian Law)', in M. D. Evans, *International Law*, Oxford: University Press, 2003, p. 794. The ICRC has commented that: "The principle of distinction between civilians and combatants was first set forth in the St. Petersburg Declaration". See J-M. Henckaerts & L. Doswald-Beck, *Customary International Humanitarian Law*, Volume I: Rules, Cambridge: University Press, 2005, p. 3.

pay attention among other things to the Preamble to the 1907 Hague Convention which includes the so-called Martens clause, which provides: "[T]he high contracting Parties clearly do not intend that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders". It goes on to explain: "[I]n cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience". [12]

11. True enough, the Court has no competence to interpret the Hague or Geneva laws (see paragraph 122). For the European Court of Human Rights, other rules and principles of international law are facts that may be relevant in the case. These are facts, however, that ought to be established carefully having regard to all the tools that international law offers. Moreover, the Court has always adhered to this procedure in the cases where the context of applicable rules of international law is important.[13] For the purposes of the presence case, developments such as the 1863 Lieber Code, the 1868 Declaration of St. Petersburg or the Oxford Manual, all establishing the principle that there is no unlimited freedom for belligerents as to the choice of means and methods of warfare and that unnecessary suffering should not be inflicted are relevant. The 1863 Lieber Code was referred to in the admissibility decision but has been omitted from the judgment (see *Kononov v. Latvia* (dec.), no. 36376/04, 20 September 2007, p. 23).

12. The fact that the Court ascribes 'pro-Nazi views' to the inhabitants of the village cannot *per se* deprive them of the protection afforded to civilians in international humanitarian law (see paragraph 130 of the judgment), any more than the villagers' lack of sympathy for the Soviet Partisans for well-documented historical reasons.[14] If the majority wanted to establish that these six men and three women were not civilians, but combatants and in

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[12] According to the ICJ, a "modern version" of the Martens clause is to be found in Article 1 (2) of Additional Protocol I of 1977 and its "continuing existence and applicability is not to be doubted". See 'Legality of the Threat or Use of Nuclear Weapons', Advisory Opinion, *ICJ Reports 1996*, 257, 260.

[13] For extensive references to scholarly writings, etc., see e.g. *Jorgic v Germany*, §§ 40-47.

[14] A well-known historian, Norman Davis, describes the Second World War in the Baltic States as follows: "It is hard for Westerners to grasp, but from the view-point of Tallinn, Riga, or Vilnius, the growing possibility of a Nazi advance felt like blessed liberation from Liberation. … In the Baltic States, in Byelorussia, and Ukraine they were cheered as liberators. German soldiers were greeted by local peasants offering the traditional welcome of bread and salt. … In … Europe that was successively occupied both by Soviets and by Nazis, the element of choice was largely absent. Both totalitarian regimes sought to enforce obedience through outright terror. For most ordinary civilians, the prospect of serving the Soviets posed the same moral dilemmas as serving the fascists. The only course of principled action for patriots and democrats was the suicidal one of trying to oppose Hitler and Stalin simultaneously." See N. Davis, *Europe: A History*. Oxford: Oxford University Press, 1996, p. 1033. As to the nature of the Soviet regime, one can refer to the following fact: "On one night alone – June 14, 1941 – over 15,000 individuals were deported from Latvia to the Gulag. Total population losses stemming from deportations, massacres, and unexplained disappearances during the first year of Soviet occupation have been estimated at 35,000". See R.J.Misiunas and R. Taagepera, *The Baltic States: Years of dependence, 1940 – 1980*, Berkley and Los Angeles: University of California Press, 1983, p. 41.

that capacity directly involved in armed activities (whether one calls it collaboration or otherwise), it should at least have examined the four conditions that Article 1 of the Hague Regulations sets forth for distinguishing combatants from non-combatants, namely: "1. To be commanded by a person responsible for his subordinates; 2. To have a fixed distinctive emblem recognizable at a distance; 3. To carry arms openly; and 4. To conduct their operations in accordance with the laws and customs of war".[15] The Court's main difficulties with the approach it has adopted are as follows. First, it has no competence to add new criteria to the existing rules or to substitute its understanding of the concepts for that generally adopted in international law for the purposes of qualifying persons as combatants. Second, it cannot re-examine all the evidence, including testimonies of the victims of this crime (see paragraph 36 of the judgment).

13. Ultimately, the scope of the foreseeability principle endorsed by the majority remains unclear. Recently, the ICTY in the *Vasiljević* case stated with reference to the judgments of the Nuremberg Tribunal: "For criminal liability to follow, it is not sufficient, however, merely to establish that the act in question was illegal under international law, in the sense of being liable to engage the responsibility of a state which breaches that prohibition, ... [T]he Trial Chamber must satisfy itself that this offence with which the accused is charged was defined with sufficient clarity *under customary international law* for its general nature, its criminal character and its approximate gravity to have been sufficiently foreseeable and accessible. When making that assessment, the Trial Chamber takes into account the specificity of international law, in particular that of customary international law. The requirement of <u>sufficient clarity</u> of the definition of a criminal offence is in fact part of the *nullum crimen sine lege* requirement, and it must be assessed in that context."[16] In the case of *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, ECHR 2001-II, the Court, while primarily concerned with the application of domestic criminal law by German courts, concluded, *inter alia*: "The Court considers that <u>at the time</u> when they were committed the applicants' acts also constituted <u>offences defined with sufficient accessibility and foreseeability by the rules of international law</u> on the protection of human rights" (at § 105). We remain of the view that taking into consideration all relevant international normative developments at the time, to murder members of the civilian population of a hostile nation without any apparent military necessity was a war crime and that "the essence of the crime" was defined with sufficient accessibility and foreseeability by the rules of international law (see also *Jorgic v. Germany*, no. 74613/01, § 114, ECHR 2007-... (extracts)). Like the Chamber, we agree that the applicant in his capacity as a military commander must have known the relevant laws of war (see paragraph 124 of the judgment).

14. As concerns the criminal intent or consciousness, the following standard applies: "*Mens rea* cannot be negated if the illegality of the war

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[15] See further e.g. J. Westlake, *International Law*. Part II. War, 2nd ed., Cambridge University Press, 1913, pp. 64 – 65.

[16] See *The Prosecutor v. Mitar Vasiljević*, Trial Chamber judgment of 29 November 2002, §§ 199, 201.

crime is obvious to a reasonable man. When an act is objectively criminal in nature, the accused will not be exculpated on the ground of an alleged subjective belief in the lawfulness of his behaviour"[17] or the belief that because of State policy he will never be prosecuted.[18] However, the competence of the Court does not extend so far as to enable it to assess in the necessary detail issues pertaining to the *actus reus* and *mens rea*. These remain within the competence of the national courts or international criminal tribunals, where available.

For all these reasons, and since we are not persuaded that the national courts, in convicting the applicant, went beyond the essence of the definition of a war crime as it existed in 1944, we are firmly convinced that the national courts were better placed than this Court to decide the *Kononov* case. Our conclusion is that there has been no violation of Article 7.

DISSENTING OPINION OF JUDGE DAVID THÓR BJÖRGVINSSON

In addition to the joint dissenting opinion I would like to emphasize the following.

1. The essence of the reasoning of the majority rests on its finding that the victims of the Mazie Bati massacre, because of their relations with the German armed forces, were not civilians who enjoyed protection under the relevant international rules concerning acceptable warfare. This explains why the majority confines itself to an assessment of whether Article 7 § 1 has been breached.

In this regard it should be stressed that it has been established by the national courts that the applicant was, as a commander and member of the armed forces of the Soviet Union, involved in the killings in Mazie Bati on 27 May 1944. The national courts have also, on the basis of extensive and thorough investigation into the facts of the case, found that the people killed were civilians protected under the relevant international law. Furthermore, they found that the acts of the applicant constituted war crimes under the applicable international and domestic law. This Court is in no position to refute that finding or to override the conclusions of the national courts as regards the facts of the case and the applicable law. By doing so the majority has gone beyond a mere re-characterisation in law of the evidence before it (see *Streletz, Kessler and Krenz v. Germany* (GC), judgment of 22 March 2001, § 111). What the majority has in fact done should rather be seen as a reassessment of the crucial factual findings of the national courts, contrary to the well established case-law of this Court, which holds that it is primarily for the national authorities, notably the courts, to establish the

[17] See Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge: University Press, 2004, p. 245.
[18] See the concurring opinion of Judge Zupančič in the *Streletz, Kessler and Krentz v. Germany* case.

facts and interpret national legislation, including legislation referring to international law.

2. To further understand the situation of the victims it is also useful to put the Mazie Bati affair of 27 May 1944 into the wider historical context.

The State of Latvia was proclaimed in 1918. In 1940 the Soviet Union annexed Latvia. As described in paragraph 9 of the judgment, in 1941 Latvia was occupied by Germany and again by the Soviet Union at the end of the Second World War. After the collapse of the Soviet Union Latvia regained independence in 1991.

In other words, in the period 1940-1991 Latvia was a victim of hostile occupation by foreign powers. When the facts of this case occurred two totalitarian regimes, Nazi Germany and the Soviet Union, were fighting each other over Latvian territory in total disregard of the rights of the Latvians to self-determination, which always was, and still remains, their fundamental legitimate claim. The aim of the Soviet Union was not to "liberate" Latvia from Nazi Germany and re-establish the country as an independent sovereign State, but to regain control over Latvia as one of the Soviet Socialist Republics. History teaches us that such a situation facilitates conditions of war where both powers are inclined to be on the look out for likely collaborators with the enemy among the people of the occupied territory and use their own criteria – military, political or otherwise – to determine who should or should not be considered a collaborator, in accordance with their own aims and interests. However, from the Latvian standpoint both powers actions were based on an equally illegitimate claim for control over their territory. It was under these conditions that the killings in Mazie Bati took place. Put in this historical context these atrocities were inflicted upon Latvian civilians by men under the command of the military representative of the Soviet Union, which was a hostile occupying power, not a liberator, of Latvia.

Being occupied by the Soviet Union until 1991 the Latvians were in no position to make Soviet Union military personnel accountable for alleged war crimes committed against their people during the Second World War, until after the country regained independence in 1991.

The historical context is relevant for three reasons. Firstly, it explains the difficult dilemma that most Latvian civilians must have found themselves in, in their relations with the occupying forces. Secondly, it explains why I agree with the majority, contrary to what the applicant has submitted, that his actions, as a military serviceman of the Soviet Union, should not be regarded as having been directed against his own people and so falling outside the ambit of international rules on acceptable warfare. Thirdly, it explains why it was not until 1998 that the applicant was charged with war crimes for his role in the Mazie Bati affair.

3. It is not disputed that Article 7, paragraph 2, refers *inter alia* to war crimes, as they are defined in international law. Just as the legal concept of "war crime" is neutral with regard to which State the alleged perpetrators represent as military servicemen, Article 7 § 2, makes no such distinction. Whether a given act qualifies as a war crime depends on the nature of the

act itself and the circumstances under which it is committed, not on which country the perpetrators represent.

4. By the prosecution and conviction of the applicant for his role in the Mazie Bati affair on 27 May 1944 justice was served. The applicant was sentenced to a modest custodial sentence of one year and eight months, due regard being had to his old age and infirmity. More importantly he was made accountable for his crimes.

Estratto (par. 54-76) della sentenza del 18 luglio 2013, Grande Camera, causa MAKTOUF e DAMJANOVIC c. Bosnia-Herzegovina

II. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

54. Both applicants complained under Article 7 of the Convention that a more stringent criminal law had been applied to them than that which had been applicable at the time of their commission of the criminal offences. Article 7 provides:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
>
> 2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

A. Introductory remark

55. Serious violations of international humanitarian law falling under the State Court's jurisdiction can be divided into two categories. Some crimes, notably crimes against humanity, were introduced into national law in 2003. The State Court and the Entity courts therefore have no other option but to apply the 2003 Criminal Code in such cases (see the international materials cited in paragraphs 31 and 32 above). In this regard, the Court reiterates that in *Šimšić v. Bosnia and Herzegovina* (dec.), no. 51552/10, 10 April 2012, the applicant complained about his 2007 conviction for crimes against humanity with regard to acts which had taken place in 1992. The Court examined that case, *inter alia*, under Article 7 of the Convention and declared it manifestly ill-founded. It considered the fact that crimes against humanity had not been criminal offences under national law during the 1992-95 war to be irrelevant, since they had clearly constituted criminal offences under international law at that time. In contrast, the war crimes committed by the present applicants constituted criminal offences under national law at the time when they were committed. The present case thus raises entirely different questions to those in the *Šimšić* case.

B. Admissibility

56. The Government argued that Mr Damjanović's complaint should be dismissed in view of his failure to lodge a constitutional appeal in a timely manner. They had no objections with regard to the admissibility of Mr Maktouf's complaint.

57. Mr Damjanović alleged that a constitutional appeal was not an effective remedy in respect of this complaint, as it did not offer reasonable prospects of success (he relied on the Constitutional Court's decision in the *Maktouf* case, finding no breach of Article 7, and many subsequent cases in which the same reasoning had been applied).

58. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention requires applicants first to use the domestic remedies, thus dispensing States from answering before

the European Court for their acts before they have had an opportunity to put matters right through their own legal system. The rule is based on the assumption that the domestic system provides an effective remedy in respect of the alleged breach. The burden of proof is on the Government claiming non-exhaustion to satisfy the Court that an effective remedy was available in theory and in practice at the relevant time; that is to say, that the remedy was accessible and capable of providing effective and sufficient redress in respect of the applicant's complaints. However, once this burden of proof has been satisfied it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement (see, among other authorities, *Akdivar and Others v. Turkey*, 16 September 1996, §§ 65-69, *Reports of Judgments and Decisions* 1996-IV; *Mirazović v. Bosnia and Herzegovina* (dec.), no. 13628/03, 6 May 2006; and *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, §§ 68-71, 17 September 2009).

59. The Court notes that on 30 March 2007 the Constitutional Court of Bosnia and Herzegovina found no breach of Article 7 of the Convention in nearly identical circumstances in the *Maktouf* case, and has since applied the same reasoning in numerous cases. Indeed, the Government did not produce before the Court any decision by the Constitutional Court finding a violation of Article 7 in a similar case. Furthermore, the State Court referred in the *Damjanović* case to the Constitutional Court's decision in the *Maktouf* case.

60. The Court concludes that a constitutional appeal did not offer reasonable prospects of success for Mr Damjanović's complaint under Article 7 of the Convention and dismisses the Government's objection. As this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and it is not inadmissible on any other grounds, it must be declared admissible.

C. Merits

1. The parties' submissions

(a) The applicants

61. The prohibition of the retroactive application of the criminal law to the disadvantage of an accused was, according to the applicants, a well-established rule of both international and domestic law. The 2003 Criminal Code, being more severe than the 1976 Code with regard to the minimum sentences for war crimes, should not therefore have been applied in their case. In this regard, they referred to a small number of cases in which the State Court had considered the 1976 Code to be more lenient (see paragraph 29 above), criticising at the same time the State Court for not applying that Code consistently. Given that their convictions had been based exclusively on national law, they submitted that the Government's reliance on the "general principles of law recognised by civilised nations" within the meaning of Article 7 § 2 was misleading. They further submitted that their case should be distinguished from the cases to which the Government and the third party had referred (namely *S.W. v. the United Kingdom*, 22 November 1995, Series A no. 335-B, and *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, ECHR 2001-II). In particular, the *S.W.* case concerned the gradual development of the

criminal law through a line of case-law, over the course of several years, in order to take account of society's changing attitudes. This was clearly different from the enactment of new legislation prescribing heavier penalties for some criminal offences, as in the present case. The applicants added that the States should not change their laws after an event so as to punish perpetrators, no matter how controversial the offence in question.

(b) The Government

62. The Government maintained that the 2003 Criminal Code was more lenient to the applicants than the 1976 Criminal Code, given the absence of the death penalty (they referred to *Karmo v. Bulgaria* (dec.), no. 76965/01, 9 February 2006). That was indeed the opinion of the Constitutional Court of Bosnia and Herzegovina in the present case (see paragraph 15 above). They further argued that even if the 2003 Code was not more lenient to the applicants, it was still justified to apply it in this case, for the following reasons. First, the Government claimed that Article 7 § 2 of the Convention provided an exception to the rule of non-retroactivity of crimes and punishments set out in Article 7 § 1 (they referred to *Naletilić v. Croatia* (dec.), no. 51891/99, ECHR 2000-V). In other words, if an act was criminal at the time when it was committed both under "the general principles of law recognised by civilised nations" and under national law, then a penalty even heavier than that which was applicable under national law might be imposed. It was clear that the acts committed by the present applicants were criminal under "the general principles of law recognised by civilised nations". As a result, the rule of non-retroactivity of punishments did not apply and, in the Government's opinion, any penalty could have been imposed on the applicants. Secondly, the Government submitted that the interests of justice required that the principle of non-retroactivity be set aside in this case (they referred in this connection to *S.W.*, cited above; *Streletz, Kessler and Krenz*, cited above; and a duty under international humanitarian law to punish war crimes adequately). The rigidity of the principle of non-retroactivity, it was argued, had to be softened in certain historical situations so that this principle would not be to the detriment of the principle of equity.

63. As to the question whether the State Court had changed its practice with regard to sentencing in war crimes cases, the Government accepted that the 1976 Code had been applied on several occasions since March 2009 (see paragraph 29 above). However, they contended that the 2003 Code was still applied in most cases. Specifically, the State Court issued 102 decisions between March 2009 and November 2012 (59 by trial chambers and 43 by appeals chambers). The trial chambers had always applied the 2003 Code. The appeals chambers had applied that Code in all the cases concerning crimes against humanity and genocide. As to war crimes, the appeals chambers had applied the 1976 Code in five cases and the 2003 Code in 16 cases. The Government criticised the approach adopted in those first five cases and argued that the State Court should always have applied the 2003 Code in war crimes cases.

(c) The third party

64. The third-party submissions of the Office of the High Representative of November 2012 were along the same lines as the Government's submissions. Notably, the third party claimed, like the Government, that the acts committed by the present applicants were criminal under "the general

principles of law recognised by civilised nations" and that therefore the rule of non-retroactivity of punishments did not apply in this case. The Office of the High Representative also emphasised that although the 2003 Code had been applied in this case, the applicants' sentences were nevertheless within the latitude of both the 1976 Code and the 2003 Code. Lastly, the third party referred to the UN Human Rights Committee's "concluding observations" on Bosnia and Herzegovina (CCPR/C/BIH/CO/1), cited in paragraph 32 above.

2. The Court's assessment

65. At the outset, the Court reiterates that it is not its task to review *in abstracto* whether the retroactive application of the 2003 Code in war crimes cases is, *per se*, incompatible with Article 7 of the Convention. This matter must be assessed on a case-by-case basis, taking into consideration the specific circumstances of each case and, notably, whether the domestic courts have applied the law whose provisions are most favourable to the defendant (see *Scoppola*, cited above, § 109).

66. The general principles concerning Article 7 were recently restated in *Kononov v. Latvia* [GC], no. 36376/04, § 185, ECHR 2010:

> "The guarantee enshrined in Article 7, an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, so as to provide effective safeguards against arbitrary prosecution, conviction and punishment. Accordingly, Article 7 is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage: it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. It follows that an offence must be clearly defined in law. This requirement is satisfied where the individual can know from the wording of the relevant provision – and, if need be, with the assistance of the courts' interpretation of it and with informed legal advice – what acts and omissions will make him criminally liable.
>
> When speaking of 'law', Article 7 alludes to the same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises written and unwritten law and which implies qualitative requirements, notably those of accessibility and foreseeability. As regards foreseeability in particular, the Court recalls that however clearly drafted a legal provision may be in any system of law including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in certain Convention States, the progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen (*Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, § 50, ECHR 2001-II; *K.-H.W. v. Germany* [GC], no. 37201/97, § 85, ECHR 2001-II (extracts); *Jorgic v. Germany*, no. 74613/01, §§ 101-109, 12 July 2007; and *Korbely v. Hungary* [GC], no. 9174/02, §§ 69-71, 19 September 2008)."

67. Turning to the present case, the Court notes that the definition of war crimes is the same in Article 142 § 1 of the 1976 Criminal Code, which was applicable at the time the offences were committed, and Article 173 § 1 of the 2003 Criminal Code, which was applied retroactively in this case (see paragraphs 26 and 28 above). Moreover, the applicants did not dispute that their acts constituted criminal offences defined with sufficient accessibility

and foreseeability at the time when they were committed. The lawfulness of the applicants' convictions is therefore not an issue in the instant case.

68. It is further noted, however, that the two Criminal Codes provide for different sentencing frameworks regarding war crimes. Pursuant to the 1976 Code, war crimes were punishable by imprisonment for a term of 5-15 years or, for the most serious cases, the death penalty (see Article 142 § 1 in conjunction with Articles 37 § 2 and 38 § 1 of the 1976 Code). A 20-year prison term could have also been imposed instead of the death penalty (see Article 38 § 2 thereof). Aiders and abettors of war crimes, like Mr Maktouf, were to be punished as if they themselves had committed the crimes, but their punishment could be reduced to one year's imprisonment (see Article 42 of the same Code in conjunction with Articles 24 § 1 and 43 § 1 thereof). Pursuant to the 2003 Code, war crimes attract imprisonment for a term of 10-20 years or, for the most serious cases, long-term imprisonment for a term of 20-45 years (see Article 173 § 1 of the 2003 Code in conjunction with Article 42 §§ 1 and 2 of that Code). Aiders and abettors of war crimes, such as Mr Maktouf, are to be punished as if they themselves had committed the crimes, but their punishment could be reduced to five years' imprisonment (Article 49 in conjunction with Articles 31 § 1 and 50 § 1 of that Code). While pointing out that his sentence should be reduced as far as possible (see paragraph 14 above), the State Court sentenced Mr Maktouf to five years' imprisonment, the lowest possible sentence under the 2003 Code. In contrast, under the 1976 Code he could have been sentenced to one year's imprisonment. As regards Mr Damjanović, he was sentenced to 11 years' imprisonment, slightly above the minimum of ten years. Under the 1976 Code, it would have been possible to impose a sentence of only five years.

69. As regards the Government's argument that the 2003 Code was more lenient to the applicants than the 1976 Code, given the absence of the death penalty, the Court notes that only the most serious instances of war crimes were punishable by the death penalty pursuant to the 1976 Code (see paragraph 26 above). As neither of the applicants was held criminally liable for any loss of life, the crimes of which they were convicted clearly did not belong to that category. Indeed, as observed above, Mr Maktouf received the lowest sentence provided for and Mr Damjanović a sentence which was only slightly above the lowest level set by the 2003 Code for war crimes. In these circumstances, it is of particular relevance in the present case which Code was more lenient in respect of the minimum sentence, and this was without doubt the 1976 Code. Such an approach has been taken by at least some of the appeals chambers in the State Court in recent cases (see paragraph 29 above).

70. Admittedly, the applicants' sentences in the instant case were within the latitude of both the 1976 Criminal Code and the 2003 Criminal Code. It thus cannot be said with any certainty that either applicant would have received lower sentences had the former Code been applied (contrast *Jamil v. France*, 8 June 1995, Series A no. 317-B; *Gabarri Moreno v. Spain*, no. 68066/01, 22 July 2003; *Scoppola*, cited above). What is crucial, however, is that the applicants could have received lower sentences had that Code been applied in their cases. As already observed in paragraph 68 above, the State Court held, when imposing Mr Maktouf's sentence, that it should be reduced to the lowest possible level permitted by the 2003 Code. Similarly, Mr Damjanović received a sentence that was close to the

minimum level. It should further be noted that, according to the approach followed in some more recent war crimes cases referred to in paragraph 29 above, the appeals chambers of the State Court had opted for the 1976 Code rather than the 2003 Code, specifically with a view to applying the most lenient sentencing rules. Accordingly, since there exists a real possibility that the retroactive application of the 2003 Code operated to the applicants' disadvantage as concerns the sentencing, it cannot be said that they were afforded effective safeguards against the imposition of a heavier penalty, in breach of Article 7 of the Convention.

71. The Court is unable to accept the Government's suggestion that its decision in *Karmo*, cited above, offers guidance for its assessment of the case now under consideration. The circumstances are significantly different. Whilst the present applicants were sentenced to relatively short terms of imprisonment, the applicant in *Karmo* had been sentenced to death and the issue was whether it was contrary to Article 7 to commute the death penalty to life imprisonment following the abolition of the death penalty in 1998. The Court considered that it was not and rejected the complaint under Article 7 as manifestly ill-founded.

72. Furthermore, the Court is unable to agree with the Government's argument that if an act was criminal under "the general principles of law recognised by civilised nations" within the meaning of Article 7 § 2 of the Convention at the time when it was committed then the rule of non-retroactivity of crimes and punishments did not apply. This argument is inconsistent with the *travaux préparatoires* which imply that Article 7 § 1 can be considered to contain the general rule of non-retroactivity and that Article 7 § 2 is only a contextual clarification of the liability limb of that rule, included so as to ensure that there was no doubt about the validity of prosecutions after the Second World War in respect of the crimes committed during that war (see *Kononov*, cited above, § 186). It is thus clear that the drafters of the Convention did not intend to allow for any general exception to the rule of non-retroactivity. Indeed, the Court has held in a number of cases that the two paragraphs of Article 7 are interlinked and are to be interpreted in a concordant manner (see, for example, *Tess v. Latvia* (dec.), no. 34854/02, 12 December 2002, and *Kononov*, cited above, § 186).

73. The Government's reliance in this regard on *S.W.* and *Streletz, Kessler and Krenz* (cited above) likewise cannot be accepted. The present case does not concern an issue of progressive development of the criminal law through judicial interpretation, as in the case of *S.W.* Nor does the case at hand concern a State practice that is inconsistent with the State's written or unwritten law. In *Streletz, Kessler and Krenz*, the applicants' acts had constituted offences defined with sufficient accessibility and foreseeability in the criminal law of the German Democratic Republic at the material time, but those provisions had not been enforced for a long time prior to the regime change in 1990.

74. The Court sees no need to examine in any detail the Government's further argument that a duty under international humanitarian law to punish war crimes adequately required that the rule of non-retroactivity be set aside in this case. It suffices to note that the rule of non-retroactivity of crimes and punishments also appears in the Geneva Conventions and their Additional Protocols (see paragraph 43 above). Moreover, as the applicants' sentences were within the compass of both the 1976 and 2003 Criminal

Codes, the Government's argument that the applicants could not have been adequately punished under the former Code is clearly unfounded.

75. Lastly, while the Court in principle agrees with the Government that States are free to decide their own penal policy (see *Achour v. France* [GC], no. 67335/01, § 44, ECHR 2006-IV, and *Ould Dah v. France* (dec.), no. 13113/03, ECHR 2009), they must comply with the requirements of Article 7 in doing so.

D. Conclusion

76. Accordingly, the Court considers that there has been a violation of Article 7 of the Convention in the particular circumstances of the present case. This conclusion should not be taken to indicate that lower sentences ought to have been imposed, but simply that the sentencing provisions of the 1976 Code should have been applied in the applicants' cases.

Sentenza del 21 ottobre 2013, Grande Camera, causa DEL RIO PRADA c. Spagna (in particolare, par. 56-118)

In the case of Del Río Prada v. Spain,

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

Dean Spielmann, *President,*
Guido Raimondi,
Ineta Ziemele,
Mark Villiger,
Isabelle Berro-Lefèvre,
Elisabeth Steiner,
George Nicolaou,
Luis López Guerra,
Ledi Bianku,
Ann Power-Forde,
Işıl Karakaş,
Paul Lemmens,
Paul Mahoney,
Aleš Pejchal,
Johannes Silvis,
Valeriu Griţco,
Faris Vehabović, *judges,*

and Michael O'Boyle, *Deputy Registrar,*

Having deliberated in private on 20 March 2013 and 12 September 2013,

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

PROCEDURE

1. The case originated in an application (no. 42750/09) against the Kingdom of Spain lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Spanish national, Ms Inés del Río Prada ("the applicant"), on 3 August 2009.

2. The applicant was represented by Mr S. Swaroop, Mr M. Muller and Mr M. Ivers, lawyers practising in London, Mr D. Rouget, a lawyer practising in Bayonne, Ms A. Izko Aramendia, a lawyer practising in Pamplona and Mr U. Aiartza Azurtza, a lawyer practising in San Sebastian. The Spanish Government ("the Government") were represented by their Agent, Mr F. Sanz Gandásegui, and their co-Agent, Mr I. Salama Salama, State Counsel.

3. The applicant alleged in particular that since 3 July 2008 her continued detention had been neither "lawful" nor "in accordance with a procedure prescribed by law" as required by Article 5 § 1 of the Convention. Relying on Article 7, she also complained that what she considered to be the retroactive application of a new approach adopted by the Supreme Court after her conviction had increased the length of her imprisonment by almost nine years.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). On 19 November 2009 the President of the Third Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1 of the Convention). On 10 July 2012 a Chamber of that Section, composed of Josep Casadevall, President, Corneliu Bîrsan, Alvina Gyulumyan, Egbert Myjer, Ján Šikuta, Luis López Guerra and Nona Tsotsoria, judges, and Santiago Quesada, Section Registrar, gave judgment. They unanimously declared the complaints under Article 7 and Article 5 § 1 of the Convention admissible and the remainder of the application inadmissible, then proceeded to find a violation of those provisions.

5. On 4 October 2012 the Court received a request from the Government for the case to be referred to the Grand Chamber. On 22 October 2012 a panel of the Grand Chamber decided to refer the case to the Grand Chamber (Article 43 of the Convention).

6. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24 of the Rules of Court.

7. The applicant and the Government each filed further written observations (Rule 59 § 1) on the merits.

8. In addition, third-party comments were received from Ms Róisín Pillay on behalf of the International Commission of Jurists (ICJ), who had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3).

9. A hearing took place in public in the Human Rights Building, Strasbourg, on 20 March 2013 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr	I. SALAMA SALAMA,	*Co-Agent*,
Mr	F. SANZ GANDÁSEGUI,	*Agent*,
Mr	J. REQUENA JULIANI,	
Mr	J. NISTAL BURON,	*Advisers*;

(b) *for the applicant*

Mr	M. MULLER,	
Mr	S. SWAROOP,	
Mr	M. IVERS,	*Counsel*,
Mr	D. ROUGET,	
Ms	A. IZKO ARAMENDIA,	
Mr	U. AIARTZA AZURTZA,	*Advisers*.

The Court heard addresses by Mr Muller, Mr Swaroop, Mr Ivers and Mr Salama Salama, as well as replies from Mr Muller, Mr Swaroop, Mr Ivers and Mr Sanz Gandásegui to its questions.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The applicant was born in 1958. She is serving a prison sentence in the region of Galicia.

11. In eight separate sets of criminal proceedings before the *Audiencia Nacional*[1], the applicant was sentenced as follows:

- in judgment no. 77/1988 of 18 December 1988: for being a member of a terrorist organisation, to eight years' imprisonment; for illegal possession of weapons, to seven years' imprisonment; for possession of explosives, to eight years' imprisonment; for forgery, to four years' imprisonment; and for using forged identity documents, to six months' imprisonment;
- in judgment no. 8/1989 of 27 January 1989: for damage to property, in conjunction with six counts of grievous bodily harm, one of causing bodily harm and nine of causing minor injuries, to sixteen years' imprisonment;
- in judgment no. 43/1989 of 22 April 1989: for a fatal attack and for murder, to twenty-nine years' imprisonment on each count;
- in judgment no. 54/1989 of 7 November 1989, for a fatal attack, to thirty years' imprisonment; for eleven murders, to twenty-nine years for each murder; for seventy-eight attempted murders, to twenty-four years on each count; and for damage to property, to eleven years' imprisonment. The *Audiencia Nacional* ordered that in accordance with Article 70.2 of the Criminal Code of 1973 the maximum term to be served (*condena*) should be thirty years;
- in judgment no. 58/1989 of 25 November 1989: for a fatal attack and two murders, to twenty-nine years' imprisonment in respect of each charge. The *Audiencia Nacional* ordered that in accordance with Article 70.2 of the Criminal Code of 1973 the maximum term to be served (*condena*) should be thirty years;
- in judgment no. 75/1990 of 10 December 1990: for a fatal attack, to thirty years' imprisonment; for four murders, to thirty years' imprisonment on each count; for eleven attempted murders, to twenty years' imprisonment on each count; and on the charge of terrorism, to eight years' imprisonment. The judgment indicated that for the purposes of the custodial sentences the maximum sentence provided for in Article 70.2 of the Criminal Code of 1973 should be taken into account;
- in judgment no. 29/1995 of 18 April 1995: for a fatal attack, to twenty-eight years' imprisonment, and for attempted murder, to twenty years and one day. The court again referred to the limits provided for in Article 70 of the Criminal Code;
- in judgment no. 24/2000 of 8 May 2000: for an attack with intent to murder, to thirty years' imprisonment; for murder, to twenty-nine years' imprisonment; for seventeen attempted murders, to twenty-four years' imprisonment on each count; and for damage to property, to eleven years' imprisonment. The judgment stated that the sentence to be served should not exceed the limit provided for in Article 70.2 of the Criminal Code of 1973. In determining which criminal law was applicable (the Criminal Code of 1973, which was applicable at the material time, or the later Criminal Code of 1995), the *Audiencia Nacional* considered that the more lenient law was the 1973 Criminal Code, because of the maximum term to be served as

[1] Court with jurisdiction in terrorist cases, among other things, sitting in Madrid.

provided for in Article 70.2 of that Code, combined with the remissions of sentence for work done in detention as provided for in Article 100.

12. In all, the terms of imprisonment to which the applicant was sentenced for these offences, committed between 1982 and 1987, amounted to over 3,000 years.

13. The applicant was held in pre-trial detention from 6 July 1987 to 13 February 1989 and began to serve her first sentence after conviction on 14 February 1989.

14. By a decision of 30 November 2000 the *Audiencia Nacional* notified the applicant that the legal and chronological links between the offences of which she had been convicted made it possible to group them together (*acumulación de penas*) as provided for in section 988 of the Criminal Procedure Act (*Ley de Enjuiciamiento Criminal*) in conjunction with Article 70.2 of the 1973 Criminal Code, in force when the offences were committed. The *Audiencia Nacional* fixed the maximum term to be served by the applicant in respect of all her prison sentences combined at thirty years.

15. By a decision of 15 February 2001 the *Audiencia Nacional* set the date on which the applicant would have fully discharged her sentence (*liquidación de condena*) at 27 June 2017.

16. On 24 April 2008, taking into account the 3,282 days' remission to which she was entitled for the work she had done since 1987, the authorities at Murcia Prison, where the applicant was serving her sentence, proposed to the *Audiencia Nacional* that she be released on 2 July 2008. Documents submitted to the Court by the Government show that the applicant was granted ordinary and extraordinary remissions of sentence by virtue of decisions of the judges responsible for the execution of sentences (*Jueces de Vigilancia Penitenciaria* at first instance and *Audiencias Provinciales* on appeal) in 1993, 1994, 1997, 2002, 2003 and 2004, for cleaning the prison, her cell and the communal areas and undertaking university studies.

17. However, on 19 May 2008 the *Audiencia Nacional* rejected that proposal and asked the prison authorities to submit a new date for the applicant's release, based on a new precedent (known as the "Parot doctrine") set by the Supreme Court in its judgment no. 197/2006 of 28 February 2006. According to this new approach, sentence adjustments (*beneficios*) and remissions were no longer to be applied to the maximum term of imprisonment of thirty years, but successively to each of the sentences imposed (see "Relevant domestic law and practice", paragraphs 39-42 below).

18. The *Audiencia Nacional* explained that this new approach applied only to people convicted under the Criminal Code of 1973 to whom Article 70.2 thereof had been applied. As that was the applicant's case, the date of her release was to be changed accordingly.

19. The applicant lodged an appeal (*súplica*) against that decision. She argued, *inter alia*, that the application of the Supreme Court's judgment was in breach of the principle of non-retroactive application of criminal-law provisions less favourable to the accused, because instead of being applied to the maximum term to be served, which was thirty years, remissions of sentence for work done in detention were henceforth to be applied to each of the sentences imposed. The effect, she argued, would be to increase the

term of imprisonment she actually served by almost nine years. The Court has not been apprised of the outcome of this appeal.

20. By an order of 23 June 2008, based on a new proposal by the prison authorities, the *Audiencia Nacional* set the date for the applicant's final release (*licenciamiento definitivo*) at 27 June 2017.

21. The applicant lodged a *súplica* appeal against the order of 23 June 2008. By a decision of 10 July 2008 the *Audiencia Nacional* rejected the applicant's appeal, explaining that it was not a question of limits on prison sentences, but rather of how to apply reductions of sentence in order to determine the date of a prisoner's release. Such reductions were henceforth to be applied to each sentence individually. Lastly, the *Audiencia Nacional* considered that the principle of non-retroactive application had not been breached because the criminal law applied in this case had been that in force at the time of its application.

22. Relying on Articles 14 (prohibition of discrimination), 17 (right to liberty), 24 (right to effective judicial protection) and 25 (principle of legality) of the Constitution, the applicant lodged an *amparo* appeal with the Constitutional Court. By a decision of 17 February 2009 the Constitutional Court declared the appeal inadmissible on the grounds that the applicant had not demonstrated the constitutional relevance of her complaints.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Constitution

23. The relevant provisions of the Constitution read as follows:

Article 9

"...

3. The Constitution guarantees the principle of legality, the hierarchy of legal provisions, the publicity of legal enactments, the non-retroactivity of punitive measures that are unfavourable to or restrict individual rights, the certainty that the rule of law will prevail, the accountability of the public authorities and the prohibition against arbitrary action on the part of the latter."

Article 14

"All Spaniards are equal before the law and may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other personal or social condition or circumstance."

Article 17

"1. Every person has the right to liberty and security. No one may be deprived of his or her liberty except in accordance with the provisions of this Article and in the cases and in the manner prescribed by law.

..."

Article 24

"1. All persons have the right to obtain effective protection by the judges and the courts in the exercise of their rights and legitimate interests, and in no case may there be a lack of defence.

..."

Article 25

"1. No one may be convicted or sentenced for any act or omission which at the time it was committed did not constitute a serious or petty criminal offence or administrative offence according to the law in force at that time.

2. Punishments entailing imprisonment and security measures shall be aimed at rehabilitation and social reintegration and may not consist of forced labour. While serving their sentence, convicted persons shall enjoy the fundamental rights set out in this Chapter, with the exception of those expressly limited by the terms of the sentence, the purpose of the punishment and the prison law. In all circumstances, they shall be entitled to paid employment and to the corresponding social-security benefits, as well as to access to cultural activities and the overall development of their personality.

..."

B. The law applicable under the Criminal Code of 1973

24. The relevant provisions of the Criminal Code of 1973, as in force at the time the offences were committed, read as follows:

Article 70

"When all or some of the sentences (*penas*) imposed ... cannot be served simultaneously by a convicted person, the following rules shall apply:

1. In imposing the sentences (*penas*), where possible the order to be followed for the purposes of their successive completion by the convicted person is that of their respective severity, the convicted person going on to serve the next sentence when the previous one has been served or extinguished by pardon ...

2. Notwithstanding the previous rule, the maximum term to be served (*condena*) by a convicted person shall not exceed three times the length of the most serious of the sentences (*penas*) imposed, the others ceasing to have effect once this maximum term, which may not exceed thirty years, is attained.

The above limit shall be applied even where the sentences (*penas*) have been imposed in different proceedings, if the facts, because they are connected, could have been tried as a single case."

Article 100 (as amended by Organic Law [*Ley Orgánica*] no. 8/1983)

"Once his judgment or conviction has become final, any person sentenced to imprisonment (*reclusión, prisión* or *arresto mayor*[2]) may be granted remission of sentence (*pena*) in exchange for work done while in detention. In serving the sentence (*pena*) imposed the prisoner shall be entitled, with the approval of the judge responsible for the execution of sentences (*Juez de Vigilancia*), to one day's remission for every two days worked in detention, and the time thus deducted shall be taken into account when granting release on licence. This benefit shall also apply, for the purposes of discharging (*liquidación*) the term of imprisonment to be served (*condena*), to prisoners who were held in pre-trial detention.

The following persons shall not be entitled to remission for work done in detention:

1. prisoners who escape or attempt to escape while serving their sentence (*condena*), even if they do not succeed.

2. prisoners who repeatedly misbehave while serving their sentence (*condena*)."

---

[2] Prison sentence of between one month and one day and six months.

25. The relevant provision of the Criminal Procedure Act in force at the material time reads as follows:

Section 988

"... When a person found guilty of several criminal offences is convicted, in different sets of proceedings, of offences that could have been tried in a single case, in accordance with section 17 of this Act, the judge or court which delivered the last judgment convicting the person concerned shall, of their own motion or at the request of the public prosecutor or the convicted person, fix the maximum term to be served in respect of all the sentences imposed, in accordance with Article 70.2 of the Criminal Code ..."

26. The right to remission of sentence for work done in detention was provided for in the Prison Regulations of 2 February 1956, the relevant provisions of which (Articles 65-73) were applicable at the time the offences were committed, by virtue of the second transitional provision of the 1981 Prison Regulations. The provisions concerned read as follows:

Article 65

"1. Under Article 100 of the Criminal Code, once his judgment or conviction has become final, any person sentenced to [imprisonment] may be granted remission of sentence (*pena*) in exchange for work done while in detention.

...

3. The following persons shall not be entitled to remission for work done in detention:

(a) prisoners who escape or attempt to escape while serving their sentence (*condena*), even if they do not succeed.

(b) prisoners who repeatedly misbehave while serving their sentence (*condena*). This provision applies to prisoners who commit a further serious or very serious disciplinary offence when they have not yet expunged a previous offence ..."

Article 66

"1. Whatever the regime to which he is subject, any prisoner may be granted remission of sentence for work done in detention provided that he meets the legal conditions. In such cases the detainee shall be entitled, for the purposes of his final release, to one day's remission for every two days' work done in detention. The total period of entitlement to remission shall also be taken into account when granting release on licence.

2. The prison's supervisory body shall submit a proposal to the *Patronato de Nuestra Señora de la Merced*. When the proposal is approved the days worked shall be counted retroactively in the prisoner's favour, from the day when he started to work.[3]"

Article 68

"Be it paid or unpaid, intellectual or manual, done inside the prison or outside ..., any work done by prisoners must be useful."

Article 71

"...

3. Extraordinary remissions of sentence may be granted for special reasons of discipline and productivity at work ..., within the limit of one day for each day worked and 175 days per year of sentence actually served ..."

[3] By a transitional provision of the 1981 Prison Regulations the powers vested in the *Patronato de Nuestra Señora de la Merced* were transferred to the judges responsible for the execution of sentences (*Jueces de Vigilancia Penitenciaria*).

Article 72

"Remissions of sentence may be granted for intellectual work:

(1) for undertaking and succeeding in religious or cultural studies organised by the management;

(2) for joining an arts, literature or science club set up by the prison authorities;

(3) for engaging in intellectual activities;

(4) for producing original works of an artistic, literary or scientific nature.

..."

Article 73

"The following prisoners shall forfeit the right to remission of sentence for work done in detention:

(1) prisoners who escape or attempt to escape. They shall forfeit the right to earn any future remission of sentence;

(2) prisoners who commit two serious or very serious disciplinary offences ...

Any remission already granted, however, shall be counted towards reducing the corresponding sentence or sentences.

27. Article 98 of the Criminal Code of 1973, regulating the release of prisoners on licence, read as follows:

"Release on licence may be granted to prisoners sentenced to more than one year's imprisonment who:

(1) are in the final phase of the term to be served (*condena*);

(2) have already served three-quarters of the term to be served;

(3) deserve early release for good behaviour; and

(4) afford guarantees of social reintegration."

28. Article 59 of the 1981 Prison Regulations (Royal Decree no.1201/1981), which explained how to calculate the term of imprisonment (three-quarters of the sentence imposed) to be served in order for a prisoner to be eligible for release on licence, read as follows:

Article 59

"In calculating three-quarters of the sentence (*pena*), the following rules shall apply:

(a) for the purposes of release on licence, the part of the term to be served (*condena*) in respect of which a pardon has been granted shall be deducted from the total sentence (*pena*) imposed, as if that sentence had been replaced by a lesser one;

(b) the same rule shall apply to sentence adjustments (*beneficios penitenciarios*) entailing a reduction of the term to be served (*condena*);

(c) when a person is sentenced to two or more custodial sentences, for the purposes of release on licence the sum of those sentences shall be treated as a single term of imprisonment to be served (*condena*). ..."

C. The law applicable following the entry into force of the Criminal Code of 1995

29. Promulgated on 23 November 1995, the Criminal Code of 1995 (Organic Law no. 10/1995) replaced the Criminal Code of 1973. It entered into force on 24 May 1996.

30. The new Code did away with remissions of sentences for work done in detention. However, the first and second transitional provisions of the new Code provided that prisoners convicted under the 1973 Code were to continue to enjoy that privilege even if their conviction was pronounced after the new Code entered into force. The transitional provisions concerned read as follows:

First transitional provision

"Crimes and lesser offences committed prior to the entry into force of the present Code shall be tried in conformity with the [Criminal Code of 1973] and other special criminal laws repealed by the present Code. As soon as this Code enters into force its provisions shall be applicable if they are more favourable to the accused."

Second transitional provision

"In order to determine which is the more favourable law, regard shall be had to the penalty applicable to the charges in the light of all the provisions of both Codes. The provisions concerning remission of sentence for work done in detention shall apply only to persons convicted under the old Code. They shall not be available to persons tried under the new Code ..."

31. Under the first transitional provision of the 1996 Prison Regulations (Royal Decree no. 190/1996), Articles 65-73 of the 1956 Regulations remained applicable to the execution of sentences imposed under the 1973 Criminal Code and to the determination of the more lenient criminal law.

32. The 1995 Criminal Code introduced new rules governing the maximum duration of prison sentences and the measures by which they could be adjusted (*beneficios penitenciarios*). Those rules were amended by Organic Law no. 7/2003 introducing reforms to ensure the full and effective execution of sentences. The amended provisions of the Criminal Code which are relevant to the present case read as follows:

Article 75

"When some or all of the sentences (*penas*) for the different offences cannot be served concurrently, they shall, as far as possible, be served consecutively, in descending order of severity."

Article 76

"1. Notwithstanding what is set forth in the preceding Article, the maximum term to be served (*condena*) by a convicted person shall not exceed three times the length of the most serious of the sentences (*penas*) imposed, the others ceasing to have effect once this maximum term, which may not exceed twenty years, is attained. Exceptionally, the maximum limit shall be:

(a) twenty-five years when a person has been found guilty of two or more crimes and one of them is punishable by law with a prison sentence of up to twenty years;

(b) thirty years when a person has been found guilty of two or more crimes and one of them is punishable by law with a prison sentence exceeding twenty years;

(c) forty years when a person has been found guilty of two or more crimes and at least two of them are punishable by law with a prison sentence exceeding twenty years;

(d) forty years when a person has been found guilty of two or more crimes ... of terrorism ... and any of them is punishable by law with a prison sentence exceeding twenty years.

2. The above limit shall be applied even where the sentences (*penas*) have been imposed in different proceedings, if the facts, because they are connected or because of when they were committed, could have been tried as a single case."

Article 78

"1. If, as a result of the limitations provided for in Article 76 § 1, the term to be served is less than half the aggregate of all the sentences imposed, the sentencing judge or court may order that decisions concerning adjustments of sentence (*beneficios penitenciarios*), day-release permits, pre-release classification and the calculation of the time remaining to be served prior to release on licence should take into account all of the sentences (*penas*) imposed.

2. Such an order shall be mandatory in the cases referred to in paragraphs (a), (b), (c) and (d) of Article 76 § 1 of this Code when the term to be served is less than half the aggregate of all the sentences imposed.

..."

33. According to the explanatory memorandum on Law no. 7/2003, Article 78 of the Criminal Code is meant to improve the efficacy of punishment for the most serious crimes:

"... Article 78 of the Criminal Code is amended so that for the most serious crimes the sum total of all the sentences imposed is taken into account for the purposes of adjustments of sentence, day-release permits, pre-release classification and the calculation of the time remaining to be served prior to release on licence.

The purpose of this amendment is to improve the efficacy of the penal system *vis-à-vis* people convicted of several particularly serious crimes, that is to say those provided for in Article 76 of the Criminal Code (namely twenty-five, thirty or forty years' actual imprisonment) when the term to be served amounts to less than half the total duration of all the sentences imposed. Where these limits are not applied, however, the courts may use their full discretion.

In application of this rule a person sentenced to one hundred, two hundred or three hundred years' imprisonment will, in reality, effectively and fully serve the maximum term (*condena*) applicable."

34. Article 90 of the Criminal Code of 1995 (as amended by Organic Law no. 7/2003) regulates release on licence. It subjects release on licence to conditions similar to those provided for in the Criminal Code of 1973 (pre-release classification, completion of three-quarters of the sentence, good behaviour and good prospects of social reintegration), but it also requires offenders to have complied with their obligations in respect of civil liability. In order to have good prospects of social reintegration offenders convicted of terrorism or organised crime must have unequivocally demonstrated their disavowal of terrorist methods and have actively cooperated with the authorities. This could take the form of a statement expressly repudiating the offences they committed and renouncing violence, together with an explicit appeal to the victims to forgive them. Unlike the new rules on the maximum duration of the sentence to be served and the conditions for applying sentence adjustments in the event of multiple convictions (Articles 76 and 78 of the Criminal Code), Article 90 of the Code is applicable immediately, regardless

of when the offences were committed or the date of conviction (single transitional provision of Law no. 7/2003).

D. The case-law of the Supreme Court

1. The case-law prior to the "Parot doctrine"

35. In an order of 25 May 1990 the Supreme Court considered that the combining of sentences in application of Article 70.2 of the Criminal Code of 1973 and section 988 of the Criminal Procedure Act concerned not the "execution" but the fixing of the sentence, and that its application was accordingly a matter for the trial court, not the judge responsible for the execution of sentences (*Jueces de Vigilancia Penitenciaria*).

36. In a judgment of 8 March 1994 (529/1994) the Supreme Court affirmed that the maximum term of imprisonment (thirty years) provided for in Article 70.2 of the Criminal Code of 1973 amounted to a "new sentence – resulting from but independent of the others – to which the sentence adjustments (*beneficios*) provided for by law, such as release on licence and remission of sentence, apply". The Supreme Court referred to Article 59 of the Prison Regulations of 1981, according to which the combination of two custodial sentences was treated as a new sentence for the purposes of release on licence.

37. In an agreement adopted by the full court on 18 July 1996, following the entry into force of the Criminal Code of 1995, the Criminal Division of the Supreme Court explained that for the purpose of determining which was the more lenient law, regard had to be had to the system of remissions of sentence introduced by the old Code of 1973 when comparing the sentences to be served respectively under that Code and the new Criminal Code of 1995. It added that under Article 100 of the Criminal Code of 1973 a prisoner who had served two days of his sentence was irrevocably considered to have served three days. The application of this rule gave the beneficiary an acquired right.[4] The Spanish courts, which had to apply this criterion to compare the terms to be served respectively under the new and the old Criminal Code, took into account the remissions of sentence granted under the old Code. They accordingly considered that where the remainder of the sentence to be served after deduction of the remissions granted prior to the entry into force of the new Code did not exceed the length of the sentence provided for in the new Code, the latter could not be considered more lenient than the old Code. That approach was confirmed by the Supreme Court in various decisions, including judgments nos. 557/1996 of 18 July 1996 and 1323/1997 of 29 October 1997.

38. The Supreme Court continued to adopt that interpretation of the maximum term to be served as prescribed in Article 76 of the new Criminal Code of 1995. In judgment no. 1003/2005, delivered on 15 September 2005, it held that "this limit amounts to a new sentence – resulting from but independent of the others – to which the sentence adjustments (*beneficios*) provided for by law, such as release on licence, day-release permits and pre-release classification apply". In the same manner and terms, it stated in judgment no. 1223/2005, delivered on 14 October 2005, that the maximum term to be served "amounts to a new sentence – resulting from but

[4] Interpretation of the second transitional provision of the Criminal Code of 1995. See also the agreement adopted by the plenary Criminal Division of the Supreme Court on 12 February 1999, concerning the application of the new limit to the term of imprisonment to be served as laid down in Article 76 of the 1995 Criminal Code.

independent of the others – to which the sentence adjustments (*beneficios*) provided for by law, such as release on licence, apply subject to the exceptions provided for in Article 78 of the Criminal Code of 1995".

2. The "Parot doctrine"

39. In judgment no. 197/2006 of 28 February 2006 the Supreme Court set a precedent known as the "Parot doctrine". The case concerned a terrorist member of ETA (H. Parot) who had been convicted under the Criminal Code of 1973. The plenary Criminal Division of the Supreme Court ruled that the remissions of sentence granted to prisoners were henceforth to be applied to each of the sentences imposed and not to the maximum term of thirty years provided for in Article 70.2 of the Criminal Code of 1973. The court's ruling was based in particular on a literal interpretation of Articles 70.2 and 100 of the Criminal Code of 1973 according to which that maximum term of imprisonment was not to be treated as a new sentence distinct from those imposed, or a distinct sentence resulting from those imposed, but rather as the maximum term a convicted person should spend in prison. This reasoning made a distinction between the "sentence" (*pena*) and the "term to be served" (*condena*); the former referred to the sentences imposed taken individually, to which remissions of sentence should be applied, while the latter referred to the maximum term of imprisonment to be served. The Supreme Court also used a teleological argument. The relevant parts of its reasoning read as follows:

> "... the joint interpretation of rules one and two of Article 70 of the Criminal Code of 1973 leads us to consider that the thirty-year limit *does not become a new sentence,* distinct from those successively imposed on the convict, or *another sentence resulting from all the previous ones*, but is the maximum term of imprisonment (*máximo de cumplimiento*) a prisoner should serve in prison. The reasons that lead us to this interpretation are: (a) first, a literal analysis of the relevant provisions leads us to conclude that the Criminal Code by no means considers the maximum term of thirty years to amount to a new sentence to which any reductions to which the prisoner is entitled should apply, for the simple reason that it says no such thing; (b) on the contrary, the sentence (*pena*) and the resulting term of imprisonment to be served (*condena*) are two different things; the wording used in the Criminal Code refers to the resulting limit as the 'term to be served' (*condena*), and fixes the different lengths of that maximum 'term to be served' (*condena*) in relation to the 'sentences' imposed. According to the first rule, that maximum is arrived at in one of two ways: the different sentences are served in descending order of severity until one of the two limits set by the system is attained (three times the length of the heaviest sentence imposed or, in any event, no more than thirty years); (c) this interpretation is also suggested by the wording of the Code, since after having served the successive sentences as mentioned, the prisoner *will no longer have to discharge* [i.e. serve] *the remaining ones* [in the prescribed order] *once the sentences already served reach the maximum length, which may not exceed thirty years* ...; (e) and from a teleological point of view, it would not be rational for the combination of sentences to reduce a long string of convictions to a single new sentence of thirty years, with the effect that an individual who has committed a single offence would be treated, without any justification, in the same way as someone convicted of multiple offences, as in the present case. Indeed, there is no logic in applying this rule in such a way that committing one murder is punished in the same way as committing two hundred murders; (f) were application for a pardon to be made, it could not apply to the resulting total term to be served (*condena*), but rather to one, several or all of the different sentences imposed; in such a case it is for the sentencing court to decide, and

not the judicial body responsible for setting the limit (the last one), which shows that the sentences are not combined into one. Besides, the first rule of Article 70 of the Criminal Code of 1973 explains how, *in such a case*, the sentences must be served successively 'the convicted person going on to serve the next sentence when the previous one has been extinguished by pardon'; (g) lastly, from a procedural point of view section 988 of the Criminal Procedure Act clearly states that it is a matter of setting the maximum limit of the *sentences* imposed (in the plural, in keeping with the wording of the law), '*fixing the maximum term to be served in respect of all the sentences*' (the wording is very clear).

Which is why the term 'combination (*refundición*) of the sentences to be served (*condenas*)' is very misleading and inappropriate. There is no merging of sentences into a single sentence, but the number of years an individual can be expected to serve in respect of multiple sentences is limited by law. This means that the prisoner serves the different sentences, with their respective specificities and with all the corresponding entitlements. That being so, the remissions of sentence for work done in detention as provided for in Article 100 of the Criminal Code of 1973 may be applied to the sentences successively served by the prisoner.

The total term to be served (*condena*) is thus served in the following manner: the prisoner begins by serving the heaviest sentences imposed. The relevant adjustments (*beneficios*) and remissions are applied to each of the sentences the prisoner serves. When the first [sentence] has been completed, the prisoner begins to serve the next one, and so on until the limits provided for in Article 70.2 of the Criminal Code of 1973 have been reached, at which point all of the sentences comprised in the total term to be served (*condena*) will have been extinguished.

Take, for example, the case of an individual given three prison sentences: thirty years, fifteen years and ten years. The second rule of Article 70 of the Criminal Code of 1973 ... limits the maximum term to be served to three times the most serious sentence or thirty years' imprisonment. In this case the actual term to be served would be thirty years. The prisoner would begin serving the successive sentences (the total term to be served), starting with the longest sentence (thirty years in this case). If he were granted a ten-year remission for whatever reason, he would have served that sentence after twenty years' imprisonment, and the sentence would be extinguished; next, the prisoner would start to serve the next longest sentence (fifteen years). With five years' remission that sentence will have been served after ten years. 20 + 10 = 30. [The prisoner] would not have to serve any other sentence, *any remaining sentences ceasing to have effect*, as provided for in the applicable Criminal Code, *once this maximum term, which may not exceed thirty years, is attained.*"

40. In the above-mentioned judgment the Supreme Court considered that there was no well-established case-law on the specific question of the interpretation of Article 100 of the Criminal Code of 1973 in conjunction with Article 70.2. It referred to a single precedent, its judgment of 8 March 1994 in which it had considered that the maximum duration provided for in Article 70.2 of the Criminal Code of 1973 amounted to "a new, independent sentence" (see paragraph 36 above). However, the Supreme Court departed from that interpretation, pointing out that that decision was an isolated one and could therefore not be relied on as a precedent in so far as it had never been applied in a consistent manner.

Even assuming that its new interpretation of Article 70 of the Criminal Code of 1973 could have been regarded as a departure from its case-law and from previous prison practice, the principle of equality before the law (Article 14 of the Constitution) did not preclude departures from the case-law, provided that sufficient reasons were given. Furthermore, the principle that the criminal law should not be applied retroactively (Article 25 § 1 and Article 9 § 3 of the Constitution) was not meant to apply to case-law.

41. Judgment no. 197/2006 was adopted by a majority of twelve votes to three. The three dissenting judges appended an opinion stating that the sentences imposed successively were transformed or joined together into

another sentence, similar in nature but different in so far as it combined the various sentences into one. That sentence, which they called "the sentence to be served", was the one resulting from the application of the limit fixed in Article 70.2 of the Criminal Code of 1973, which effectively extinguished the sentences that went beyond that limit. This new "unit of punishment" was the term the prisoner had to serve, to which remission for work done in detention was to be applied. Remissions would therefore affect the sentences imposed, but only once the rules on the consecutive serving of sentences had been applied to them "for the purposes of their completion". The dissenting judges also pointed out that for the purposes of determining the most lenient criminal law following the entry into force of the Criminal Code of 1995, all Spanish courts, including the Supreme Court (agreements adopted by the plenary Criminal Division on 18 July 1996 and 12 February 1999), had agreed to the principle that reductions of sentence should be applied to the sentence resulting from the application of Article 70.2 of the Criminal Code of 1973 (the thirty-year limit). In application of that principle no fewer than sixteen people convicted of terrorism had recently had their sentences reduced for work done in detention although they had each been given prison sentences totalling over a hundred years.

42. The dissenting judges considered that the method applied by the majority was not provided for in the Criminal Code of 1973 and therefore amounted to retroactive implicit application of the new Article 78 of the Criminal Code of 1995, as amended by Organic Law no. 7/2003 introducing measures to ensure the full and effective execution of sentences. This new interpretation to the convicted person's detriment was based on a policy of full execution of sentences which was alien to the Criminal Code of 1973, could be a source of inequalities and was contrary to the settled case-law of the Supreme Court (judgments of 8 March 1994, 15 September 2005 and 14 October 2005). Lastly, the dissenting judges considered that criminal policy reasons could on no account justify such a departure from the principle of legality, even in the case of an unrepentant terrorist murderer as in the case concerned.

3. Application of the "Parot doctrine"

43. The Supreme Court confirmed the "Parot doctrine" in subsequent judgments (see, for example, judgment no. 898/2008 of 11 December 2008). In its judgment no. 343/2011 of 3 May 2011 it referred to the departure from previous case-law in judgment no. 197/2006 in the following terms:

> "In the present case it was initially considered that the appellant would have finished serving the ljjegal maximum term of imprisonment on 17 November 2023, and that situation has not changed. It is the way sentence adjustments (*beneficios penitenciarios*) are applied that has changed. Until judgment no. 197/2006 (cited above) they were applied to the maximum term a prisoner could serve. This judgment and others that followed deemed that to be an error, and considered that the adjustment should be applied to the sentences actually imposed, which were to be served in succession, one after the other, until the limit provided for by law had been reached."

44. According to information supplied by the Government, the "Parot doctrine" has been applied to ninety-three convicted members of ETA and

thirty-seven other people found guilty of particularly serious crimes (drug traffickers, rapists and murderers).

E. The case-law of the Constitutional Court

45. In its judgment no. 174/1989 of 30 October 1989 the Constitutional Court noted that the remissions of sentence for work done in detention provided for in Article 100 of the Criminal Code of 1973 were periodically validated by the judges responsible for the execution of sentences (*Jueces de Vigilancia Penitenciaria*) further to a proposal by the prison authorities. It explained that remissions of sentence which had already been approved had to be taken into account by the trial court required to rule on the discharge (*liquidación*) of the term of imprisonment to be served (*condena*), and that remissions already accrued in application of the law could not subsequently be revoked to correct any errors or permit the application of a new interpretation. It added that where there was no appeal against a decision by a judge responsible for the execution of sentences, that decision became final and binding in conformity with the principle of legal certainty and the right not to have final judicial decisions overruled. It considered that the right to remissions of sentence for work done in detention was not conditional under the relevant law, as demonstrated by the fact that prisoners who misbehaved or attempted to escape lost that right only in respect of future adjustments, not in respect of those already granted.

46. In judgment no. 72/1994 of 3 March 1994 the Constitutional Court explained that the remissions of sentence for work done in detention provided for in Article 100 of the Criminal Code of 1973 reflected the principle enshrined in Article 25 § 2 of the Constitution that punishments entailing imprisonment must be aimed at the rehabilitation and social reintegration of the offender.

47. Various people who had suffered the effects of the "Parot doctrine" lodged *amparo* appeals with the Constitutional Court. The public prosecutor supported the cases of some of the individuals concerned, who complained in their appeals of violations of the principles of legality and non-retroactive interpretation of the law to the detriment of the accused. In his submissions he maintained that the principle of legality – and the principle of non-retroactivity it entailed – should apply to the execution of sentences. In a series of judgments of 29 March 2012 the Constitutional Court, sitting as a full court, ruled on the merits of these *amparo* appeals.

48. In two of those judgments (nos. 39/2012 and 57/2012), the Constitutional Court allowed the appeals, holding that there had been a violation of the right to effective judicial protection (Article 24 § 1 of the Constitution) and of the right to liberty (Article 17 § 1 of the Constitution). It considered that the new method of applying remissions of sentence as a result of the Supreme Court's departure from its case-law in 2006 had challenged final judicial decisions concerning the interested parties. It noted that the *Audiencia Nacional* which had adopted the decisions in question had considered that the Criminal Code of 1973 (which provided for a maximum term of imprisonment of thirty years) was more favourable to the persons concerned than the Criminal Code of 1995 (where the limit was twenty-five years) because they would have lost the right to remissions of sentence from the time the Criminal Code of 1995 entered into force had it been applied to them. Observing that the *Audiencia Nacional* had based its finding on the principle that the remissions of sentence provided for under

the old Code should be deducted from the legal maximum term of imprisonment (namely thirty years), it held that final judicial decisions could not be altered by a new judicial decision applying another method. It concluded that there had been a violation of the right to effective judicial protection, and more specifically of the right not to have final judicial decisions overruled (the "intangibility" of final judicial decisions, or the principle of *res judicata*). Concerning the right to liberty, it considered that, regard being had to the Criminal Code of 1973 and the method of applying remissions of sentence adopted in the judicial decisions cited above, the prisoners concerned had completed their sentences, which meant that their continued detention after the release date proposed by the prison authorities (in conformity with the formerly applicable rules) had no legal basis. In both decisions it referred to the Court's judgment in *Grava v. Italy* (no. 43522/98, §§ 44-45, 10 July 2003).

49. In a third case (judgment no. 62/2012), the Constitutional Court allowed an *amparo* appeal, holding that there had been a violation of the right to effective judicial protection (Article 24 § 1 of the Constitution) because the *Audiencia Nacional* had changed the date of the prisoner's final release, thereby disregarding its own firm and final judicial decision given a few days earlier.

50. The Constitutional Court rejected *amparo* appeals in twenty-five cases (judgments nos. 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 59, 61, 64, 65, 66, 67, 68 and 69/2012), because the decisions of the ordinary courts fixing the prisoners' final release date based on the new approach introduced in 2006 had not contradicted the final decisions previously reached in those cases. Those decisions had not explicitly mentioned the manner of applying remissions of sentence for work done in detention, and that issue had not been decisive as regards the choice of the applicable Criminal Code.

51. Both in the judgments in favour of the appellants and in those against, the Constitutional Court rejected the complaint under Article 25 of the Constitution (principle of legality) because the question of the application of remissions of sentence for work done in detention concerned the execution of the sentence and on no account the application of a harsher sentence than that provided for in the applicable criminal law, or a sentence exceeding the limit allowed by law. The Constitutional Court referred to the Court's case-law establishing a distinction between measures constituting a "penalty" and those relating to the "execution" of a sentence for the purposes of Article 7 of the Convention (*Hogben v. the United Kingdom*, no. 11653/85, Commission decision of 3 March 1986, Decisions and Reports (DR) 46, p. 231; *Grava*, cited above, § 51; and *Gurguchiani v. Spain*, no. 16012/06, § 31, 15 December 2009).

52. In the parts of its judgment no. 39/2012 concerning the principle of legality, for example, the Constitutional Court stated:

> "3. ... It must first be observed that the question under examination does not fall within the scope of the fundamental right enshrined in Article 25 § 1 of the Constitution – namely the interpretation and application of criminal charges, the classification of the facts established in respect of the offences concerned and the application of the corresponding penalties ... – but rather concerns the execution of custodial sentences, that is to say the application of remissions of sentence for work

done in detention, and the interpretation we are required to examine cannot lead to the serving of sentences heavier than those provided for in respect of the criminal offences concerned, or to imprisonment in excess of the legal limit. In a similar manner, contrary to what the prosecution have argued, the European Court of Human Rights also considers that, even when they have an impact on the right to liberty, measures concerning the execution of the sentence – rather than the sentence itself – do not fall within the scope of the principle of no punishment without law enshrined in Article 7 § 1 of the Convention provided that they do not result in the imposition of a penalty harsher than that provided for by law. In its judgment in the case of *Grava v. Italy* (§ 51) of 10 July 2003, the European Court of Human Rights reached this conclusion in a case concerning remission of sentence, citing *mutatis mutandis Hogben v. the United Kingdom* (no. 11653/85, Commission decision of 3 March 1986, Decisions and Reports (DR) 46, pp. 231, 242, relating to release on licence). More recently, in its judgment of 15 December 2009 in the case of *Gurguchiani v. Spain* (§ 31), the Court stated: 'both the Commission and the Court in their case-law have drawn a distinction between a measure that constitutes in substance a 'penalty' and a measure that concerns the 'execution' or 'enforcement' of the 'penalty'. In consequence, where the nature and purpose of a measure relate to a remission of sentence or a change in a regime for early release, this does not form part of the 'penalty' within the meaning of Article 7.'

The court must also reject the complaint concerning the alleged violation of the principle of no punishment without law (Article 25 § 1 of the Constitution) as a result of the retroactive application of Article 78 of the Criminal Code of 1995 (in its initial wording and as amended by Organic Law no. 7/2003), authorising the sentencing judge or court to order that 'decisions concerning adjustments of sentence, day-release permits, pre-release classification and the calculation of the time remaining to be served prior to release on licence should take into account all of the sentences imposed' in certain situations where sentences were grouped together (Article 78 § 1 of the Criminal Code). The law obliges the courts to take into account all the sentences in cases where particularly heavy multiple sentences were imposed. There are certain exceptions to this obligation, however (Article 78 §§ 2 and 3 of the Criminal Code currently in force). That said, the impugned decisions and the Supreme Court decision cited in them did not involve any retroactive application of that rule (which in any event is not applicable to remissions of sentence for work done in detention, as the Criminal Code of 1995 did away with such remissions). They simply applied the provisions that were in force at the time the offences of which the applicant was convicted were committed (Articles 70.2 and 100 of the Criminal Code of 1973), but with a new interpretation which, although based on the method of calculation expressly provided for in Article 78 of the Criminal Code of 1995, was possible, they explained, in view of the wording of Articles 70.2 and 100 of the Criminal Code of 1973. That being so, if one follows the reasoning of the judicial bodies and the applicable rules, the appellant's complaint lacks any factual basis as the principle of the non-retroactive application of a harsher criminal law enshrined in Article 25 § 1 of the Constitution is breached only where a criminal law has been applied retroactively to acts committed before its entry into force ..."

Concerning the right to liberty, the Constitutional Court held:

"4. ... In our case-law remissions of sentence for work done in detention directly affect the fundamental right to liberty guaranteed by Article 17 § 1 of the Constitution, as the duration of the term of imprisonment depends *inter alia* on how they are applied, regard being had to Article 100 of the Criminal Code of 1973 ... That provision states that 'the prisoner shall be entitled, with the approval of the judge responsible for the execution of sentences, to one day's remission for every two days worked', as calculated periodically by the judges responsible for the execution of sentences, based on proposals made by the prison authorities, said remission then being taken into account, for the purposes of the term of imprisonment to be served, by the sentencing court ...

We have also held that remissions of sentence for work done in detention are in the spirit of Article 25 § 2 of the Constitution and the rehabilitational purpose of custodial sentences ... While it is true that Article 25 § 2 embodies no fundamental right protected by the *amparo* remedy, it does establish a penal and prison policy guideline for the legislature, as well as a principle regarding the interpretation of the rules on the

imposition and execution of prison sentences, and both the guideline and the principle are enshrined in the Constitution ...

Also, having noted that the right guaranteed by Article 17 § 1 of the Constitution authorises deprivation of liberty only 'in the cases and in the manner prescribed by law', we have found that it cannot be ruled out that the manner in which the sentence to be served is calculated may undermine that right in the event of failure to comply with the legal provisions relating to the consecutive or concurrent serving of different sentences that might have given rise to a reduction of the duration of the detention, where failure to apply the rules concerned leads to the unlawful extension of the detention and, consequently, of the deprivation of liberty ... In a similar vein the European Court of Human Rights has also found a violation of the right to liberty guaranteed by Article 5 of the Convention in a case where a prisoner served a longer sentence 'than the sentence [he] should have served under the domestic law, taking into account the remission to which he was entitled. The additional time spent in prison accordingly amounted to unlawful detention within the meaning of the Convention' (*Grava v. Italy*, ECHR, 10 July 2003, § 45)."

After having found a violation of the right to effective judicial protection, the Constitutional Court had the following to say concerning the consequences of that violation as regards the right to liberty:

"8. However, we cannot limit ourselves to the mere finding of a violation [of Article 24 § 1 of the Constitution] arrived at above. We must also consider the consequences of that violation in terms of the right to liberty (Article 17 § 1 of the Constitution).

Bearing in mind the binding nature of the order of 28 May 1997 adopted by the court responsible for the execution of sentences (whose role it was to determine how the sentence should be served and when it should end) and the legal situation created by the aforesaid decision in respect of the calculation of remissions of sentence for work done in detention, the sentence was served for years as prescribed in the order in question: application of the former Criminal Code and the rules governing remissions of sentence for work done in detention, according to which the prisoner was entitled to one day's remission for every two days worked, and deduction of the resulting remission, as periods of sentence discharged, from the maximum actual term of thirty years to be served following the combination of the sentences. That was confirmed by unequivocal acts by the prison authorities, who drew up charts showing provisional lengths of sentence taking into account remission for work done in detention, approved periodically by the judge responsible for the execution of sentences further to proposals by the prison authorities, and in particular one chart of 25 January 2006 which served as a basis for the proposal to release the prisoner on 29 March 2006, submitted to the judge by the prison governor.

It follows that, under the legislation in force at the time of the offence, and taking into account the remissions of sentence for work done in detention as calculated according to the firm and binding criteria established by the judge responsible for the execution of sentences, the appellant had already discharged the sentence he was given. That being so, and although the appellant was deprived of his liberty in a lawful manner, his deprivation of liberty fell outside the cases provided for by law once he had finished serving his sentence in the conditions outlined above, as the legal basis for his continuing detention had ceased to exist. It follows that the additional time the appellant served in prison amounted to unlawful deprivation of liberty in breach of the fundamental right to liberty guaranteed by Article 17 § 1 of the Constitution (see *Grava v. Italy*, ECHR 10 July 2003, §§ 44 and 45).

In a State where the rule of law prevails it is unacceptable to extend a prisoner's incarceration once he has served his sentence. The courts should accordingly take the necessary steps, as soon as possible, to put a stop to the violation of the fundamental right to liberty and arrange for the appellant's immediate release."

53. The judgments of the Constitutional Court prompted separate opinions – concurring or dissenting – from certain judges. In the dissenting opinion she appended to judgment no. 40/2012, Judge A. Asua Batarrita stated that the fact that the new interpretation of the rule for calculating the term of imprisonment to be served had been applied while the sentence was already under way shed doubt on an established legal situation and distorted projections based on the consistent interpretation of the applicable rules. She described the arrangements for remissions of sentence introduced by the Criminal Code of 1973 and the distinction traditionally made between the "nominal duration" and the "actual duration" of the sentence, which the courts took into account when fixing sentences. She pointed out that remissions of sentence for work done in detention differed from other measures entailing adjustment of sentences, such as release on licence, and that the granting of such remissions was not left to the discretion of the courts, which were not bound by criteria such as the prisoner's good conduct or how dangerous he or she was considered to be. The judge concluded that remissions of sentence for work done in detention were mandatory by law. She stated that, under the Criminal Code of 1973, the principle of legality should apply not only to offences but also to the punitive consequences of their commission, that is to say the nominal limit of the prison sentences and their actual limit after deduction of the remissions of sentence for work done in detention as provided for in Article 100 of the Criminal Code of 1973. Noting that the limits set under Article 70.2 of the Criminal Code of 1973, combined with the remissions of sentence for work done in detention, had effectively reduced the maximum nominal sentence (thirty years) to a shorter actual term of imprisonment (twenty years), except in the event of misconduct or attempted escape, she expressed the view that the "Parot doctrine" had established an artificial distinction between the "sentence" (*pena*) and the "term of imprisonment to be served" (*condena*) that had no basis in the Criminal Code, and had subjected the application of the thirty-year limit to a new condition – not provided for by Article 70.2 of the Criminal Code of 1973 – according to which, during that period, the sentence was to be served "in a prison", thereby preventing the application of the rules on remissions of sentence for work done in detention. In her view that was tantamount to imposing a nominal maximum term of forty-five years (that is, thirty years' actual imprisonment plus fifteen years corresponding to work done in detention).

She considered that neither the teleological arguments nor the criminal policy considerations underlying the "Parot doctrine" could justify such a departure from the case-law concerning the interpretation of a law – the Criminal Code of 1973 – that had been repealed over ten years earlier. In view of all these considerations she concluded that the interpretation by the Supreme Court in its judgment of 2006 had not been foreseeable and that there had been a violation of Article 25 § 1 (principle of legality), Article 17 § 1 (right to liberty) and Article 24 § 1 (right to effective judicial protection) of the Constitution.

54. In the concurring opinion he appended to judgment no. 39/2012, Judge P. Perez Tremps referred to the Court's case-law concerning Article 5 of the Convention, and in particular the requirement that the law be foreseeable (*M. v. Germany*, no. 19359/04, § 90, ECHR 2009). He specified that this requirement should apply to the real and effective duration of the deprivation of liberty. Having noted that the legislation interpreted by the Supreme Court – the Criminal Code of 1973 – was no longer in force in

2006 and could therefore be brought into play only if it worked in the convicted person's favour, he concluded that a sudden, unforeseeable departure from the case-law was incompatible with the right to liberty. He also doubted that legislation that made no explicit provision for the means of calculating remissions of sentence, and could be interpreted in two radically different ways, met the required standard of quality of the law.

55. In the dissenting opinion he appended to judgment no. 41/2012, Judge E. Gay Montalvo stated that the application of Articles 70.2 and 100 of the Criminal Code of 1973 in conformity with the "Parot doctrine" had led to the imposition of a penalty exceeding the thirty-year limit if one added the sentence actually served to the time the law deemed to have been served in other ways. He concluded that there had been a violation of the principle of no punishment without law, on the one hand, and of the right to liberty on the other, because the prisoner's detention had been unlawfully extended.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

56. The applicant alleged that what she considered to be the retroactive application of a departure from the case-law by the Supreme Court after she had been convicted had extended her detention by almost nine years, in violation of Article 7 of the Convention, which reads as follows:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
>
> 2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

A. The Chamber judgment

57. In its judgment of 10 July 2012 the Chamber found that there had been a violation of Article 7 of the Convention.

58. It reached that finding after having noted, first of all, that although the provisions of the Criminal Code of 1973 applicable to remissions of sentence and the maximum term of imprisonment a person could serve – namely thirty years under Article 70 of that Code – were somewhat ambiguous, in practice the prison authorities and the Spanish courts tended to treat the maximum legal term of imprisonment as a new, independent sentence to which adjustments such as remission of sentence for work done in detention should be applied. It concluded that at the time when the offences had been committed and at the time when the decision to combine the sentences had been adopted (on 30 November 2000), the relevant Spanish law, taken as a whole, including the case-law, had been formulated with sufficient precision to enable the applicant to discern to a reasonable

degree the scope of the penalty imposed and the manner of its execution (§ 55 of the judgment, with a reference, by contrast, to *Kafkaris v. Cyprus* [GC], no 21906/04, § 150, ECHR 2008).

59. Secondly, the Chamber observed that in the applicant's case the new interpretation by the Supreme Court in 2006 of the way in which remissions of sentence should be applied had led, retroactively, to the extension of the applicant's term of imprisonment by almost nine years, by depriving her of the remissions of sentence for work done in detention to which she would otherwise have been entitled. That being so, it considered that this measure not only concerned the execution of the applicant's sentence, but also had a decisive impact on the scope of the "penalty" for the purposes of Article 7 (§ 59 of the judgment).

60. Thirdly, the Chamber noted that the Supreme Court's change of approach had no basis in the case-law, and that the Government themselves had acknowledged that the previous practice of the prisons and the courts would have been more favourable to the applicant. It pointed out that the departure from previous practice had come about after the entry into force of the new Criminal Code of 1995, which had done away with remissions of sentence for work done in detention and established new – stricter – rules on the application of sentence adjustments to prisoners sentenced to several lengthy terms of imprisonment. It emphasised that the domestic courts must not, retroactively and to the detriment of the individual concerned, apply the criminal policy behind legislative changes brought in after the offence was committed (§ 62 of the judgment). It concluded that it had been difficult, or even impossible, for the applicant to imagine, at the material time and also at the time when all the sentences were combined and a maximum term of imprisonment fixed, that the Supreme Court would depart from its previous case-law in 2006 and change the way remissions of sentence were applied, that this departure from case-law would be applied to her case and that the duration of her incarceration would be substantially lengthened as a result (§ 63 of the judgment).

B. The parties' submissions to the Grand Chamber

1. The applicant

61. The applicant submitted that the thirty-year maximum term of imprisonment set by the decision of 30 November 2000 to combine the sentences and place an upper limit on the term to be served amounted to a new sentence and/or the final determination of her sentence. She agreed with the Chamber's finding that practice at the time gave her a legitimate expectation, while serving her prison sentence, that the reductions of sentence to which she was entitled for the work done since 1987 would be applied to the maximum legal term of thirty years' imprisonment.

62. That being so, she submitted that the application to her case of the Supreme Court's departure from case-law in its judgment no. 197/2006 amounted to the retroactive imposition of an additional penalty that could not merely be described as a measure relating to the execution of the sentence. As a result of this change of approach the thirty-year term fixed by the decision of 30 November 2000, of which she had been notified the same day, had ceased to be treated as a new, independent and/or final sentence and the various sentences imposed on her between 1988 and 2000 (totalling over three thousand years' imprisonment) in eight trials had, in a manner of speaking, been restored. The applicant submitted that by applying the

remissions of sentence to each of her sentences individually the Spanish courts had deprived her of the remissions of sentence she had earned and added nine years to her imprisonment. In so doing, the courts concerned had not simply altered the rules applicable to remissions of sentence, but had also redefined and/or substantially changed the "penalty" she had been informed she would have to serve.

63. The applicant argued that the Supreme Court's departure from the case-law in its judgment no. 197/2006 had not been reasonably foreseeable in the light of the previous practice and case-law, and had deprived the remissions of sentence for work done in detention provided for in the Criminal Code of 1973 of any meaning for people in her situation. In the applicant's submission the judgment concerned had resulted in the application to her case of the criminal policy behind the new Criminal Code of 1995, in spite of the fact that the intention of the drafters of the Code had been to keep the remissions of sentence provided for in the Criminal Code of 1973 in place for anyone who had been convicted under that Code.

64. In the alternative, there was no denying that at the time the applicant had committed the offences Spanish law had not been formulated with sufficient precision to enable her to discern, to a degree that was reasonable in the circumstances, the scope of the penalty imposed and the manner of its execution (the applicant referred to *Kafkaris*, cited above, § 150). In the applicant's submission, the Criminal Code of 1973 was ambiguous in that it did not specify whether the maximum term of thirty years' imprisonment was a new, independent sentence, whether the individual sentences continued to exist once they had been combined together, and to which sentence the remissions of sentence for work done should be applied. Judgment no. 197/2006 had not clarified the question of the determination of the sentence as the Supreme Court had not expressly set aside its order of 25 May 1990 according to which the combining of sentences provided for in Article 70.2 of the Criminal Code of 1973 concerned the determination of the sentence.

Besides, had that order still been in force the *Audiencia Nacional* would have had to choose between the various sentences to which the remissions of sentence could potentially have been applied, namely the thirty-year maximum term or the individual sentences. In conformity with the *Scoppola v. Italy (no. 2)* judgment ([GC], no. 10249/03, 17 September 2009), the *Audiencia Nacional* would have been obliged to apply the more lenient criminal law, regard being had to the particular circumstances of the case.

65. Also, the distinction between the penalty and its execution was not always clear in practice. It was for the Government, when relying on that distinction, to demonstrate that it was applicable in a particular case, notably when the lack of clarity was due to the way in which the State had drafted or applied its laws. The present case should be distinguished from cases concerning discretionary measures of early release or measures that did not result in a redefinition of the penalty (the applicant referred to *Hogben*, cited above, *Hosein v. the United Kingdom*, no. 26293/95, Commission decision of 28 February 1996; *Grava*, cited above; and *Uttley v. the United Kingdom* (dec.), no. 36946/03, 29 November 2005). In the alternative, from the point of view of the quality of the law the present case was more like *Kafkaris* in terms of the uncertainty as to the scope and substance of the penalty, due in

part to the way in which the rules on remissions of sentence had been interpreted and applied. In any event, it was clear from the *Kafkaris* judgment that the "quality of law" requirement applied both to the scope of the penalty and to the manner of its execution, particularly when the substance and the execution of the penalty were closely linked.

66. Lastly, regarding the case-law in criminal matters, even assuming that it was legitimate for the courts to alter their approach to keep abreast of social changes, the Government had failed to explain why the new approach had been applied retroactively. In any event, neither the Government nor the courts had claimed that the new 2006 approach had been applied to the applicant in response to "new social realities".

2. The Government

67. The Government reiterated that the applicant was a member of the ETA criminal organisation and had taken part in numerous terrorist attacks from 1982 until her detention in 1987. They added that for her crimes the applicant had been sentenced between 1988 and 2000 to imprisonment totalling over 3,000 years, for twenty-three murders, fifty-seven attempted murders and other offences. They submitted that the different judgments convicting the applicant had been based on the Criminal Code of 1973, which had been in force at the times when the offences had been committed and which gave a very clear definition of the different offences and the penalties they entailed. Five of the judgments by which the applicant had been convicted, as well as the decision of 30 November 2000 to combine the sentences and set a maximum term of imprisonment, had expressly informed the applicant that, in accordance with Article 70.2 of the Criminal Code, the total duration of the prison sentence she would have to serve was thirty years. They also pointed out that on 15 February 2001, the date of the *Audiencia Nacional*'s decision setting 27 June 2017 as the date on which the applicant would have finished serving her sentence, the applicant had already accrued over four years' remission of sentence for work done in detention. And as she had not appealed against that decision, she was considered to have acquiesced to the release date fixed by the *Audiencia Nacional*.

68. It was perfectly clear under the provisions of the Criminal Code of 1973 that the maximum term of thirty years was not to be regarded as a new penalty but rather as a measure placing an upper limit on the total term of imprisonment in respect of the various sentences imposed, to be served successively in order of decreasing severity, the residual sentences being extinguished accordingly. The sole purpose of combining and placing an upper limit on the sentences had been to fix the duration of the actual term to be served as a result of all the sentences imposed in the different sets of proceedings. Besides, Article 100 of the Criminal Code of 1973 made it just as clear that remissions of sentence for work done in detention were to be applied to the "sentence imposed", in other words to each of the sentences imposed until the maximum term had been reached.

69. While it was true that prior to the adoption by the Supreme Court of judgment no. 197/2006 the Spanish prisons and courts had tended, in practice, to apply remissions of sentence for work done in detention to the thirty-year maximum term of imprisonment, that practice did not concern the determination of the penalty, but its execution. Furthermore, that practice had no basis in the case-law of the Supreme Court in the absence of any established principle as to the manner of applying remissions of sentence for work done in detention. The sole judgment delivered on this

issue by the Supreme Court in 1994 did not suffice to set an authoritative precedent under Spanish law. The Supreme Court's case-law in the matter had not been settled until its Criminal Division had adopted judgment no. 197/2006. What is more, the Government argued, that case-law had been endorsed by the full Constitutional Court in several judgments delivered on 29 March 2012, containing numerous references to the Court's case-law concerning the distinction between a "penalty" and its "execution".

70. In the Government's submission the Chamber had mistakenly considered that the application of the "Parot doctrine" had deprived of all purpose the remissions of sentence for work done in detention granted to convicted prisoners under the Criminal Code of 1973. Remissions of sentence continued to be applied, but to each of the sentences individually, until the maximum term had been reached. Only in the case of the most serious crimes, such as those committed by the applicant, would the thirty-year limit be reached before the remissions of sentence granted for work done in detention had significantly reduced the sentences imposed. Similarly, the Chamber had mistakenly considered that the Supreme Court had retroactively applied the policy behind the legislative reforms of 1995 and 2003. It was plain to see that the reforms in question made no mention of the means of applying remissions of sentence for work done in detention, the Criminal Code of 1995 having done away with them. Had the criminal policy behind the 2003 law been applied retroactively, the applicant would have been liable to a maximum term of imprisonment of forty years.

71. In its judgment the Chamber had departed from the Court's case-law concerning the distinction between measures that amounted to a "penalty" and those relating to the "execution" of a penalty. Under that case-law a measure concerning remission of sentence or a change in the system of release on licence was not an integral part of the "penalty" within the meaning of Article 7 (the Government referred to *Grava*, cited above, § 51; *Uttley*, cited above; *Kafkaris*, cited above, § 142; and also the *Hogben* decision cited above). In the *Kafkaris* case the Court had acknowledged that a prison-law reform which was applied retroactively, excluding prisoners serving life sentences from earning remissions of sentence for work done in detention, concerned the execution of the sentence as opposed to the "penalty" imposed (§ 151). In the present case the Government submitted that there had been no change in prison law. The only effect of Supreme Court judgment no. 197/2006 concerning remissions of sentence for work done in detention had been to prevent the date of the applicant's release being brought forward nine years, not to increase the penalty imposed on her.

72. The present case differed from cases which clearly concerned the penalty as opposed to its execution (the Government cited *Scoppola (no. 2)*; *Gurguchiani*; and *M. v. Germany*, all cited above). The disputed measure concerned remissions of sentence or "early release", not the maximum term that could be served in respect of the sentences imposed, which had not changed. Remissions of sentence for work done in detention did not pursue the same aims as the penalty as such, but were measures relating to its execution in so far as they allowed prisoners to be released before all their sentences had been served, provided that they demonstrated a willingness to return to the social mainstream through work or other paid activities. That being so,

remissions of sentence for work done in detention could not be likened to measures imposed following conviction for a "criminal offence"; instead, they were measures relating to the prisoner's conduct while serving the sentence. In any event there was no question of any "severity" as they always benefited the prisoner concerned by bringing forward the date of release.

73. The Government further submitted that the Chamber judgment was inconsistent with the Court's case-law on the question to what extent a person should be able, when committing an offence, to predict the exact term of imprisonment he or she would incur. As remissions of sentence for work done in detention were purely a prison matter, the Supreme Court could not be criticised for having departed from previous practice with regard to the application of remissions of sentence, as the change had had no effect on the rights enshrined in Article 7. The Court had never held that the foreseeability requirement extended to the exact length of the sentence to be served taking into account sentence adjustments, remissions, pardons or any other factors affecting the execution of the sentence. Such factors were impossible to foresee and to calculate *ex ante*.

74. Lastly, the Government submitted that the implications of the Chamber judgment were open to dispute as they shed doubt on the value and purpose the Court itself had attributed to case-law in criminal and prison matters (*Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, § 50, ECHR 2001-II). The Chamber had considered that a single judgment given in 1994 – faulty albeit confirmed by administrative practice – should prevail over case-law established by the Supreme Court and endorsed by the Constitutional Court, even though the latter case-law was more in keeping with the wording of the law in force at the material time. A judicial interpretation respectful of the letter of the applicable law could not, as a matter of principle, be said to be unforeseeable.

C. Third-party observations

75. The International Commission of Jurists pointed out that the principle of no punishment without law enshrined in Article 7 of the Convention and in other international agreements was an essential component of the rule of law. It submitted that, in conformity with that principle, and with the aim and purpose of Article 7 prohibiting any arbitrariness in the application of the law, the autonomous concepts of "law" and "penalty" must be interpreted sufficiently broadly to preclude the surreptitious retroactive application of a criminal law or a penalty to the detriment of a convicted person. It argued that where changes to the law or the interpretation of the law affected a sentence or remission of sentence in such a way as to seriously alter the sentence in a way that was not foreseeable at the time when it was initially imposed, to the detriment of the convicted person and his or her Convention rights, those changes, by their very nature, concerned the substance of the sentence and not the procedure or arrangements for executing it, and accordingly fell within the scope of the prohibition of retroactivity. The International Commission of Jurists submitted that certain legal provisions classified at domestic level as rules governing criminal procedure or the execution of sentence had serious, unforeseeable effects detrimental to individual rights, and were by nature comparable or equivalent to a criminal law or a penalty with retroactive effect. For this reason the prohibition of retroactivity should apply to such provisions.

76. In support of its argument that the principle of non-retroactivity should apply to procedural rules or rules governing the execution of sentences which seriously affected the rights of the accused or convicted person, the International Commission of Jurists referred to various sources of international and comparative law (statutes and rules of procedure of international criminal courts, Portuguese, French and Netherlands legislation and case-law).

D. The Court's assessment

1. Principles established by the Court's case-law

(a) Nullum crimen, nulla poena sine lege

77. The guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 even in time of war or other public emergency threatening the life of the nation. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment (see *S.W. v. the United Kingdom* and *C.R. v. the United Kingdom*, 22 November 1995, § 34, Series A no. 335-B, and § 32, Series A no. 335-C, respectively, and *Kafkaris*, cited above, § 137).

78. Article 7 of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage (concerning the retrospective application of a penalty, see *Welch v. the United Kingdom*, 9 February 1995, § 36, Series A no. 307-A; *Jamil v. France*, 8 June 1995, § 35, Series A no. 317-B; *Ecer and Zeyrek v. Turkey*, nos. 29295/95 and 29363/95, § 36, ECHR 2001-II; and *Mihai Toma v. Romania*, no. 1051/06, §§ 26-31, 24 January 2012). It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) (see *Kokkinakis v. Greece*, 25 May 1993, § 52, Series A no. 260-A). While it prohibits in particular extending the scope of existing offences to acts which previously were not criminal offences, it also lays down the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy (see *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 145, ECHR 2000-VII; for an example of the application of a penalty by analogy, see *Başkaya and Okçuoğlu v. Turkey* [GC], nos. 23536/94 and 24408/94, §§ 42-43, ECHR 1999-IV).

79. It follows that offences and the relevant penalties must be clearly defined by law. This requirement is satisfied where the individual can know from the wording of the relevant provision, if need be with the assistance of the courts' interpretation of it and after taking appropriate legal advice, what acts and omissions will make him criminally liable and what penalty he faces on that account (see *Cantoni v. France*, 15 November 1996, § 29, *Reports of Judgments and Decisions* 1996-V, and *Kafkaris*, cited above, § 140).

80. The Court must therefore verify that at the time when an accused person performed the act which led to his being prosecuted and convicted there was in force a legal provision which made that act punishable, and that the punishment imposed did not exceed the limits fixed by that provision (see *Coëme and Others*, cited above, § 145, and *Achour v. France* [GC], no. 67335/01, § 43, ECHR 2006-IV).

(b) The concept of a "penalty" and its scope

81. The concept of a "penalty" in Article 7 § 1 of the Convention is, like the notions of "civil rights and obligations" and "criminal charge" in Article 6 § 1, an autonomous Convention concept. To render the protection offered by Article 7 effective, the Court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a "penalty" hin the meaning of this provision (see *Welch*, cited above, § 27, and *Jamil*, cited above, § 30).

82. The wording of Article 7 § 1, second sentence, indicates that the starting-point in any assessment of the existence of a penalty is whether the measure in question is imposed following conviction for a "criminal offence". Other factors that may be taken into account as relevant in this connection are the nature and purpose of the measure; its characterisation under national law; the procedures involved in the making and implementation of the measure; and its severity (see *Welch*, cited above, § 28; *Jamil*, cited above, § 31; *Kafkaris*, cited above, § 142; and *M. v. Germany,* cited above, § 120). The severity of the order is not in itself decisive, however, since many non-penal measures of a preventive nature may have a substantial impact on the person concerned (see *Welch*, cited above, § 32, and *Van der Velden v. the Netherlands* (dec.), no. 29514/05, ECHR 2006-XV).

83. Both the Commission and the Court in their case-law have drawn a distinction between a measure that constitutes in substance a "penalty" and a measure that concerns the "execution" or "enforcement" of the "penalty". In consequence, where the nature and purpose of a measure relate to the remission of a sentence or a change in a regime for early release, this does not form part of the "penalty" within the meaning of Article 7 (see, among other authorities, *Hogben*, cited above; *Hosein*, cited above; *L.-G.R. v. Sweden,* no. 27032/95, Commission decision of 15 January 1997; *Grava*, cited above, § 51; *Uttley*, cited above; *Kafkaris*, cited above, § 142; *Monne v. France* (dec.), no. 39420/06, 1 April 2008; *M. v. Germany*, cited above, § 121; and *Giza v. Poland* (dec.), no. 1997/11, § 31, 23 October 2012). In the *Uttley* case, for example, the Court found that the changes made to the rules on early release after the applicant's conviction had not been "imposed" on him but were part of the general regime applicable to prisoners, and far from being punitive, the nature and purpose of the "measure" were to permit early release, so they could not be regarded as inherently "severe". The Court accordingly found that the application to the applicant of the new regime for early release was not part of the "penalty" imposed on him.

84. In the *Kafkaris* case, where changes to the prison legislation had deprived prisoners serving life sentences – including the applicant – of the right to remissions of sentence, the Court considered that the changes related to the execution of the sentence as opposed to the penalty imposed on the applicant, which remained that of life imprisonment. It explained that although the changes in the prison legislation and in the conditions of release might have rendered the applicant's imprisonment harsher, these changes could not be

construed as imposing a heavier "penalty" than that imposed by the trial court. It reiterated in this connection that issues relating to release policies, the manner of their implementation and the reasoning behind them fell within the power of the States Parties to the Convention to determine their own criminal policy (see *Achour*, cited above, § 44, and *Kafkaris*, cited above, § 151).

85. However, the Court has also acknowledged that in practice the distinction between a measure that constitutes a "penalty" and a measure that concerns the "execution" or "enforcement" of the "penalty" may not always be clear-cut (see *Kafkaris*, cited above, § 142; *Gurguchiani*, cited above, § 31; and *M. v. Germany*, cited above, § 121). In the *Kafkaris* case it accepted that the manner in which the Prison Regulations concerning the execution of sentences had been understood and applied in respect of the life sentence the applicant was serving went beyond the mere execution of the sentence. Whereas the trial court had sentenced the applicant to imprisonment for life, the Prison Regulations explained that what that actually meant was twenty years' imprisonment, to which the prison authorities might apply any remissions of sentence. The Court considered that "the distinction between the scope of a life sentence and the manner of its execution was therefore not immediately apparent" (§ 148).

86. In the *Gurguchiani* case the Court considered that the replacement of a prison sentence – while it was being served – by expulsion combined with a ten-year ban on entering the country amounted to a penalty just like the one imposed when the applicant had been convicted.

87. In the case of *M. v. Germany* the Court considered that the extension of the applicant's preventive detention by the courts responsible for the execution of sentences, by virtue of a law enacted after the applicant had committed his offence, amounted to an additional sentence imposed on him retrospectively.

88. The Court would emphasise that the term "imposed" used in its second sentence cannot be interpreted as excluding from the scope of Article 7 § 1 all measures introduced after the pronouncement of the sentence. It reiterates in this connection that it is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory (see *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 175, ECHR 2012, and *Scoppola (no. 2)*, cited above, § 104).

89. In the light of the foregoing, the Court does not rule out the possibility that measures taken by the legislature, the administrative authorities or the courts after the final sentence has been imposed or while the sentence is being served may result in the redefinition or modification of the scope of the "penalty" imposed by the trial court. When that happens, the Court considers that the measures concerned should fall within the scope of the prohibition of the retroactive application of penalties enshrined in Article 7 § 1 *in fine* of the Convention. Otherwise, States would be free – by amending the law or reinterpreting the established regulations, for example – to adopt measures which retroactively redefined the scope of the penalty imposed, to the convicted person's detriment, when the latter could not have imagined such a development at the time when the offence was committed or the sentence was imposed. In such conditions Article 7 § 1 would be deprived of any useful

effect for convicted persons the scope of whose sentences was changed *ex post facto* to their disadvantage. The Court points out that such changes must be distinguished from changes made to the manner of execution of the sentence, which do not fall within the scope of Article 7 § 1 *in fine.*

90. In order to determine whether a measure taken during the execution of a sentence concerns only the manner of execution of the sentence or, on the contrary, affects its scope, the Court must examine in each case what the "penalty" imposed actually entailed under the domestic law in force at the material time, or in other words, what its intrinsic nature was. In doing so it must have regard to the domestic law as a whole and the way it was applied at the material time (see *Kafkaris*, cited above, § 145).

(c) Foreseeability of criminal law

91. When speaking of "law" Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises statutory law as well as case-law and implies qualitative requirements, notably those of accessibility and foreseeability (see *Kokkinakis*, cited above, §§ 40-41; *Cantoni*, cited above, § 29; *Coëme and Others*, cited above, § 145; and *E.K. v. Turkey*, no. 28496/95, § 51, 7 February 2002). These qualitative requirements must be satisfied as regards both the definition of an offence and the penalty the offence carries.

92. It is a logical consequence of the principle that laws must be of general application that the wording of statutes is not always precise. One of the standard techniques of regulation by rules is to use general categorisations as opposed to exhaustive lists. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice (see *Kokkinakis*, cited above, § 40, and *Cantoni*, cited above, § 31). However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances (see *Kafkaris*, cited above, § 141).

93. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain (*ibid.*). The progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition in the Convention States (see *Kruslin v. France*, 24 April 1990, § 29, Series A no. 176-A). Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen (see *S.W.* and *C.R. v. the United Kingdom*, cited above, § 36 and § 34 respectively; *Streletz, Kessler and Krenz*, cited above, § 50; *K.-H.W. v. Germany* [GC], no. 37201/97, § 85, ECHR 2001-II (extracts); *Korbely v. Hungary* [GC], no. 9174/02, § 71, ECHR 2008; and *Kononov v. Latvia* [GC], no. 36376/04, § 185, ECHR 2010). The lack of an accessible and reasonably foreseeable judicial interpretation can even lead to a finding of a violation of the accused's Article 7 rights (see, concerning the constituent elements of the offence, *Pessino v. France*, no. 40403/02, §§ 35-36, 10 October 2006, and *Dragotoniu and Militaru-Pidhorni v. Romania*, nos. 77193/01 and 77196/01, §§ 43-44, 24 May 2007; as regards the penalty, see *Alimuçaj v. Albania*, no. 20134/05, §§ 154-162, 7 February 2012). Were that

not the case, the object and the purpose of this provision – namely that no one should be subjected to arbitrary prosecution, conviction or punishment – would be defeated.

2. Application of the above principles to the present case

94. The Court notes at the outset that the legal basis for the applicant's various convictions and prison sentences was the Criminal Code of 1973, the criminal law applicable at the time when the offences were committed (1982-1987), which the applicant has not disputed.

95. The Court observes that the parties' submissions mainly concern the calculation of the total term of imprisonment the applicant should serve in accordance with the rules concerning the maximum term of imprisonment in respect of combined sentences, on the one hand, and the system of remissions of sentence for work done in detention as provided for in the Criminal Code of 1973, on the other. The Court notes in this connection that, by a decision adopted on 30 November 2000 on the basis of section 988 of the Criminal Procedure Act and Article 70.2 of the Criminal Code of 1973, the *Audiencia Nacional* fixed the maximum term of imprisonment the applicant should serve in respect of all her prison sentences at thirty years (see paragraph 14 above). It further notes that, after having deducted from that thirty-year maximum term the remissions of sentence granted to the applicant for work done in detention, on 24 April 2008 the Murcia Prison authorities proposed 2 July 2008 to the *Audiencia Nacional* as the date for the applicant's final release (see paragraph 16 above). On 19 May 2008 the *Audiencia Nacional* asked the prison authorities to change the proposed date and calculate a new date for the applicant's release based on the new approach – the so-called "Parot doctrine" – adopted by the Supreme Court in judgment no. 197/2006 of 28 February 2006, according to which any applicable adjustments and remissions of sentence should be applied successively to each individual sentence until such time as the prisoner had finished serving the thirty-year maximum term of imprisonment (see paragraphs 17, 18 and 39-42 above). Lastly, the Court observes that in application of this new case-law the *Audiencia Nacional* fixed the date of the applicant's final release at 27 June 2017 (see paragraph 20 above).

(a) Scope of the penalty imposed

96. It is the Court's task in the present case to establish what the "penalty" imposed on the applicant entailed under the domestic law, based in particular on the wording of the law, read in the light of the accompanying interpretative case-law. In so doing, it must also have regard to the domestic law as a whole and the way it was applied at the material time (see *Kafkaris*, cited above, § 145).

97. It is true that when the applicant committed the offences, Article 70.2 of the Criminal Code of 1973 referred to a limit of thirty years' imprisonment as the maximum term to be served (*condena*) in the event of multiple sentences (see paragraph 24 above). There thus seems to have been a distinction between the concept of "term to be served" (*condena*) and the individual sentences (*penas*) actually pronounced or imposed in the various judgments convicting the applicant. At the same time, Article 100 of the

Criminal Code of 1973, on remission of sentence for work done, established that in discharging the "sentence imposed" the detainee was entitled to one day's remission for every two days' work done (see paragraph 24 above). However, that Article contained no specific guidance on how to apply remissions of sentence when multiple sentences were combined as provided for under Article 70.2 of the Criminal Code and a maximum total term of imprisonment was fixed, as in the applicant's case, where sentences totalling three thousand years' imprisonment were reduced to thirty years in application of that provision. The Court observes that it was not until Article 78 of the new Criminal Code of 1995 was introduced that the law expressly stated, with regard to the application of sentence adjustments, that in exceptional cases the total duration of the sentences imposed could be taken into account, rather than the maximum term provided for by law (see paragraph 32 above).

98. The Court must also consider the case-law and practice regarding the interpretation of the relevant provisions of the Criminal Code of 1973. It notes that, as the Government have acknowledged, prior to the Supreme Court's judgment no. 197/2006, when a person was given several prison sentences and it was decided to combine them and fix a maximum term to be served, the prison authorities and the Spanish courts applied the remissions of sentence for work done in detention to the maximum term to be served under Article 70.2 of the Criminal Code of 1973. The prison and judicial authorities thus took into account the maximum legal term of thirty years' imprisonment when applying remissions of sentence for work done in detention. In a judgment of 8 March 1994 (its first ruling on this question – see paragraph 36 above) the Supreme Court referred to the maximum legal term of thirty years' imprisonment as a "new, independent sentence" to which the possibilities of adjustment provided for by law, such as release on licence and remission of sentence, should be applied. The Spanish courts, including the Supreme Court, took the same approach when comparing the sentences to be served respectively under the Criminal Code of 1995 and the previous Code, taking into account any remissions of sentence already granted under the previous Code, in order to determine which was the most lenient criminal law (see paragraphs 37, 41 and 48 above). Lastly, until the Supreme Court's judgment no. 197/2006 this approach was applied to numerous prisoners convicted under the Criminal Code of 1973, whose remissions for work done in detention were deducted from the maximum term of thirty years' imprisonment (see paragraph 41 above).

99. Like the Chamber, the Grand Chamber considers that in spite of the ambiguity of the relevant provisions of the Criminal Code of 1973 and the fact that the Supreme Court did not set about clarifying them until 1994, it was clearly the practice of the Spanish prison and judicial authorities to treat the term of imprisonment to be served (*condena*), that is to say the thirty-year maximum term of imprisonment provided for in Article 70.2 of the Criminal Code of 1973, as a new, independent sentence to which certain adjustments, such as remissions of sentence for work done in detention, should be applied.

100. That being so, while she was serving her prison sentence – and in particular after the *Audiencia Nacional* decided on 30 November 2000 to combine her sentences and fix a maximum term of imprisonment – the applicant had every reason to believe that the penalty imposed was the thirty-year maximum term, from which any remissions of sentence for work

done in detention would be deducted. Indeed, in its last judgment convicting the applicant, on 8 May 2000, delivered before the decision to combine the sentences was taken, the *Audiencia Nacional* took into account the maximum term of imprisonment provided for in the Criminal Code of 1973, combined with the system of remissions of sentence for work done in detention provided for in Article 100 of the same Code, in determining which Criminal Code – the one in force at the material time or the Criminal Code of 1995 – was the more favourable to the applicant (see paragraph 11 above). In these circumstances, contrary to what the Government have suggested, the fact that the applicant did not challenge the decision of the *Audiencia Nacional* of 15 February 2001 fixing the date on which she would have finished serving her sentence (*liquidación de condena*) at 27 June 2017 is not decisive, as that decision did not take into account the remissions of sentence already earned and was therefore unrelated to the question of how remissions of sentence should be applied.

101. The Court further notes that remissions of sentence for work done in detention were expressly provided for by statutory law (Article 100 of the Criminal Code of 1973), and not by regulations (compare *Kafkaris*, cited above). Moreover, it was in the same Code that the sentences were prescribed and the remissions of sentence were provided for. The Court also notes that such remissions of sentence gave rise to substantial reductions of the term to be served – up to a third of the total sentence – unlike release on licence, which simply provided for improved or more lenient conditions of execution of the sentence (see, for example, *Hogben* and *Uttley*, both cited above; see also the dissenting opinion of Judge A. Asua Batarrita appended to judgment no. 40/2012 of the Constitutional Court, paragraph 53 above). After deduction of the remissions of sentence for work done in detention periodically approved by the judge responsible for the execution of sentences (*Juez de Vigilancia Penitenciaria*), the sentence was fully and finally discharged on the date of release approved by the sentencing court. Furthermore, unlike other measures that affected the execution of the sentence, the right to remissions of sentence for work done in detention was not subject to the discretion of the judge responsible for the execution of sentences: the latter's task was to fix the remissions of sentence by simply applying the law, on the basis of proposals made by the prison authorities, without considering such criteria as how dangerous the prisoner was considered to be, or his or her prospects of reintegration (see paragraph 53 above; compare *Boulois v. Luxembourg* [GC], no. 37575/04, §§ 98-99, ECHR 2012, and *Macedo da Costa v. Luxembourg* (dec.), no. 26619/07, 5 June 2012). It should be noted in this connection that Article 100 of the Criminal Code of 1973 provided for the automatic reduction of the term of imprisonment for work done in detention, except in two specific cases: when the prisoner escaped or attempted to escape, and when the prisoner misbehaved (which, according to Article 65 of the 1956 Prison Regulations, meant committing two or more serious or very serious breaches of discipline; see paragraph 26 above). Even in these two cases, remissions of sentence already allowed by the judge could not be taken away retroactively, as days of remission of sentence already granted were deemed to have been served and formed part of the prisoner's legally acquired rights

(see paragraphs 26 and 45 above). The present case should be distinguished in this respect from *Kafkaris*, where the five years' remission of sentence granted to life prisoners at the beginning of their incarceration was conditional on their good conduct (see *Kafkaris*, cited above, §§ 16 and 65).

102. The Court also considers it significant that, although the Criminal Code of 1995 did away with remissions of sentence for work done in detention for people convicted in the future, its transitional provisions authorised prisoners convicted under the old Criminal Code of 1973 – like the applicant – to continue to enjoy the benefits of the scheme if it was to their advantage (see paragraph 30 above). Law no. 7/2003, on the other hand, introduced harsher conditions of release on licence, even for prisoners convicted before its entry into force (see paragraph 34 above). The Court infers from this that in opting, as a transitional measure, to maintain the effects of the rules concerning remissions of sentence for work done in detention and for the purposes of determining the most lenient criminal law, the Spanish legislature considered those rules to be part of substantive criminal law, that is to say of the provisions which affected the actual fixing of the sentence, not just its execution.

103. In the light of the foregoing the Grand Chamber considers, like the Chamber, that at the time when the applicant committed the offences that led to her prosecution and when the decision to combine the sentences and fix a maximum prison term was taken, the relevant Spanish law, taken as a whole, including the case-law, was formulated with sufficient precision to enable the applicant to discern, to a degree that was reasonable in the circumstances, the scope of the penalty imposed on her, regard being had to the maximum term of thirty years provided for in Article 70.2 of the Criminal Code of 1973 and the remissions of sentence for work done in detention provided for in Article 100 of the same Code (contrast *Kafkaris*, cited above, § 150). The penalty imposed on the applicant thus amounted to a maximum of thirty years' imprisonment, and any remissions of sentence for work done in detention would be deducted from that maximum penalty.

(b) Whether the application of the "Parot doctrine" to the applicant altered only the means of execution of the penalty or its actual scope

104. The Court must now determine whether the application of the "Parot doctrine" to the applicant concerned only the manner of execution of the penalty imposed or, on the contrary, affected its scope. It notes that in its decisions of 19 May and 23 June 2008 the court that convicted the applicant – that is, the *Audiencia Nacional* – rejected the proposal by the prison authorities to set 2 July 2008 as the date of the applicant's final release, based on the old method of applying remissions of sentence (see paragraphs 17, 18 and 20 above). Relying on the "Parot doctrine" established in judgment no. 197/2006, given by the Supreme Court on 28 February 2006 – well after the offences had been committed, the sentences combined and a maximum term of imprisonment fixed – the *Audiencia Nacional* moved the date back to 27 June 2017 (see paragraph 20 above). The Court notes that in judgment no. 197/2006 the Supreme Court departed from the interpretation it had adopted in a previous judgment of 1994 (see paragraph 40 above). The majority of the Supreme Court considered that the new rule by which remissions of sentence for work done in detention were to be applied to each of the individual sentences – rather than to the thirty-year maximum term as previously – was more in conformity with the actual wording of the

provisions of the 1973 Criminal Code, which distinguished between the "sentence" (*pena*) and the "term to be served" (*condena*).

105. While the Court readily accepts that the domestic courts are the best placed to interpret and apply domestic law, it reiterates that their interpretation must nevertheless be in keeping with the principle, embodied in Article 7 of the Convention, that only the law can define a crime and prescribe a penalty.

106. The Court also notes that the calculation of the remissions of sentence for work done in detention by the applicant – that is to say, the number of days worked in detention and the number of days' remission deductible from her sentence – was never in dispute. As determined by the prison authorities, the duration of these remissions of sentence – 3,282 days in all – was accepted by all the courts which handled the case. For example, in its decision applying the Supreme Court's "Parot doctrine", the *Audiencia Nacional* did not change the quantum of the remissions of sentence granted to the applicant for work done in detention. The decision did not concern whether she deserved the remissions, for example in view of her conduct or circumstances relating to the execution of her sentence. The aim of the decision was to determine the element of the penalty to which the remissions of sentence should be applied.

107. The Court notes that the application of the "Parot doctrine" to the applicant's situation deprived of any useful effect the remissions of sentence for work done in detention to which she was entitled by law and in accordance with final decisions by the judges responsible for the execution of sentences. In other words, the applicant was initially sentenced to a number of lengthy terms of imprisonment, which were combined and limited to an effective term of thirty years, on which the remissions of sentence to which she was meant to be entitled had no effect whatsoever. It is significant that the Government have been unable to specify whether the remissions of sentence granted to the applicant for work done in detention have had – or will have – any effect at all on the duration of her incarceration.

108. That being so, although the Court agrees with the Government that arrangements for granting adjustments of sentence as such fall outside the scope of Article 7, it considers that the way in which the provisions of the Criminal Code of 1973 were applied in the present case went beyond mere prison policy.

109. Regard being had to the foregoing and to Spanish law in general, the Court considers that the recourse in the present case to the new approach to the application of remissions of sentence for work done in detention introduced by the "Parot doctrine" cannot be regarded as a measure relating solely to the execution of the penalty imposed on the applicant as the Government have argued. This measure taken by the court that convicted the applicant also led to the redefinition of the scope of the "penalty" imposed. As a result of the "Parot doctrine", the maximum term of thirty years' imprisonment ceased to be an independent sentence to which remissions of sentence for work done in detention were applied, and instead became a thirty-year sentence to which no such remissions would effectively be applied.

110. The measure in issue accordingly falls within the scope of the last sentence of Article 7 § 1 of the Convention.

(c) Whether the "Parot doctrine" was reasonably foreseeable

111. The Court notes that the *Audiencia Nacional* used the new method of application of remissions of sentence for work done in detention introduced by the "Parot doctrine" rather than the method in use at the time of the commission of the offences and the applicant's conviction, thus depriving her of any real prospect of benefiting from the remissions of sentence to which she was nevertheless entitled in accordance with the law.

112. This change in the system for applying remissions of sentence was the result of the Supreme Court's departure from previous case-law, as opposed to a change of legislation. That being so, it remains to be determined whether the new interpretation of the relevant provisions of the Criminal Code of 1973, long after the offences were committed and the applicant convicted – and even after the decision of 30 November 2000 to combine the sentences and set a maximum term of imprisonment – was reasonably foreseeable for the applicant, that is to say, whether it could be considered to reflect a perceptible line of case-law development (see *S.W.* and *C.R. v. the United Kingdom*, cited above, § 43 and § 41, respectively). To establish that, the Court must examine whether the applicant could have foreseen at the time of her conviction, and also when she was notified of the decision to combine the sentences and set a maximum term of imprisonment – if need be, after taking appropriate legal advice – that the penalty imposed might turn into thirty years of actual imprisonment, with no reduction for the remissions of sentence for work done in detention provided for in Article 100 of the Criminal Code of 1973.

In so doing it must have regard to the law applicable at the time, and in particular the judicial and administrative practice prior to the "Parot doctrine" introduced by the Supreme Court's judgment of 28 February 2006. The Court observes in this connection that the only relevant precedent cited in that judgment was a judgment of 8 March 1994 in which the Supreme Court had taken the opposite approach, namely that the maximum prison term of thirty years was a "new, independent sentence" to which all the remissions of sentence provided for by law were to be applied (see paragraph 36 above). In the Court's view, the fact that a single judgment does not serve as an authority under Spanish law (see paragraph 40 above) cannot be decisive. What is more, as the dissenting judges observed in the judgment of 28 February 2006, an agreement adopted by the plenary Supreme Court on 18 July 1996 had established that remissions of sentence granted under the Criminal Code of 1973 were to be taken into account when comparing the sentences to be served under the new and the old Criminal Codes respectively (see paragraphs 37 and 41 above). Following the entry into force of the Criminal Code of 1995, the Spanish courts were required to use this criterion, on a case-by-case basis, to determine which Criminal Code was the more lenient, taking into account the effects on sentencing of the system of remissions of sentence for work done in detention.

113. The Government themselves have admitted that it was the practice of the prison and judicial authorities prior to the "Parot doctrine" to apply remissions of sentence for work done in detention to the maximum term of thirty years' imprisonment, even though the first decision of the Supreme Court on the question was not delivered until 1994.

114. The Court also attaches importance to the fact that the Supreme Court did not depart from its case-law until 2006, ten years after the law concerned had been repealed. In acting thus the Supreme Court gave a new interpretation of the provisions of a law that was no longer in force, namely the Criminal Code of 1973, which had been superseded by the Criminal Code of 1995. In addition, as indicated above (see paragraph 102), the transitional provisions of the Criminal Code of 1995 were intended to maintain the effects of the system of remissions of sentence for work done in detention set in place by the Criminal Code of 1973 in respect of people convicted under that Code – like the applicant – precisely so as to comply with the rules prohibiting retroactive application of the more stringent criminal law. However, the Supreme Court's new interpretation, which rendered ineffective any remissions of sentence already granted, led in practice to the applicant and other people in similar situations being deprived of the benefits of the remission system.

115. Moreover, the Court cannot accept the Government's argument that the Supreme Court's interpretation was foreseeable because it was more in keeping with the letter of the Criminal Code of 1973. The Court reiterates that its task is not to determine how the provisions of that Code should be interpreted in the domestic law, but rather to examine whether the new interpretation was reasonably foreseeable for the applicant under the "law" applicable at the material time. That "law" – in the substantive sense in which the term is used in the Convention, which includes unwritten law or case-law – had been applied consistently by the prison and judicial authorities for many years, until the "Parot doctrine" set a new course. Unlike the judicial interpretations involved in *S.W.* and *C.R. v. the United Kingdom*, cited above, the departure from case-law in the present case did not amount to an interpretation of criminal law pursuing a perceptible line of case-law development.

116. Lastly, the Court is of the view that the criminal-policy considerations relied on by the Supreme Court cannot suffice to justify such a departure from case-law. While the Court accepts that the Supreme Court did not retroactively apply Law no. 7/2003 amending the Criminal Code of 1995, it is clear from the reasoning given by the Supreme Court that its aim was the same as that of the above-mentioned law, namely to guarantee the full and effective execution of the maximum legal term of imprisonment by people serving several long sentences (see paragraph 33 above). In this connection, while the Court accepts that the States are free to determine their own criminal policy, for example by increasing the penalties applicable to criminal offences (see *Achour*, cited above, § 44), they must comply with the requirements of Article 7 in doing so (*Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], nos. 2312/08 and 34179/08, § 75, 18 July 2013). On this point, the Court reiterates that Article 7 of the Convention unconditionally prohibits the retrospective application of the criminal law where it is to an accused's disadvantage.

117. In the light of the foregoing, the Court considers that at the time when the applicant was convicted and at the time when she was notified of the decision to combine her sentences and set a maximum term of imprisonment, there was no indication of any perceptible line of case-law

development in keeping with the Supreme Court's judgment of 28 February 2006. The applicant therefore had no reason to believe that the Supreme Court would depart from its previous case-law and, that the *Audiencia Nacional*, as a result, would apply the remissions of sentence granted to her not in relation to the maximum thirty-year term of imprisonment to be served, but successively to each of the sentences she had received. As the Court has noted above (see paragraphs 109 and 111), this departure from the case-law had the effect of modifying the scope of the penalty imposed, to the applicant's detriment.

118. It follows that there has been a violation of Article 7 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

119. The applicant alleged that since 3 July 2008 she had been kept in detention in breach of the requirements of "lawfulness" and "a procedure prescribed by law". She relied on Article 5 of the Convention, the relevant parts of which read as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> ..."

A. The Chamber judgment

120. In its judgment the Chamber stated, in the light of the considerations that had led it to find a violation of Article 7 of the Convention, that at the material time the applicant could not have foreseen to a reasonable degree that the effective duration of her term of imprisonment would be increased by almost nine years, and that following a departure from case-law a new method of applying remissions of sentence would be applied to her retroactively. The Chamber accordingly found that since 3 July 2008, the applicant's detention had not been "lawful" and was therefore in violation of Article 5 § 1 of the Convention (§ 75 of the judgment).

B. The parties' submissions to the Grand Chamber

1. The applicant

121. The applicant submitted that Article 5 § 1 of the Convention also enshrined requirements as to the quality of the law which meant that a domestic law authorising deprivation of liberty had to be sufficiently clear and foreseeable in its application. She further submitted that Article 5 applied to the right of a convicted person to early release where the legal provisions establishing the right did not make it conditional or discretionary but applicable to anyone who met the legal conditions of entitlement (*Grava*, cited above, §§ 31-46), irrespective of whether the measure related to the sentence proper or to its execution for the purposes of Article 7. She argued that the extension of the sentence and/or of its effective duration had not been reasonably foreseeable and, in the alternative, that the substance of

the penalty imposed and/or the manner of its execution and/or its effective duration had not been reasonably foreseeable either.

2. *The Government*

122. The Government submitted that the Chamber judgment had departed from the Court's case-law concerning Article 5 of the Convention, in particular the *Kafkaris* and *M. v. Germany* judgments cited above. They argued that in the present case there was a perfect causal link between the penalties imposed for the numerous serious crimes the applicant had committed and the length of time she had spent in prison. The judgments by which she had been convicted had stated that she would have to spend thirty years in prison, as had the decision of 2000 to combine the sentences and fix a maximum term of imprisonment and the decision of 2001 setting the date of the applicant's release at 27 June 2017.

C. The Court's assessment

1. *Principles established by the Court's case-law*

123. Sub-paragraphs (a) to (f) of Article 5 § 1 of the Convention contain an exhaustive list of permissible grounds for deprivation of liberty, and no deprivation of liberty will be lawful unless it falls within one of those grounds (see *M. v. Germany*, cited above, § 86). Article 5 § 1 (a) permits "the lawful detention of a person after conviction by a competent court". Having regard to the French text, the word "conviction", for the purposes of Article 5 § 1 (a), has to be understood as signifying both a finding of guilt after it has been established in accordance with the law that there has been an offence (see *Guzzardi v. Italy*, 6 November 1980, § 100, Series A no. 39), and the imposition of a penalty or other measure involving deprivation of liberty (see *Van Droogenbroeck v. Belgium*, 24 June 1982, § 35, Series A no. 50).

124. Furthermore, the word "after" in sub-paragraph (a) does not simply mean that the detention must follow the "conviction" in point of time: in addition, the "detention" must result from, "follow and depend upon" or occur "by virtue of" the "conviction". In short, there must be a sufficient causal connection between the two (see *Weeks v. the United Kingdom*, 2 March 1987, § 42, Series A no. 114, § 42; *Stafford v. the United Kingdom* [GC], no. 46295/99, § 64, ECHR 2002-IV; *Kafkaris*, cited above, § 117; and *M. v. Germany*, cited above, § 88). However, with the passage of time the link between the initial conviction and the extension of the deprivation of liberty gradually becomes less strong (see *Van Droogenbroeck*, cited above, § 40). The causal link required under sub-paragraph (a) might eventually be broken if a position were reached in which a decision not to release, or to redetain a person, was based on grounds that were inconsistent with the objectives of the sentencing court, or on an assessment that was unreasonable in terms of those objectives. Where that was the case a detention that was lawful at the outset would be transformed into a deprivation of liberty that was arbitrary and, hence, incompatible with

Article 5 (see *Weeks*, cited above, § 49, and *Grosskopf v. Germany*, no. 24478/03, § 44, 21 October 2010).

125. It is well established in the Court's case-law on Article 5 § 1 that all deprivation of liberty must not only be based on one of the exceptions listed in sub-paragraphs (a) to (f) but must also be "lawful". Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law. This primarily requires any arrest or detention to have a legal basis in domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all the Articles of the Convention (see *Kafkaris*, cited above, § 116, and *M. v. Germany*, cited above, § 90). The "quality of the law" implies that where a national law authorises deprivation of liberty it must be sufficiently accessible, precise and foreseeable in its application to avoid all risk of arbitrariness (see *Amuur v. France*, 25 June 1996, § 50, *Reports* 1996-III). The standard of "lawfulness" set by the Convention requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see *Baranowski v. Poland*, no. 28358/95, § 52, ECHR 2000-III; *M. v. Germany*, cited above, § 90; and *Oshurko v. Ukraine*, no. 33108/05, § 98, 8 September 2011). Where deprivation of liberty is concerned, it is essential that the domestic law define clearly the conditions for detention (see *Creangă v. Romania* [GC], no. 29226/03, § 120, 23 February 2012).

126. Lastly, the Court reiterates that although Article 5 § 1 (a) of the Convention does not guarantee, in itself, a prisoner's right to early release, be it conditional or final (see *İrfan Kalan v. Turkey* (dec.), no. 73561/01, 2 October 2001, and *Çelikkaya v. Turkey* (dec.), no. 34026/03, 1 June 2010), the situation may differ when the competent authorities, having no discretionary power, are obliged to apply such a measure to any individual who meets the conditions of entitlement laid down by law (see *Grava*, cited above, § 43; *Pilla v. Italy*, no. 64088/00, § 41, 2 March 2006; and *Şahin Karataş v. Turkey*, no. 16110/03, § 37, 17 June 2008).

2. Application of the above principles to the present case

127. The Court observes first of all that as the applicant rightly pointed out, the distinction made for the purposes of Article 7 of the Convention between the "penalty" and the "execution" of the penalty is not decisive in connection with Article 5 § 1 (a). Measures relating to the execution of a sentence or to its adjustment can affect the right to liberty protected by Article 5 § 1, as the actual duration of deprivation of liberty depends on their application, among other things (see, for example, *Grava*, cited above, §§ 45 and 51, and, concerning the transfer of prisoners between States, *Szabó v. Sweden* (dec.), no. 28578/03, ECHR 2006-VIII). While Article 7 applies to the "penalty" as imposed by the sentencing court, Article 5 applies to the resulting detention.

128. In the present case the Court has no doubt that the applicant was convicted by a competent court in accordance with a procedure prescribed by law, within the meaning of Article 5 § 1 (a) of the Convention. Indeed, the applicant did not dispute that her detention was legal until 2 July 2008, the date initially proposed by the prison authorities for her final release. The Court must

therefore establish whether the applicant's continued detention after that date was "lawful" within the meaning of Article 5 § 1 of the Convention.

129. The Court notes that in eight different sets of proceedings the *Audiencia Nacional* found the applicant guilty of various offences linked to terrorist attacks. In application of the Criminal Code in force at the time when the offences were committed, the applicant was given prison sentences totalling over 3,000 years (see paragraphs 11-12 above). In most of those judgments, as well as in its decision of 30 November 2000 to combine the sentences and set a maximum term of imprisonment, the *Audiencia Nacional* indicated that the applicant was to serve a maximum term of thirty years' imprisonment in accordance with Article 70.2 of the Criminal Code of 1973 (see paragraphs 11 and 14 above). The Court notes that the applicant's detention has not yet attained that maximum term. There is clearly a causal link between the applicant's convictions and her continuing detention after 2 July 2008, which resulted respectively from the guilty verdicts and the maximum thirty-year term of imprisonment fixed on 30 November 2000 (see, *mutatis mutandis*, *Kafkaris*, § 120).

130. However, the Court must examine whether the "law" authorising the applicant's continuing detention beyond 2 July 2008 was sufficiently foreseeable in its application. Compliance with the foreseeability requirement must be examined with regard to the "law" in force at the time of the initial conviction and throughout the subsequent period of detention. In the light of the considerations that led it to find a violation of Article 7 of the Convention, the Court considers that at the time when the applicant was convicted, when she worked in detention and when she was notified of the decision to combine the sentences and set a maximum term of imprisonment, she could not have foreseen to a reasonable degree that the method used to apply remissions of sentence for work done in detention would change as a result of a departure from case-law by the Supreme Court in 2006, and that the new approach would be applied to her.

131. The Court notes that the application of the departure from case-law to the applicant's situation effectively delayed the date of her release by almost nine years. She has therefore served a longer term of imprisonment than she should have served under the domestic legislation in force at the time of her conviction, taking into account the remissions of sentence she had already been granted in conformity with the law (see, *mutatis mutandis*, *Grava*, cited above, § 45).

132. The Court concludes that since 3 July 2008 the applicant's detention has not been "lawful", in violation of Article 5 § 1 of the Convention.

III. ARTICLE 46 OF THE CONVENTION

133. The relevant parts of Article 46 of the Convention read as follows:

> "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.

...”

A. The Chamber judgment

134. Having regard to the particular circumstances of the case and to the urgent need to put an end to the violation of Article 7 and Article 5 § 1 of the Convention, the Chamber considered it incumbent on the respondent State to ensure that the applicant was released at the earliest possible date (§ 83 of the judgment).

B. The parties’ submissions to the Grand Chamber

1. *The applicant*

135. The applicant argued that the fact that the Court had never made use in a similar case of its exceptional power to indicate individual measures was irrelevant. She submitted that the Court had the power to indicate the measures to be taken and that when the nature of the violation found did not leave “any real choice as to the measures required to remedy it”, it could decide to indicate only one such measure. She also criticised the Government for not having indicated which remedies other than her release were available should the Court find violations of Articles 5 and 7 of the Convention.

2. *The Government*

136. The Government submitted that in similar cases concerning the retroactive application of legislative changes resulting in the extension of a convicted person’s detention the Court had never used its exceptional power to indicate individual measures for the execution of its judgment (they cited *M. v. Germany*, cited above). In this connection they pointed out that, although it had found a violation of Article 7 in the *Kafkaris* case (cited above) because the legislation failed to meet the requisite standard, the Court had not indicated any measure concerning the release of the applicant, who was still in prison when the judgment was delivered (the Government also referred to *Kafkaris v. Cyprus* (dec.), no. 9644/09, 21 June 2011).

C. The Court’s assessment

137. By virtue of Article 46 of the Convention, the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties, execution being supervised by the Committee of Ministers. This means that when the Court finds a violation, the respondent State is under a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction under Article 41, but also to take individual and/or, if appropriate, general measures in its domestic legal order to put an end to the violation found by the Court and to redress the effects, the aim being 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, among many other authorities, *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII; *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], no. 32772/02, § 85, ECHR 2009; and *Scoppola (no. 2)*, cited above, § 147).

138. It is true that in principle 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 *Scozzari and Giunta*, cited above, § 249). However, in certain particular situations, with a view to assisting the respondent State in fulfilling its obligations under Article 46, the Court may seek to indicate the type of individual and/or general measures that might be taken in order to put an end to the situation that gave rise to the finding of a violation (see *Broniowski v. Poland* [GC], no. 31443/96, § 194, ECHR 2004-V, and *Stanev v. Bulgaria* [GC], no. 36760/06, §§ 255-258, ECHR 2012). In other exceptional cases, the nature of the violation found may be such as to leave no real choice as to the measures required to remedy it and the Court may decide to indicate only one such measure (see *Assanidze v. Georgia* [GC], no. 71503/01, §§ 202-203, ECHR 2004-II; *Aleksanyan v. Russia*, no. 46468/06, §§ 239-240, 22 December 2008; and *Fatullayev v. Azerbaijan*, no. 40984/07, §§ 176-177, 22 April 2010).

139. The Grand Chamber agrees with the Chamber's finding and considers that the present case belongs to this last-mentioned category. Having regard to the particular circumstances of the case and to the urgent need to put an end to the violations of the Convention it has found, it considers it incumbent on the respondent State to ensure that the applicant is released at the earliest possible date.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

140. 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."

141. The applicant sought compensation for the non-pecuniary damage allegedly suffered and also the reimbursement of the costs and expenses incurred. The Government contested the claim in respect of non-pecuniary damage.

A. The Chamber judgment

142. In its judgment the Chamber awarded the applicant 30,000 euros (EUR) in respect of non-pecuniary damage. It also awarded her EUR 1,500 for costs and expenses incurred in the proceedings before it.

B. The parties' submissions to the Grand Chamber

1. The applicant

143. The applicant claimed EUR 60,000 for the non-pecuniary damage she had allegedly sustained, and the reimbursement of the costs and expenses incurred in the proceedings before the Grand Chamber, in addition to those already awarded by the Chamber. She submitted no receipts for the costs and expenses incurred in the proceedings before the Grand Chamber.

2. *The Government*

144. The Government submitted that an award of compensation by the Court to a person convicted of acts as murderous as those committed by the applicant – who had been found guilty in judicial proceedings that met all the requirements of a fair trial – would be difficult to understand. They argued that in the *Kafkaris* judgment (cited above), "having regard to all the circumstances of the case", the Court had considered that the finding of a violation of Article 7 of the Convention constituted in itself sufficient just satisfaction in respect of any non-pecuniary damage suffered.

C. The Court's assessment

1. *Non-pecuniary damage*

145. The Court accepts that in the *Kafkaris* judgment it considered that a finding of a violation constituted in itself sufficient just satisfaction in respect of any non-pecuniary damage suffered. In that judgment, however, it had found no violation of Article 5 § 1, and its finding of a violation of Article 7 concerned only the quality of the law. The present case is different, the Court having found that the applicant's continued detention after 2 July 2008 is in breach of Article 5 § 1, and that she has had to serve a heavier penalty than the one that was imposed, in disregard of Article 7 of the Convention (see, *mutatis mutandis*, *M. v. Germany*, cited above, § 141). This must have caused the applicant non-pecuniary damage which cannot be compensated solely by these findings of violations.

146. Having regard to all the circumstances of the case and making its assessment on an equitable basis, the Court awards the applicant EUR 30,000 under this head.

2. *Costs and expenses*

147. According to the Court's case-law, costs and expenses will not be awarded under Article 41 unless it is established that they were actually incurred, were necessarily incurred and were also reasonable as to quantum (see, for example, *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 54, ECHR 2000-XI).

148. The Grand Chamber notes that the applicant was awarded EUR 1,500 for costs and expenses incurred in the proceedings before the Chamber. As she has submitted no documentary evidence of the costs and expenses incurred in the proceedings before the Grand Chamber (compare *Tănase v. Moldova* [GC], no. 7/08, § 193, ECHR 2010), she should be awarded EUR 1,500 in respect of all costs and expenses.

3. *Default interest*

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

FOR THESE REASONS, THE COURT

1. *Holds*, by fifteen votes to two, that there has been a violation of Article 7 of the Convention;

2. *Holds*, unanimously, that since 3 July 2008 the applicant's detention has not been "lawful", in violation of Article 5 § 1 of the Convention;

3. *Holds*, by sixteen votes to one, that the respondent State is to ensure that the applicant is released at the earliest possible date;

4. *Holds*, by ten votes to seven, that the respondent State is to pay the applicant, within three months, EUR 30,000 EUR (thirty thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

5. *Holds*, unanimously, that the respondent State is to pay the applicant, within three months, EUR 1,500 (one thousand five hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

6. *Holds*, unanimously, that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the amounts indicated in points 4 and 5 above at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

7. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 21 October 2013.

Michael O'Boyle	Dean Spielmann
Deputy Registrar	President

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

(a) Concurring opinion of Judge Nicolaou;
(b) Joint partly dissenting opinion of Judges Villiger, Steiner, Power-Forde, Lemmens and Griţco;
(c) Joint partly dissenting opinion of Judges Mahoney and Vehabović;
(d) Joint partly dissenting opinion of Judge Mahoney.

D.S.
M.O.B.

CONCURRING OPINION OF JUDGE NICOLAOU

1. I have voted with the majority on all aspects of the case but, in so far as the finding of a violation of Article 7 is concerned, I rely on reasoning which is not identical to that of the majority. This difference also affects the manner of coming to a conclusion on Article 5 § 1.

2. What I regard as the essential elements that bear on the Article 7 issue may be shortly stated. In eight different sets of criminal proceedings, concluded between 18 December 1988 and 8 May 1990, the applicant was convicted of a multitude of offences, including some of the most grave, committed in the context of terrorist activity during the period 1982-1987. The applicant was sentenced to various terms of imprisonment, receiving a considerable number of thirty-year terms for murder. The total length of imprisonment would have exceeded three thousand years if the sentences were to have run consecutively.

3. National systems deal, each in its own way, with the problem posed by a series of prison sentences that may be imposed either in the same or in different proceedings. It is obviously necessary for a decision to be taken on what such sentences entail. Should they be consecutive or concurrent and should there be a ceiling? In this regard rules must take into account the public-interest purpose of criminal law enforcement, including the protection of life, while at the same time allowing for a fair and humane approach. Further, where the law provides for life sentences, rules are also expected to be in place for achieving a balance between the interests involved.

4. In whichever way a system is constructed, both principle and the Court's case-law require that a distinction be maintained between, on the one hand, provisions concerning the penalty allowed by the law pre-dating the offences, seen always in the light of any subsequent more lenient law since the actual sentence cannot, consistently with Article 7, exceed the limit set by the *lex mitior* (*Scoppola v. Italy* (no. 2) [GC] judgment no. 10249/03, 17 September 2009); and, on the other hand, provisions which regulate the subsequent manner of enforcement or execution of the sentence, principally those relating to remission. As has been said, the dividing line may sometimes not be clear cut: *Kafkaris v. Cyprus* [GC], no. 21906/04, § 142, ECHR 2008. When that is the case, it is all the more necessary to specify where that line is to be drawn and to explain why. There is also another distinction which needs to be made, but to that I shall come later.

5. At the time when the offences were committed, the position was governed by the Criminal Code of 1973, Article 70.2 of which was judicially viewed as providing, first, that whatever the aggregate of the years of imprisonment imposed might be, it would be converted to a maximum of only thirty years; and, second, the figure so fixed would then form the sole basis for applying the law on remission of sentence. According to Article 100 of that Code (as amended by Law no. 8/1983) a person convicted was entitled to one day's remission for every two days of work in detention; and although this was subject to the approval of the judge supervising the execution of sentence, approval was certain in the absence of fault on the prisoner's part. In the present case, in each of the last five sets of criminal proceedings, the *Audiencia Nacional*, as trial court, directed

its attention to how the various sentences should be approached and, following established judicial practice, concluded that the sentence was finally to be one of thirty years' imprisonment. When all eight sets of proceedings had been concluded, the *Audiencia Nacional*, acting under the power given to it by section 988 of the Criminal Procedure Act, examined in the light of the totality of the sentences what the final unified sentence should be under the provisions of Article 70.2 of the 1973 Criminal Code. By a decision of 30 November 2000 it fixed the maximum term of imprisonment at thirty years, to which, *inter alia*, the rules on remission of sentence based on work done in prison would apply.

6. It is germane to note that prior to the time when the applicant's maximum term of imprisonment was finally fixed, the Supreme Court itself had stated, in an order dated 25 May 1990, that the competent court for applying Article 70.2 of the Criminal Code of 1973, in pursuance of section 988 of the Criminal Procedure Act, was the trial court (the *Audiencia Nacional*). It explained that this was so because the matter concerned the fixing of the sentence and not its execution, for which responsibility lay with another judge, specifically assigned to that task. High water mark was reached when the existing judicial practice was upheld by the Supreme Court in a judgment handed down on 8 March 1994. The Supreme Court affirmed, after having specifically reviewed the matter in question, that the maximum thirty-year term provided for by Article 70.2 of the Criminal Code was a "new sentence – resulting from but independent of the others – to which the sentence adjustments (*beneficios*) provided for by the law, such as release on licence and remission of sentence, apply"; and it pointed out that this understanding of the law was also reflected in Article 59 of the Prison Regulations of 1981. The judicial conclusion that any sentence adjustments (*beneficios*) should take as a starting point the "new sentence" meant, of course, that the most severe penalty a convicted person could face was imprisonment for thirty years minus any possible remission. In two subsequent judgments, one delivered on 15 September 2005 and the other on 14 October 2005, although the Supreme Court did not specifically revisit the point, it reiterated, using essentially the same language in both, that the length of imprisonment arrived at by converting the sentences originally imposed constituted a new and independent sentence resulting from them and that sentence adjustments (*beneficios*), provided for by the law, were to be applied to the new sentence not to the original ones.

7. The matters in issue in the present case make it unnecessary to comment either on the scope and adequacy of the relevant legal provisions or on the view taken by the judicial authorities as to how they should be interpreted. What is significant is that, for persons within the State's jurisdiction, the criminal law was authoritatively defined by judicial decision whose temporal effect reached back in time to when Article 70.2 of the Criminal Code of 1973 came into force. The Supreme Court judgment of 8 March 1994 affirmed the interpretation that had already been given to that provision and the resulting clear and constant judicial practice pre-dating the commission of the offences in the present case. There was never any hint of uncertainty. Whatever the number of infringements of the criminal law and whatever their gravity and the respective penalties

provided for in respect of each, the real penalty to be incurred would in no case exceed a maximum imprisonment of thirty years, this being the uppermost limit of the final new and independent sentence, to which the remission system would then be applied in the execution of the sentence, thereby leading to a reduction of that limit as well. This is the crucial point in the present case. Any subsequent change that introduced retrospectively a higher penalty, whether by statute or by case-law, could not but fall foul of the protection afforded by Article 7 of the Convention.

8. In fact, in the present case, at a certain point in time the applicant was credited with an amount of work which, if the law had remained unaltered, would have required her release from prison well before the end of the thirty-year term. But the situation had by then changed. Statute law introduced stricter provisions for serious crime; and then came the judicial reversal of the previous case-law already described. The new Criminal Code of 1995, with effect from 1996, provided for higher conversion penalties and abolished the remission of sentence for work done in prison. However, it also contained transitional provisions predicated on the most lenient law for persons already convicted under the Criminal Code of 1973. More stringent provisions were subsequently added by Law no.7/2003, intended to ensure that in the most serious cases the prisoner served the whole of the term fixed as a result of converting the sentences originally imposed. A short time later, in the context of the saved provisions of the Criminal Code of 1973 on remission entitlement, the Supreme Court adopted a new interpretative approach regarding the meaning and purpose of the sentence that resulted from conversion. By a judgment handed down on 28 February 2006, it reversed the previous case-law on the interpretation of Article 70.2 of the Criminal Code of 1973, by reading that provision as meaning that "the thirty-year limit does not become a new sentence, distinct from those successively imposed on the convict, or another sentence resulting from all the previous ones, but is the maximum term of imprisonment (*máximo de cumplimiento)* a prisoner should serve in prison".

9. Thus, the Supreme Court reverted to the several sentences which had originally been imposed and declared their continuing significance. Consequently, the sentence which resulted from Article 70.2 was no longer the real maximum penalty for the totality of the offences but merely the limit of the period to be actually served when the remission system was applied successively to the original sentences, as part of the manner of execution. In enunciating this new judicial position – the "Parot doctrine" – the Supreme Court felt unfettered by previous authority. It gave detailed reasons for the new interpretation. It derived support from, *inter alia*, the wording of the relevant provisions of the Criminal Code of 1973, paying particular attention to the term *pena* (the sentence imposed) and *condena* (the sentence to be served), and it drew conclusions on the basis of the difference between them. As I have already stated, this Court should refrain from expressing anything resembling a choice between domestic interpretations. It is in fact quite irrelevant whether that interpretation was sound or, in any event, warranted. It is also irrelevant whether the Supreme Court was, as it explained, free to depart from its previous judgment of 8 March 1994 and justified in doing so.

10. In my opinion there are two relevant questions to be asked from the Convention point of view. The first is whether there was, at the time of the commission of the offences, a judicial approach creating a firm and constant practice that gave statute law a meaning that was both tangible and certain. The answer to this must be in the affirmative, particularly when the matter is seen in the light of the interpretation given, at a certain point in time, by the Supreme Court in its judgment of 8 March 1994. The Supreme Court's new interpretation of 28 February 2006 was quite obviously not the result of a gradual and foreseeable clarification of case-law in the sense of *S.W. v. the United Kingdom* and *C.R. v. the United Kingdom*, 22 November 1995, Series A no. 335-B and 335-C, respectively, and later case-law (cited in § 93 of the judgment). The second question is whether it was, in any event, possible to change that view of the law with retroactive effect. The former view of the law could, indeed, be changed; but the retroactive operation of the judgment, a feature also found in other jurisdictions, is not compatible with Article 7 of the Convention, in the same way that it would not be compatible in the case of statutory retroactivity as, for example, in *Welch v. the United Kingdom*, judgment of 9 February 1995, *Series A no. 307-A*.

11. I have so far been addressing the Article 7 issue, which, in my view, turns entirely on what can be taken to have been the real maximum penalty to which the applicant was liable at the time the offences were committed. I have tried to explain why, in terms of Article 7(1), the penalty "imposed" was to be equated with the converted maximum sentence under Article 70.2 of the Criminal Code of 1973. The analysis on this matter focuses on the way the sentence in question was defined and, although the object of arriving at such a definition concerned the effect that it would have on how the remission system was applied, that system did not itself acquire any intrinsic Article 7 significance. This is not to say, however, that the judicial change did not have an impact on the applicant's rights. In fact it did. But only on the applicant's Article 5 § 1 rights.

12. It is at this point that the next distinction becomes relevant. Provisions concerning the manner of enforcement or execution of sentences must be distinguished not only from those which bear on Article 7 but also from those which bear on Article 5 § 1. Changes within the general prison regime, i.e. those that affect the manner in which the sentence is executed, may adversely affect the person in detention, as for example, in *Hogben v. the United Kingdom*, (no. 11635/85, Commission decision of March 1986, Decisions and Reports (DR) 46), and *Uttley v. the United Kingdom* (dec.), no. 36946/03, 29 November 2005, but they will not be inconsistent with either Article 7 or Article 5 § 1. There may nevertheless be changes which go beyond that. A problem will then arise under one or both of those Articles. A change subsequent to the passing of a final lawful sentence – the one effectively imposed – does not, in my view, raise an Article 7 issue. It can, however, call into question the Article 5 § 1 lawfulness of detention in respect of a given period.

13. In the present case, for the reasons I have stated, the retroactive change involving the application of the remission system did not, in itself, contravene Article 7. It was, however, incompatible with Article 5 § 1, for it deprived the applicant of an acquired right to earlier release. The majority in

this case attribute importance to the lack of foreseeability at the time the applicant was convicted and at the time the applicant was notified of the change (§§ 112 and 117 of the judgment) and they make that an integral part of the reasoning by which they arrive at the conclusion that there has been a violation of Article 7. I am unable to follow that reasoning. In my respectful opinion, the change in the application of the remission system after the Article 70.2 sentence had been fixed goes only to the Article 5 §1 issue; what is relevant in so far as Article 7 is concerned is, subject to the *lex mitior* rule, the change in the real maximum penalty which existed at the time the offences were committed. As to the rest, I gratefully adopt the majority's reasoning on Article 5 § 1.

JOINT PARTLY DISSENTING OPINION OF JUDGES VILLIGER, STEINER, POWER-FORDE, LEMMENS AND GRIŢCO

We voted against the majority in its award of non-pecuniary damages to the applicant. We acknowledge that, in principle, the Court's general practice is to award damages in cases where violations of human rights have been found. This is particularly so where the right to liberty has been breached (see *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 253, ECHR 2009).

The present case, however, is distinguishable from *A. and Others v. the United Kingdom* in which the Court found that it had not been established that any of the applicants had engaged, or attempted to engage, in any act of terrorist violence. The applicant, in the instant case, stands convicted of many serious terrorist offences that involved the murders and attempted murders of and the infliction of grievous bodily harm upon numerous individuals. Against that background, we prefer to adopt the approach of the Court in *McCann and Others v. the United Kingdom* (27 September 1995, § 219, Series A no. 324). Consequently, having regard to the special circumstances pertaining to the context of this case, we do not consider it appropriate to make an award for non-pecuniary or moral damage. In our view, the Court's finding of violation taken together with the measure indicated pursuant to Article 46 constitute sufficient just satisfaction.

JOINT PARTLY DISSENTING OPINION OF JUDGES MAHONEY AND VEHABOVIĆ

As concerns Article 7

We are unable to share the views of the majority of the Grand Chamber that the facts complained of by the applicant disclose a violation of Article 7 § 1, which provides:

> "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

The specific issue is whether the second sentence of this provision was breached as a result of the application in the applicant's case, some years after her conviction and sentence for various extremely serious crimes of violence, of the so-called "Parot doctrine", whereby the method used to calculate reductions of sentence obtained through work and studies accomplished in prison was changed, so as to deprive her in practice of her hitherto existing expectation of early release on the basis of such reductions in sentence. Our disagreement goes to the narrow point whether the measure complained of by the applicant gave rise to a modified "penalty" within the meaning of the second sentence of Article 7 § 1, so as to attract the protection of the safeguard afforded.

As the judgment states (at paragraph 83), the Convention case-law has consistently drawn a distinction between a measure that constitutes in substance a "penalty" and a measure that concerns the "execution" or "enforcement" of the "penalty".

In the early case of *Hogben v. the United Kingdom* (no. 11653/85, Commission decision of 3 March 1986, Decisions and Reports (DR) 46, p. 231), the complainant was a convicted prisoner who, as a result of a change in the policy on release on parole, had to serve a substantially longer time in prison than he would otherwise have done. In its decision declaring the application inadmissible, the European Commission of Human Rights reasoned as follows:

> "The Commission recalls that the applicant was sentenced to life imprisonment in 1969 for committing a murder in the course of a robbery. It is clear that the penalty for this offence at the time it was committed was life imprisonment and thus no issue under Article 7 arises in this respect.
>
> Furthermore, in the opinion of the Commission, the 'penalty' for purposes of Article 7 § 1 must be considered to be that of life imprisonment. Nevertheless it is true that as a result of the change in parole policy the applicant will not become eligible for release on parole until he has served 20 years' imprisonment. Although this may give rise to the result that his imprisonment is effectively harsher than if he had been eligible for release on parole at an earlier stage, such matters relate to the execution of the sentence as opposed to the 'penalty' which remains that of life imprisonment. Accordingly, it cannot be said that the 'penalty' imposed is a heavier one than that imposed by the trial judge."

It is difficult to discern the difference in principle between the circumstances of that case and those of the present case, where the sentence ultimately imposed on the applicant for the commission of a series of crimes in Spain remains the same, namely thirty years' imprisonment, although in the meantime the date of eligibility for release has in practice changed to her disadvantage.

Similarly, in the case of *Uttley v. the United Kingdom* ((dec), no. 36946/03, 29 November 2005), the essence of the applicant's complaint was that a change in the regime for early release, brought about by intervening legislation (enacted in 1991), had the effect of imposing on him (when he was convicted in 1995) a further or additional "penalty' over and above the "penalty" that was applicable at the time when he had committed the offences (prior to 1983). Relying on *Hogben* as well as the case of *Grava v. Italy* (no. 43522/98, §§ 44-45, 10 July 2003), the Court held:

> "Although... the license conditions imposed on the applicant on his release after eight years can be considered as 'onerous' in the sense that they inevitably limited his freedom of action, they did not form part of the 'penalty' within the meaning of Article 7, but were part of the regime by which prisoners could be released before serving the full term of the sentence imposed.
>
> Accordingly, the application to the applicant of the post-1991... regime for early release was not part of the 'penalty' imposed on him, with the result that no comparison is necessary between the early-release regime before 1983 and that after 1991. As the sole penalties applied were those imposed by the sentencing judge, no 'heavier' penalty was applied than the one applicable when the offences were committed."

This line of reasoning was then confirmed by the Grand Chamber in the case of *Kafkaris v. Cyprus* ([G.C.], ECHR 2008), where, as paragraph 84 of the present judgment puts it, changes to the prison legislation had deprived prisoners serving life sentences – including the applicant – of the right to remissions of sentence. The Grand Chamber stated (at paragraph 151):

> "[A]s regards the fact that as a consequence of the change in the prison law, ... the applicant, as a life prisoner, no longer has a right to have his sentence remitted, the Court notes that this matter relates to the execution of the sentence as opposed to the 'penalty' imposed on him, which remains that of life imprisonment. Although the changes in the prison legislation and in the conditions of release may have rendered the applicant's imprisonment effectively harsher, these changes cannot be construed as imposing a heavier 'penalty' than that imposed by the trial court... In this connection, the Court would reiterate that issues relating to release policies, the manner of their implementation and the reasoning behind them fall within the power of the member States in determining their own criminal policy... Accordingly, there has not been a violation of Article 7 of the Convention in this regard...".

We see no cause to depart from this reasoning in the present case, especially given that in both *Uttley* and *Kafkaris* the "right" to obtain a remission of sentence was removed completely. We do not see it as being material for the purposes of the applicability of Article 7 that in the present case the removal of the "right" of remission was effected by a changed judicial interpretation of the applicable Spanish legislation rather than by an amendment of the legislation itself, as in *Kafkaris* and *Uttley*.

We naturally accept that the Court must remain free to go behind appearances and assess for itself whether a particular measure amounts in

substance to a "penalty" (paragraph 81 of the present judgment); and that the term "imposed" in the second sentence of Article 7 § 1 cannot be interpreted as necessarily excluding from the scope of Article 7 § 1 measures adopted in regard to the prisoner after the pronouncement of the sentence (paragraph 88 of the present judgment).

We also well understand the humanitarian thinking behind the reasoning of the majority and recognise that the circumstances of the present case are quite extraordinary and, indeed, disquieting from the point of view of the fairness of treatment of prisoners, especially those who have the prospect of spending a large part of their life incarcerated.

However, despite these extraordinary circumstances, we are not able to agree with the majority that the dividing line between the "penalty" imposed on the applicant for the commission of criminal offences (to which Article 7 of the Convention is applicable) and the measures subsequently taken for regulating the execution of her sentence (which, for their part, do not attract the application of Article 7) was crossed in the present case as a consequence of the application to her of the so-called "Parot doctrine" in the calculation of her release date. While it is undeniable that the dividing line between the two concepts (of a penalty and of a measure regulating the serving of the sentence) is not always easy to draw, this does not justify blurring the dividing line out of existence, even in the presence, as in the instant case, of serious issues as to compliance with legal certainty and respect of legitimate expectations in relation to measures regulating the serving of the sentence. Our difference of opinion with the majority is thus as to the side of the dividing line on to which the impugned decision in the instant case falls.

In order to arrive at its conclusion of applicability of Article 7 § 1, second sentence, to the measure complained of, the majority has taken up the distinction between "the scope of the penalty" and "the manner of its execution", a distinction drawn in the *Kafkaris* judgment in relation to the lack of precision of the relevant Cypriot law applicable at the time of the commission of the offence (see paragraphs 81 and seq. of the present judgment).

As a matter of principle, the judgment appears to take a subsequent detrimental change in "the scope of the penalty" as being the determining factor for the application of Article 7. In the present case, "the scope of the penalty" imposed on the applicant is said to have been modified to her detriment by the changed judicial interpretation of the legislative provision on reduction of sentence on account of work done in prison (see paragraphs 109, 111 and 117 of the present judgment).

Even accepting recourse to the notion of the "scope of the penalty", which is presumably meant to be more extensive than that of a "penalty", we are not, however, convinced by the reasons given by the majority for being able to distinguish the circumstances of the present case from those of earlier cases, so as to take the present case outside the logic and rationale of the Court's well settled case-law.

We do not read the present judgment as saying that the decisive factor for the application of Article 7 is the mere fact of prolonging, by means of changes to the remission system or parole system, the time that the prisoner could expect at the outset of his or her sentence to spend in prison. That is to say, prolonging "the penalty" in this sense. That would mean that any

unforeseeable change in the remission or parole system, whether accomplished by a legislative or regulatory text, by executive practice or by judicial case-law, would be contrary to Article 7, because the actual time of expected incarceration had been increased.

The majority does, however, rely on the fact that "the applicant had every reason to believe that the penalty imposed was the thirty-year maximum sentence, from which any remissions of sentence for work done in detention would be deducted"; and that she "had no reason to believe that... the *Audiencia Nacional*... would apply the remissions of sentence granted to her not in relation to the maximum thirty-year term of imprisonment to be served, but successively to each of the sentences she had received" (see paragraphs 100 and 117 of the present judgment). The argument is that the (jurisprudential) change effected to the modalities of early release (in the instant case, the change in the method for calculating reductions of sentence for work done in prison) was such as to make the "penalty" imposed on the applicant "heavier". In effect, as paragraph 103 *in fine* of the present judgment would seem to suggest, such reasoning amounts to incorporating into the definition of the "penalty" the existence and modalities of a given remission system at the time of sentencing, as an element of the "penalty" determining its potential length.

It is so that persons convicted of criminal offences and sentenced to imprisonment will take the sentence and the relevant remission or parole scheme together at the outset of their sentence, in the sense of making calculations as to whether, how and when they are likely to be released from prison and of planning their conduct in prison accordingly. In ordinary language, they will take the sentence imposed and the possibilities and modalities of remission, parole or early release as a "packet".

The Court's settled case-law is, however, quite clearly to the effect the Contracting States may, after the commission of the offence or even after sentencing, alter the prison regime in so far as it concerns the manner of serving the sentence, so as to make changes that have a negative impact on early release of prisoners and thus on the length of time spent in prison, without entering into the scope of the specific protection afforded by Article 7 of the Convention. As shown by *Kafkaris*, such changes may include amending the legislation so as to remove completely for a given category of convicted prisoners any "right" to benefit from remission of sentence, as occurred in practice in relation to the present applicant as a result of the application to her of the "Parot doctrine". Yet the present judgment does not purport to overrule or depart from that well settled case-law.

Furthermore, although this is another consideration relied on by the majority (see paragraph 101 of the present judgment), we are not convinced that the difference between an automatic entitlement under the law to remission days on a prisoner's satisfying certain conditions (such as work performed in prison), as in the present case, and discretionary release on parole for good behaviour is in itself decisive. There is a margin of appreciation available to the Contracting States how to regulate the prison system, in particular as regards the serving of sentences. The States may opt for rewards for good behaviour, or for measures facilitating reinsertion into society, or for schemes offering automatic credits for early release, and so

on. It is up to the Contracting States whether they make the system chosen automatic or discretionary, executive or judicial in its operation, or a mixture. We do not understand how framing a condition for earlier release as an automatic consequence of a certain event, rather than as being discretionary or dependent on an assessment of conduct in prison or dangerousness, is in itself a factor capable of rendering Article 7 applicable.

Our analysis, on the basis of the Court's existing case-law, is that the contested decision in the present case represents a measure affecting the serving of the sentence (how and when early release can be obtained) and not the "penalty" as such – so that although issues as to the fair treatment of prisoners, notably under the head of the principles of legal certainty and legitimate expectations, may be raised, the application of Article 7 and the very specific guarantee that it sets out are not brought into play.

It is true that the Supreme Court, by adopting the "Parot doctrine", imposed a new method for calculating reduction of prison sentences and overturned well established case-law, thereby ultimately causing the time spent by the applicant in prison to be considerably extended; but this negative consequence is not the mischief that Article 7 is directed towards preventing. Although the result is that her "imprisonment is effectively harsher" (to quote the words of *Hogben*) than if she had benefited from the previously existing interpretative case-law and practice regarding implementation of the relevant 1973 legal provision, the detriment suffered by her relates to the execution of the sentence as opposed to the "penalty", which remains one of thirty years' imprisonment. Accordingly, it cannot be said that the "penalty" has become heavier than it was when initially imposed. The impugned decision concerns exclusively the way in which the lawfully prescribed sentence is to be executed; it does not raise issues under the principle *nulla poena sine lege,* the basic principle at the core of Article 7. The applicable criminal legislation remains the same, as does the prison sentence imposed, even though, as a result of the Spanish courts correcting what they deemed to be a mistaken interpretation and, thus, a mistaken implementation of that criminal legislation over previous years, a different method for calculating the reduction of the applicant's prison sentence was applied. It is in this crucial respect that the circumstances of the present case are clearly distinguishable from those of other cases that have been held by the Court to come within the ambit of Article 7.

In short, we do not think that the applicant's "penalty", within the meaning of Article 7, was made heavier by the impugned decision, despite the latter's very significant impact on the time that she has to spend in prison before the expiry of the thirty-year sentence of imprisonment imposed on her. The second sentence of Article 7 § 1 is not applicable to the measures concerning the execution of the sentence and the method by which days of remission are to be calculated or allocated. Our concern is that the majority appear to have stretched the concept of a "penalty", even understood as being "the scope of a penalty", beyond its natural and legitimate meaning in order to bring a perceived instance of unfair treatment of convicted prisoners within the ambit of Article 7.

As concerns Article 5

Whether the facts complained of fall within the scope of Article 5 and, if so, whether the requirements of that Article were met is another question, and on that we agree with the reasoning of the judgment.

As concerns Article 41

As to whether, in the particular circumstances of this case, it is "necessary" – this being the condition imposed by Article 41 of the Convention for the award of just satisfaction – to afford the applicant any financial compensation by way of just satisfaction for the violations of the Convention found by the Court, we would respectfully agree with the conclusion and reasoning expressed by Judges Villiger, Steiner, Power-Forde, Lemmens and Griţco in their separate opinion.

PARTLY DISSENTING OPINION OF JUDGE MAHONEY

Having voted against a violation of Article 7, I felt it appropriate also to vote against point 3 of the operative provisions, making a consequential order directing the respondent State to release the applicant at the earliest possible date. This was because I did not consider such an order to be warranted on the sole basis of the finding of a violation of Article 5 § 1 of the Convention on the ground of the defective "quality" of the applicable Spanish law.

In any event, the present case is not at all comparable to earlier cases such as *Assanidze v. Georgia* ([G.C.], no. 71503/01, §§ 202-203, ECHR 2004-II) and *Ilaşçu and Others v. Moldova and Russia* ([G.C.], no. 48787/99, §§ 488-490, ECHR 2004-VII), where the deprivation of liberty found by the Court was not merely contrary to procedural safeguards laid down by the Convention but was the product of a flagrant denial of justice, wholly arbitrary and offensive to the rule of law. Nor, in my view, can any support be derived from the cases of *Aleksanyan v. Russia* (no. 46468/06, §§ 239-240, 22 December 2008) and *Fatullayev v. Azerbaijan* (no. 40984/07, §§ 175-177, 22 April 2001), cited in the present judgment (at paragraph 138 *in fine*), where the detention in question was characterised as "unacceptable", in the first case as "not serv[ing] any meaningful purpose under Article 5" and in the second as being the consequence of criminal convictions in relation to which "there existed no justification for imposing prison sentences".