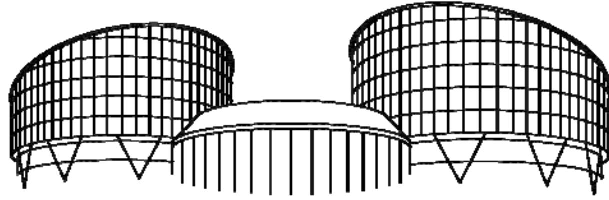

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

1959 · 50 · 2009

GRAND CHAMBER

CASE OF SCOPPOLA v. ITALY (No. 2)

(Application no. 10249/03)

JUDGMENT

STRASBOURG

17 September 2009

This judgment is final but may be subject to editorial revision.

In the case of Scoppola v. Italy (no. 2),

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

Jean-Paul Costa, *President,*
Nicolas Bratza,
Peer Lorenzen,
Françoise Tulkens,
Josep Casadevall,
Ireneu Cabral Barreto,
Rait Maruste,
Alvina Gyulumyan,
Danutė Jočienė,
Ján Šikuta,
Dragoljub Popović,
Mark Villiger,
Giorgio Malinverni,
George Nicolaou,
András Sajó,
Mirjana Lazarova Trajkovska, *judges,*
Vitaliano Esposito, *ad hoc judge,*

and Michael O'Boyle, *Deputy Registrar*,

Having deliberated in private on 7 January and 8 July 2009,

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

PROCEDURE

1. The case originated in an application (no. 10249/03) against the Italian Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Italian national, Mr Franco Scoppola ("the applicant"), on 24 March 2003.

2. The applicant was represented by Mr N. Paoletti, Mrs A. Mari and Mrs G. Paoletti, lawyers practising in Rome. The Italian Government ("the Government") were represented by their Agent, Mrs E. Spatafora and their co-deputy Agent, Mr N. Lettieri.

3. The applicant alleged in particular that his sentence to life imprisonment had breached Articles 6 and 7 of the Convention.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). On 13 May 2008 it was declared partly admissible by a Chamber of that Section composed of the following judges: Françoise Tulkens, Antonella Mularoni, Ireneu Cabral Barreto, Danutė

Jočienė, Dragoljub Popović, András Sajó and Vitaliano Esposito, and also of Sally Dollé, Section Registrar. On 2 September 2008 the Chamber relinquished jurisdiction in favour of the Grand Chamber. The applicant did not object to relinquishment; after having made such an objection, the Government withdrew it (Article 30 of the Convention and Rule 72).

5. 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. Following the withdrawal of Vladimiro Zagrebelsky, the judge elected in respect of Italy, the Government appointed Vitaliano Esposito to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

6. The applicant and the Government each filed a memorial on the merits.

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 7 January 2009 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Mr N. LETTIERI, of the State legal service, *Agent*;

(b) *for the applicant*
Mr N. PAOLETTI, lawyer,
Mrs A. MARI, lawyer, *Counsel*,
Mrs G. PAOLETTI, lawyer, *Adviser.*

The Court heard addresses by Mr Paoletti, Mr Lettieri and Mrs Mari, and their replies to questions from the Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1940 and is at present imprisoned in Parma.

9. On 2 September 1999, after a fight with his two sons, the applicant killed his wife and injured one of his sons. He was arrested on 3 September.

10. At the end of the preliminary investigation the Rome prosecution service asked for the applicant to be committed to stand trial for murder, attempted murder, ill-treatment of his family and unauthorised possession of a firearm

11. At a hearing on 18 February 2000 before the Rome preliminary hearings judge (*giudice dell'udienza preliminare* – “the GUP”) the applicant

asked to be tried under the summary procedure, a simplified process which entailed a reduction of sentence in the event of conviction. In the version in force at that time Article 442 § 2 of the Code of Criminal Procedure ("the CCP") provided that, if the crime committed by the defendant was punishable by life imprisonment, the appropriate sentence should be thirty years. (see paragraph 29 below).

12. The GUP agreed to follow the summary procedure. Further hearings were held on 22 September and 24 November 2000. The last-mentioned hearing began at 10.19 a.m.

13. On 24 November 2000 the GUP found the applicant guilty and noted that he was liable to a sentence of life imprisonment; however, as the applicant had elected to stand trial under the summary procedure, the judge sentenced him to a term of 30 years.

14. On 12 January 2001 the Public Prosecutor's Office at the Rome Court of Appeal appealed on points of law against the Rome GUP's judgment of 24 November 2000. The prosecution argued that the GUP should have applied Article 7 of Legislative Decree no. 341 of 24 November 2000, which entered into force on the very day when the applicant was convicted. After being amended by parliament, Legislative Decree no. 341 was converted into Law no. 4 of 19 January 2001.

15. The prosecution contended in particular that Article 7 of Legislative Decree no. 341 had amended Article 442 of the CCP and now provided that, in the event of trial under the summary procedure, life imprisonment was to be substituted for life imprisonment with daytime isolation if there were "cumulative offences" (*concorso di reati*) or a "continuous offence" (*reato continuato* – see paragraph 31 below). The GUP's failure to apply Legislative Decree no. 341 amounted to "a manifest error of law" (*evidente errore di diritto*).

16. On 5 and 22 February 2001 the applicant appealed. His chief submission was that he should be acquitted on the ground that his conduct had not been intentional or that, at the time when the offences were committed, he was incapable of understanding the wrongful nature of his acts and of forming the intent to commit them (*incapacità de intendere e volere*). In the alternative, he requested a reduction of his sentence.

17. As there were now two appeals, at two different levels of jurisdiction, the Public Prosecutor's appeal on points of law was changed to an appeal on both facts and law and the Rome Assize Court of Appeal was declared to have jurisdiction to hear the case (Article 580 of the CCP).

18. The hearing in private before the Rome Assize Court of Appeal was held on 10 January 2002. The applicant was not present and was tried in absentia. He alleged that, as he had difficulty in walking, he had asked to be taken to the courtroom by ambulance or some other suitably adapted vehicle but that**,** as the prison management had refused his request**,** he had been deprived of the possibility of participating in the appeal proceedings.

19. In a judgment of 10 January 2002, deposited with the registry on 23 January 2002, the Assize Court of Appeal sentenced the applicant to life imprisonment.

20. It observed that before the entry into force of Legislative Decree no. 341 Article 442 § 2 of the CCP had been interpreted to mean that life imprisonment was to be replaced by a term of thirty years, whether or not it was to be accompanied by daytime isolation on account of an accumulation of offences with the most serious one. In following that approach, the GUP had fixed the sentence in relation to the most serious offence, without considering whether to order the applicant's daytime isolation on account of his conviction on the other charges against him.

21. However, Legislative Decree no. 341 of 24 November 2000 had entered into force on the very day of the GUP's decision. As its provisions were classed as procedural rules, it was applicable to pending proceedings, according to the *tempus regit actum* principle. The Assize Court of Appeal further observed that under the terms of Article 8 of Legislative Decree no. 341 the applicant could have withdrawn his request to be tried under the summary procedure and have stood trial under the ordinary procedure. As he had not done so, the first-instance decision ought to have taken account of the change in the rules on penalties which had taken place in the meantime.

22. On 18 February 2002 the applicant appealed on points of law. He argued in the first place that the appeal proceedings should be declared null and void because he had not been able to participate, as defendant, in the appeal hearing on 10 January 2002. In his second and third grounds of appeal the applicant asserted that the trial courts had not given sufficient reasons either for ruling that he had intended to commit murder or for their finding that he knew what he was doing and had acted intentionally when committing the offences. Lastly, he contested the finding of an aggravating circumstance (that he had acted for futile reasons) and complained of the refusal to grant him extenuating circumstances.

23. On 31 July 2002 the applicant submitted further grounds of appeal. He contended that a fresh expert opinion should have been produced on his mental state at the time when the offences were committed and presented new arguments on the question of aggravating and extenuating circumstances. Lastly, he submitted that the penalty deemed to be applicable in his case (life imprisonment with isolation) was excessive.

24. In a judgment deposited with its registry on 20 January 2003, the Court of Cassation dismissed the applicant's appeal.

25. On 18 July 2003 the applicant lodged an extraordinary appeal on the ground of a factual error (Article 625a of the CCP). He asserted in the first place that the domestic courts' finding that he could have been taken to the appeal hearing by an ordinary means of transport and did not need an ambulance had been the result of an erroneous reading of the documents in

the file. In addition, his absence, as the defendant, from that hearing had breached Article 6 of the Convention. The applicant further alleged that the sentence of life imprisonment imposed on him following the changes made by Legislative Decree no. 341 of 2000, and thus through a retrospective criminal-law provision, had breached Article 7 of the Convention and the principles of fair trial. He submitted that his waiver of procedural safeguards as a result of electing to stand trial under the summary procedure had not been compensated for by the reduction of his sentence promised by the State at the time when he made that choice. Lastly, he maintained that life imprisonment was an inhuman and degrading punishment and as such contrary to Article 3 of the Convention.

26. In a judgment of 14 May 2004, deposited with its registry on 28 October 2004, the Court of Cassation declared the applicant's extraordinary appeal inadmissible. It observed that he was not complaining of factual errors committed by the domestic courts but essentially attempting to challenge the Court of Cassation's assessment on points of law.

II. RELEVANT DOMESTIC LAW

A. The summary procedure

27. The summary procedure is governed by Articles 438 and 441 to 443 of the CCP. It is based on the assumption that the case can be decided as the file stands (*allo stato degli atti*) at the preliminary hearing. A request to be tried under the summary procedure may be made orally or in writing at any time before the parties have made their submissions at the preliminary hearing. If the summary procedure is followed, the hearing takes place in private and is given over to the parties' oral submissions; in principle, they must base their arguments on the documents included in the prosecution's file, even though, exceptionally, oral evidence may be allowed. If the judge finds the defendant guilty, the sentence imposed is reduced by one-third (Article 442 § 2). The relevant domestic provisions are described in the *Hermi v. Italy* judgment ([GC], no. 18114/02, §§ 27-28, ECHR 2006-...).

28. The Court also gave an overview of the provisions governing the summary procedure in its *Fera v. Italy* judgment (no. 45057/98, 21 April 2005). At the time of the events which gave rise to the *Fera* case the summary procedure was not available to persons accused of crimes punishable by life imprisonment. In judgment no. 176 of 23 April 1991 the Constitutional Court had quashed the provision of the Code of Criminal Procedure making that possibility available because it went beyond the powers parliament had delegated to the government with a view to the adoption of the new Code of Criminal Procedure ("the CCP").

B. The amendment of Article 442 of the CPP by Law no. 479 of 16 December 1999

29. By Law no. 479 of 16 December 1999, which came into force on 2 January 2000, parliament reintroduced the possibility of allowing a defendant liable to a sentence of life imprisonment to opt for the summary procedure. Section 30 provides:

Section 30

"The following changes shall be made to Article 442 of the Code of Criminal Procedure:

...

(b) in paragraph 2, after the first sentence is added the following [second and last sentence]: 'life imprisonment shall be replaced by thirty years' imprisonment'".

C. Legislative Decree no. 341 of 24 November 2000

30. Legislative Decree no. 341 of 24 November 2000, which came into force on the same day and was converted into Law no. 4 of 19 January 2001, purported to give an authentic interpretation of the second sentence of paragraph 2 of Article 442 of the CCP and added a third sentence.

31. Legislative Decree no. 341 included, under the chapter entitled "Authentic interpretation of Article 442 paragraph 2 of the Code of Criminal Procedure and provisions regarding the summary procedure in trials for offences punishable by life imprisonment"**,** Articles 7 and 8, which provide:

Article 7

"1. In Article 442, paragraph 2, [second and] last sentence, of the Code of Criminal Procedure, the words 'life imprisonment' should be taken to mean life imprisonment without daytime isolation.

2. In Article 442, paragraph 2, of the Code of Criminal Procedure is added, *in fine*, the following sentence: "Life imprisonment with daytime isolation, in the event of cumulative offences or a continuous offence, shall be replaced by life imprisonment."

Article 8

"1. In criminal proceedings pending on the date of the entry into force of the present legislative decree, where the defendant is liable to or has been sentenced to life imprisonment with daytime isolation, and has opted for the summary procedure ..., he or she may withdraw his or her request within thirty days of the date on which the legislation implementing the present legislative decree enters into force. In that case, the proceedings shall be resumed under the ordinary procedure at the stage they had reached when the request was made. Any investigative findings which may have

been reached may be used within the limits laid down by Article 511 of the Code of Criminal Procedure.

2. Where, on account of an appeal by the prosecution, it is possible to apply the provisions of Article 7, the accused may withdraw the request referred to in paragraph 1 within thirty days of the time when he or she learns of the appeal by the prosecution or, if such an appeal was lodged before the entry into force of the legislation to implement the present legislative decree, within thirty days' of the latter date. The provisions of the second and third sentences of paragraph 1 shall apply...”

D. Article 2 of the Criminal Code

32. Article 2 of the 1930 Criminal Code, entitled “Succession of criminal laws”, reads as follows:

> “1. No one may be punished for an act which, under the law in force at the time when it was committed, was not an offence.
>
> 2. No one may be punished for an act which, under a subsequent law, does not constitute an offence; if the defendant has been sentenced, execution of his sentence and its criminal effects shall cease.
>
> 3. If the law in force at the time when the offence was committed and later [laws] differ, the law to be applied is the one whose provisions are most favourable to the defendant, except where a final sentence has already been imposed.
>
> 4. The provisions of the [two] preceding paragraphs shall not apply when the later laws are exceptional and temporary.
>
> 5. The provisions of the present article shall also apply where a legislative decree's conversion into statute-law is time barred [*decadenza*] or does not take place, and where a legislative decree has been converted into statute-law with amendments.”

E. Publication in the Official Gazette

33. Royal Decree no. 1252 of 7 June 1923 provides that the Official Gazette (*Gazzetta ufficiale*) is published by the Ministry of Justice. Article 2 of the decree reads as follows:

> “Publication shall take place every working day during the hours of the afternoon (*nelle ore pomeridiane*).”

34. By judgment no. 132 of 19 May 1976 the Constitutional Court ruled that publication of a law in the Official Gazette was the “essential and decisive moment” among the steps taken to promulgate a legislative text. Moreover, the expression “publication in the Official Gazette” presupposed that the latter was placed in circulation and therefore accessible to the public. The Constitutional Court observed in particular: “[the terms] publication of laws 'in the' Official Gazette [could] only mean ... also

publication 'of the' Official Gazette ...: otherwise there would be a negation of the very procedure of publishing laws, which, historically speaking, was designed to create an objective situation effectively permitting every individual to be aware of the acts in question (*situazione oggettiva di effettiva conoscibilità, da parte di tutti, degli atti medesimi*).”

III. INTERNATIONAL TEXTS AND DOCUMENTS

A. The United Nations Covenant on Civil and Political Rights

35. Article 15 of the International Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations in Resolution 2200 A (XXI) of 16 December 1966, which entered into force on 23 March 1976, is worded 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 when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.
>
> 2. Nothing in this article shall 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 recognized by the community of nations.”

B. The American Convention on Human Rights

36. Article 9 of the American Convention on Human Rights, which was adopted on 22 November 1969 at the Inter-American Specialised Conference on Human Rights and came into force on 18 July 1978, reads as follows:

> “No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.”

C. The European Union's Charter of Fundamental Rights and the case-law of the Court of Justice of the European Communities

37. At the European Council meeting in Nice on 7 December 2000 the European Commission, the European Parliament and the Council of the European Union proclaimed the Charter of Fundamental Rights of the

European Union. Article 49 of the Charter, entitled "Principles of legality and proportionality of criminal offences and penalties" is worded 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 law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.
>
> 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 recognised by the community of nations.
>
> 3. The severity of penalties must not be disproportionate to the criminal offence."

38. In the case of Berlusconi and Others, the Court of Justice of the European Communities held that the principle of the retroactive application of the more lenient penalty formed part of the constitutional traditions common to the member States (see the judgment of 3 May 2005 in joined cases C-387/02, C-391/02 and C-403/02). The relevant passages of the judgment (§§ 66 to 69) read as follows:

> "66. Setting aside the applicability of Article 6 of the First Companies Directive to the failure to publish annual accounts, it should be noted that, under Article 2 of the Italian Criminal Code, which sets out the principle that the more lenient penalty should be applied retroactively, the new Articles 2621 and 2622 of the Italian Civil Code ought to be applied even if they entered into force only after the commission of the acts underlying the prosecutions brought in the cases in the main proceedings.
>
> 67. It must be pointed out in this regard that, according to settled case-law, fundamental rights form an integral part of the general principles of law, the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories (see, inter alia, Case C 112/00 Schmidberger [2003] ECR I 5659, paragraph 71 and the case-law there cited, and Joined Cases C 20/00 and C 64/00 Booker Aquaculture and Hydro Seafood [2003] ECR I 7411, paragraph 65 and the case-law there cited).
>
> 68. The principle of the retroactive application of the more lenient penalty forms part of the constitutional traditions common to the Member States.
>
> 69. It follows that this principle must be regarded as forming part of the general principles of Community law which national courts must respect when applying the national legislation adopted for the purpose of implementing Community law and, more particularly in the present cases, the directives on company law."

39. The principles affirmed by the Court of Justice were repeated in a judgment of the Criminal Division of the French Court of Cassation given

on 19 September 2007 (dismissal of appeal no. 06-85899). The relevant passages of the judgment read as follows:

> "... in any event the general principles of Community law take precedence over national law. In a judgment of 3 May 2005 the Court of Justice of the European Communities observed that the principle of the retroactive application of the more lenient penalty forms part of the constitutional traditions common to the member States and it follows that the said principle must be considered one of the general principles of Community law which national courts must comply with when applying the national law adopted with a view to implementing Community law (paragraphs 68 and 69 of the judgment of 3 May 2005). In the present case, consequently, it was in breach of that principle taking precedence over national law that the Paris Court of Appeal sentenced [the accused] on the basis of a national law adopted with a view to implementing Community law, having unlawfully disregarded the principle of the retroactive application of the more lenient penalty.
>
> ... Article 15 of the International Covenant on Civil and Political Rights provides, without any exception, that where, subsequent to the commission of an offence, the law provides for the application of a more lenient penalty, the offender must be given the benefit thereof. That text takes precedence over French law by virtue of Article 55 of the Constitution of 4 October 1958. It follows that the Paris Court of Appeal could not disregard the new more lenient law on the sole ground that the later law had expressly excluded any retroactive effect in contravention of the principle laid down by the text referred to above. ..."

D. The statute of the International Criminal Court

40. Under the terms of Article 24 § 2 of the Statute of the International Criminal Court,

> "In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply."

E. The case-law of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("the ICTY")

41. In a judgment of 4 February 2005, given in the *Dragan Nikolic* case (no. IT-94-2-A), the Appeals Chamber of the ICTY held that the principle of the applicability of the more lenient criminal law (*lex mitior*) applied to its statute. The relevant parts of the judgment (§§ 79 to 86) read as follows:

> "79. The Trial Chamber first considered whether the principle of *lex mitior* had been applicable in the former Yugoslavia and whether it was part of the law of the International Tribunal and then addressed the question of whether the *lex mitior* principle was applicable in the present case.

80. The contentious part of the Sentencing Judgement is the finding of the Trial Chamber that “the principle of *lex mitior* applies only to cases in which the commission of a criminal offence and the subsequent imposition of a penalty took place within one and the same jurisdiction” and that, because this Tribunal exercises a different jurisdiction from the national jurisdiction in which the crimes were committed, the principle does not apply. The Appeals Chamber notes that the question of the applicability of the principle is not one of jurisdiction, but rather one of whether differing criminal laws are relevant and applicable to the law governing the sentencing consideration of the International Tribunal.

81. The principle of *lex mitior* is understood to mean that, if the law relevant to the offence of the accused has been amended, the less severe law should be applied. It is an inherent element of this principle that the relevant law must be binding upon the court. Accused persons can only benefit from the more lenient sentence if the law is binding, since they only have a protected legal position when the sentencing range must be applied to them. The principle of *lex mitior* is thus only applicable if a law that binds the International Tribunal is subsequently changed to a more favourable law by which the International Tribunal is also obliged to abide.

82. The International Tribunal is clearly bound by its own Statute and Rules, and thus to the sentencing range of a term up to and including the remainder of the convicted person's life as provided for in Rule 101(A) of the Rules and Article 24(1) of the Statute. The Appeals Chamber notes that there has not been a change in the laws of the International Tribunal regarding sentencing ranges.

83. The sentencing range in the former Yugoslavia would be restricted to a fixed term of imprisonment. The Appeals Chamber notes that, since the establishment of the International Tribunal, an accused before it can receive a maximum sentence that is not limited to a fixed term of imprisonment.

84. The Appeals Chamber, however, reiterates its finding that the International Tribunal, having primacy, is not bound by the law or sentencing practice of the former Yugoslavia. It has merely to take it into consideration. Allowing the principle of *lex mitior* to be applied to sentences of the International Tribunal on the basis of changes in the laws of the former Yugoslavia would mean that the States of the former Yugoslavia have the power to undermine the sentencing discretion of the International Tribunal's judges. In passing a national law setting low maximum penalties for the crimes mentioned in Articles 2 to 5 of the International Tribunal's statute, States could then prevent their citizens from being properly sentenced by this Tribunal. This is not compatible with the International Tribunal's primacy enshrined in Article 9(2) of the Statute and its overall mandate.

85. In sum, properly understood, *lex mitior* applies to the Statute of the International Tribunal. Accordingly, if ever the sentencing powers conferred by the Statute were to be amended, the International Tribunal would have to apply the less severe penalty. So far as concerns the requirement of Article 24(1) that “the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia”, these words have to be construed in accordance with the principles of interpretation applicable to the Statute of which they form part. So construed, they refer to any pertinent laws of the former Yugoslavia which were in force at the time of commission of the crime in question; subsequent changes in those laws are not imported.

86. For the foregoing reasons, the fifth ground of appeal is dismissed."

THE LAW

I. SCOPE OF THE CASE AND PRELIMINARY QUESTIONS RAISED BY THE GOVERNMENT

A. Whether the Court may examine the case under Article 6 of the Convention

1. The question raised by the Government

42. On a preliminary point, the Government contested the decision of 13 May 2008 in which the Court's Second Section declared admissible the complaint under Article 6 of the Convention. They observed that, previously, in its partial decision of 8 September 2005, the Court's Third section had rejected a complaint similar to the one examined under that provision. The relevant parts of the Third Section's reasoning read as follows:

> "The applicant further alleged a two-fold violation of Article 6 of the Convention... He argued that the proceedings had been unfair because he had been sentenced under the summary procedure and in his absence.
>
> As regards the first limb of the complaint, he noted that in consequence of choosing the summary procedure he had waived certain rights guaranteed by Article 6. He added, however, that his waiver had not been voluntary but had been conditioned by an agreement entered into with the sole purpose of securing a reduction of his sentence. He contended that the respondent State – which had been repeatedly found by the European Court to be in breach of the reasonable-time requirement – had introduced a system aimed at rewarding defendants who waived fundamental safeguards instead of reorganising the administration of justice.
>
> The Court notes that it was the applicant himself who requested application of the summary procedure. Although opting for the summary procedure has the effect of weakening procedural safeguards, the applicant may waive the safeguards of the ordinary procedure provided that the waiver is unequivocal and that no. public-interest considerations militate against it (see *Kwiatkowska v. Italy* (dec.), no. 52868/99, 30 November 2000).
>
> There is no doubt that the applicant was aware of the consequences of his request for application of the summary procedure and that he unequivocally waived the rights guaranteed under the ordinary procedure. The Court does not consider that the possibility of securing a reduction of his sentence meant that the applicant was forced

to request application of the summary procedure. Furthermore, Article 8 of the 2000 legislative decree gave him the possibility of withdrawing his request to forgo the ordinary procedure. Lastly, there was no public-interest consideration which militated against such a waiver.

The Court therefore finds that this limb of the complaint is ill-founded.

...”

43. At the same time, the Third Section decided to give notice to the Government of the complaint concerning the applicant's life sentence, asking them a question relating to compliance with the principles set forth in Article 7 of the Convention (“Was the applicant sentenced, in breach of Article 7 of the Convention, to a heavier penalty than the one applicable at the time when the offence was committed?”). The operative part of the partial decision of 8 September 2005 reads as follows:

“For these reasons, the Court, unanimously,

Adjourns its examination of the applicant's complaint under Article 7 of the Convention;

Declares the remainder of the application inadmissible.”

44. However, in its final decision on admissibility of 13 May 2008 the Second Section said:

“The Court notes first of all that the applicant's complaints do not exclusively concern the alleged infringement of the *nulla poena sine lege* principle, as enshrined in Article 7 of the Convention, but also the question whether the provisions introduced by Legislative Decree no. 341 of 24 November 2000 infringed the principles of fair trial as guaranteed by Article 6 § 1 of the Convention. ...

The Court considers, in the light of all the arguments of the parties, that these complaints raise serious questions of fact and of law which cannot be settled at this stage of the examination of the application but require an examination of the merits; it follows that these complaints cannot be declared manifestly ill-founded, within the meaning of Article 35 § 3 of the Convention. No other ground of inadmissibility has been found.”

45. The Government argued that the two decisions cited above were in contradiction with each other in that the complaint under Article 6 about the fact that the applicant had been convicted under the summary procedure had been rejected by means of a decision against which no appeal lay, that being surely incompatible with the Court's intention to look into “the question whether the provisions introduced by Legislative Decree no. 341 of 24 November 2000 infringed the principles of fair trial”. Moreover, before the decision on admissibility no specific question relating to compliance with Article 6 of the Convention had been put to the Government by the Court's Registry, so that the Government had been prevented from

submitting detailed observations on the admissibility and merits of the complaint in question.

46. In the light of the foregoing considerations, the Government submitted that the merits of the complaint relating to Article 6 of the Convention should not be examined.

2. The applicant's reply

47. The applicant rejected the Government's argument. He observed that the Court was master of the characterisation to be given in law to the facts and could decide to examine the complaints submitted to it under more than one of the Convention's provisions.

3. The Court's assessment

48. The Grand Chamber recalls first of all that the scope of its jurisdiction in cases submitted to it is limited only by the Chamber's decision on admissibility (see *Perna v. Italy* [GC], no. 48898/99, § 23, ECHR 2003-V, and *Azinas v. Cyprus* [GC], no. 56679/00, § 32, ECHR 2004-III). Within the compass thus delimited, the Grand Chamber may deal with any issue of fact or law that arises during the proceedings before it (see, among many other authorities, *Philis v. Greece (no. 1)*, 27 August 1991, § 56, Series A no. 209, and *Guerra and Others v. Italy*, 19 February 1998, § 44 *in fine, Reports of Judgments and Decisions* 1998-I).

49. In its partial decision of 8 September 2005 on the admissibility of the application the Court's Third Section declared inadmissible three complaints under Article 6 of the Convention. These related in particular to:

(a) the fact that the applicant had been unable to meet his lawyer in the premises intended for that purpose;

(b) the fact that the applicant had not been able to take part in the appeal hearing; and

(c) the applicant's allegation that his choice of the summary procedure, entailing the waiver of certain procedural rights, had not been voluntary.

50. The Grand Chamber observes that none of the above complaints was ultimately declared admissible and that the Government's fears in that respect are unfounded. Those aspects of the applicant's right to a fair trial are therefore not part of the “case” submitted to it.

51. It should be noted, however, that the partial decision of 8 September 2005 also mentioned a fourth complaint under Article 6, concerning the fact that the applicant had been sentenced to life imprisonment. The Court's Third Section took the view that that complaint “relate[d] to the same matter as the complaint concerning Article 7 of the Convention and must therefore be examined under the latter provision”.

52. When notice of the application was given to the Government the parties were therefore asked to submit observations on whether the

applicant's life sentence had breached Article 7 of the Convention. Subsequently, in the applicant's observations in reply to those of the Government, he put forward arguments relating to a violation of the principles of fair trial. In particular, he alleged that when he opted for the summary procedure he entered into an agreement with the State whereby he waived part of his procedural safeguards in exchange for the substitution of a thirty-year sentence for life imprisonment in the event of his conviction. He contended that the State's failure to honour that agreement had been incompatible with Article 6 of the Convention.

53. The Court observes that under the terms of Article 32 of the Convention its jurisdiction "[extends] to all matters concerning the interpretation and application of the Convention and the protocols thereto which are referred to it as provided in Articles 33, 34 and 47" and that "in the event of dispute as to whether the Court has jurisdiction", the decision is a matter for the Court.

54. Since the Court is master of the characterisation to be given in law to the facts of the case, it does not consider itself bound by the characterisation given by the applicant or the Government. By virtue of the *jura novit curia* principle, it has, for example, considered of its own motion complaints under Articles or paragraphs not relied on by the parties and even under a provision in respect of which the Commission had declared the complaint to be inadmissible while declaring it admissible under a different one. A complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on (see *Powell and Rayner v. the United Kingdom*, 21 February 1990, § 29, Series A no. 172, and *Guerra and Others*, cited above, § 44).

55. It follows that by taking the view that it was appropriate to examine whether the provisions introduced by Legislative Decree no. 341 of 24 November 2000 had also "infringed the principles of fair trial as guaranteed by Article 6 § 1 of the Convention", the Court's Second Section did no more than use its right to characterise the applicant's complaint and to examine it under more than one Convention provision. Such a reclassification, which took into account, among other considerations, the applicant's new arguments, cannot be considered arbitrary. Moreover, given that the complaint concerning the applicant's life sentence was never rejected, it is not caught by the principle that a decision to declare a complaint inadmissible is final and that no appeal lies against it.

56. Lastly, with regard to the Government's argument that there had been a breach of the adversarial nature of the procedure before the Court (see paragraph 45 above), it should be noted that the applicant's observations and the final decision on admissibility were communicated to the Government. They therefore had the opportunity before the Grand Chamber to submit any argument to the effect that the complaint relating to Article 6 was inadmissible or ill-founded. In that connection, the Grand

Chamber reiterates that even after a Chamber decision to declare a complaint admissible it may, where appropriate, examine issues relating to its admissibility, for example by virtue of Article 35 § 4 *in fine* of the Convention, which empowers the Court to "reject any application which it considers inadmissible ... at any stage of the proceedings", or where such issues have been joined to the merits or where they are otherwise relevant at the merits stage (see *K. and T. v. Finland* [GC], no. 25702/94, §§ 140-141, ECHR 2001-VII, and *Perna*, cited above, §§ 23-24). Thus, even at the merits stage, subject to Rule 55 of the Rules of Court, the Grand Chamber may reconsider a decision to declare an application admissible where it concludes that it should have been declared inadmissible for one of the reasons given in the first three paragraphs of Article 35 of the Convention (see *Azinas*, cited above, § 32).

57. It follows that there is no reason why the Grand Chamber should not examine the case submitted to it from the standpoint of Article 6 also. The Government's preliminary objection must therefore be rejected.

B. Whether the Court's Second Section was entitled to relinquish jurisdiction in favour of the Grand Chamber

58. The Government further submitted that the intention expressed by the Second Section on 13 May 2008 to relinquish jurisdiction in favour of the Grand Chamber was hard to reconcile with the adoption of a final decision on admissibility. In addition, they argued, that decision contradicted the partial decision and was capable of "prejudicing whatever view of the case the Grand Chamber might take".

59. The Court observes that, under the terms of Article 30 of the Convention, "where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention ... the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber". At the time when the Court's Second Section expressed its intention to relinquish jurisdiction in the present case it had not yet rendered its judgment. Moreover, it is not for the Grand Chamber to return to the issue whether the case raises a "serious question affecting the interpretation of the Convention". In any event, it is hard to understand how the decision to declare the application admissible could "prejudice the assessment" of the Grand Chamber. In that connection, it should be pointed out that, as mentioned above, the Grand Chamber may examine issues relating to the admissibility of the complaints submitted to it (see paragraph 56 above). Lastly, if the Government were of the opinion that the proposal to relinquish jurisdiction was not correct, they could have objected by virtue of Article 30 *in fine* of the Convention. However, after lodging such an objection, they withdrew it of their own accord (see paragraph 4 *in fine* above).

60. In the light of the foregoing, the Court considers that the Second Section's decisions to declare the application admissible and to relinquish jurisdiction in favour of the Grand Chamber were adopted in accordance with the Convention and its Rules and do not prejudice the further examination of the case.

II. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

61. The applicant considered that his life sentence 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.”

A. The Government's plea of non-exhaustion of domestic remedies

62. The Government repeated the objection of non-exhaustion of domestic remedies which they had raised before the Chamber. They alleged that in the Court of Cassation the applicant did not rely on the principle of non-retrospectiveness of the criminal law but merely asserted that the penalty applicable to the offences with which he had been charged was not life imprisonment.

1. The Chamber's decision

63. In its final decision of 13 May 2008 on the admissibility of the application, the Court's Second Section dismissed the Government's preliminary objection, observing that in his appeal on points of law the applicant had contended that the penalty of life imprisonment should not have been imposed on him; in addition, in his extraordinary appeal on the ground of factual error he had alleged that his sentence breached Articles 6 and 7 of the Convention. That being so, the Chamber ruled that the applicant had raised before the Court of Cassation, at least in substance, the complaints he intended to make subsequently at international level, and that he had made normal use of the remedies which he considered effective.

2. *Arguments of the parties*

(a) The Government

64. The Government observed in the first place that in its partial admissibility decision of 8 September 2005 the Third Section, when summarising the applicant's arguments regarding the alleged breach of Article 7 of the Convention, expressed itself as follows:

> "After asserting that in his case the prosecution was not even empowered to appeal, because Article 443 of the Code of Criminal Procedure provided for such a possibility only in the event of a conviction by the preliminary investigations judge following an amendment of the charge, the applicant – who did not include this point in his grounds of appeal on points of law against the judgment of the Assize Court of Appeal – noted that ultimately he had been sentenced to a penalty which was not provided for at the time when he agreed to be tried under the summary procedure."

65. In the Government's opinion, it was difficult to see how the applicant could have raised his complaint under Article 7 "at least in substance" if he had not presented any argument to the Court of Cassation concerning the imposition of a heavier penalty than the one provided for at the time when he agreed to stand trial under the summary procedure. In dismissing their plea of non-exhaustion the Second Section had therefore contradicted the Third Section's finding in its partial decision.

66. Moreover, the arguments put forward by the applicant in the Court of Cassation concerned the nature of the offences he had been charged with, the way the offences had been committed, aggravating or extenuating circumstances and the state of his physical and mental health. Those matters had nothing whatever to do with the allegedly unfair application of Legislative Decree no. 341 of 2000. The same applied to the extraordinary appeal on the ground of a factual error, which essentially concerned the alleged illegality of the decision to try the applicant in absentia in the appeal proceedings. On the other hand, he had neglected to rely in his submissions to the Court of Cassation on Article 2 § 3 of the Criminal Code, which provides that where there is a difference between the law in force at the time of the commission of an offence and later laws the law applied is the one most favourable to the accused (see paragraph 32 above).

(b) The applicant

67. The applicant agreed with the Chamber's decision.

3. *The Court's assessment*

(a) General principles

68. The Court reiterates that the purpose of the rule on exhaustion of domestic remedies is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court (see, among many other authorities, *Remli v. France*, 23 April 1996, § 33, *Reports* 1996-II, and *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V). The rule is based on the assumption, reflected in Article 13 of the Convention (with which it has a close affinity), that there is an effective domestic remedy available in respect of the alleged violation (see *Kudła v. Poland* [GC], no. 30210/96, § 152, ECHR 2000-XI). In this way, it is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (see *Akdivar and Others v. Turkey*, 16 September 1996, § 65, *Reports* 1996-IV).

69. The rule of exhaustion of domestic remedies must be applied with some degree of flexibility and without excessive formalism. At the same time, it normally requires that the complaints intended to be made subsequently at the international level should have been aired before the appropriate national courts, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law (see, among many other authorities, *Fressoz and Roire v. France* [GC], no. 29183/95, § 37, ECHR 1999-I, and *Azinas*, cited above, § 38).

70. However, the obligation under Article 35 requires only that an applicant should have normal recourse to the remedies likely to be effective, adequate and accessible (see *Sofri and Others v. Italy* (dec.), no. 37235/97, ECHR 2003-VIII). In particular, the only remedies which the Convention requires to be exhausted are those that relate to the breaches alleged and are at the same time available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness (see *Dalia v. France*, 19 February 1998, § 38, *Reports* 1998-I). In addition, according to the "generally recognised rules of international law", there may be special circumstances which absolve applicants from the obligation to exhaust the domestic remedies at their disposal (see *Aksoy v. Turkey*, 18 December 1996, § 52, *Reports* 1996-VI). However, the existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust domestic remedies (see *Brusco v. Italy* (dec.), no. 69789/01, ECHR 2001-IX, and *Sardinas Albo v. Italy* (dec.), no. 56271/00, ECHR 2004-I).

71. Lastly, Article 35 § 1 of the Convention provides for a distribution of the burden of proof. As far as the Government is concerned, where it claims non-exhaustion it must satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success (see *Akdivar and Others*, cited above, § 68, and *Sejdovic v. Italy* [GC], no. 56581/00, § 46, ECHR 2006-II).

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

72. The Court observes first of all that, contrary to the Government's assertion (see paragraphs 64-65 above), the Third Section in its partial admissibility decision did not prejudge the question whether domestic remedies had been exhausted. It did no more than make a brief remark, when summarising the applicant's arguments under Article 7 of the Convention, concerning the fact that his grounds of appeal contained no argument on a specific point. It should also be noted that, in the event, it decided to give notice of this complaint to the Government. That decision does not support the Government's contention that this complaint should be rejected for failure to comply with the obligations arising from Article 35 § 1 of the Convention.

73. As regards the question whether remedies were exhausted, the Court observes that, in his appeal against his conviction at first instance the applicant's chief submission was that he should be acquitted on the ground that his conduct had not been intentional or that, at the time when the offences were committed, he was incapable of understanding the wrongful nature of his acts and of forming the intent to commit them. In the alternative, he requested a reduction of his sentence (see paragraph 16 above). In his appeal on points of law the applicant complained of being convicted in his absence, repeated his arguments concerning the absence of criminal intent and his mental state, contested an aggravating circumstance and asked the Court of Cassation to acknowledge the existence of extenuating circumstances (see paragraphs 22-23 above).

74. The Court takes the view that the applicant presented argument, in accordance with the formalities prescribed by Italian law, in support of his contention, among other complaints, that the sentence imposed on him was excessive. On the other hand, he did not contest, either in his first appeal or in his appeal on points of law, the allegedly retrospective application of Legislative Decree no. 341 of 2000. The Government rightly pointed to that fact (see paragraph 66 above). It is true that the applicant did present arguments in support of the contention that the application of Legislative Decree no. 341 to his detriment had breached Articles 6 and 7 of the Convention in the context of his extraordinary

appeal on the ground of a factual error (see paragraph 25 above); nevertheless, an extraordinary appeal is a means of obtaining, as an exceptional measure, the reopening of proceedings that have been terminated by a final decision on account of a manifest factual error on the part of the Court of Cassation. It was, therefore, not capable of remedying the applicant's complaints concerning the incompatibility between the provisions of Legislative Decree no. 341 of 2000 and his Convention rights (see, *mutatis mutandis*, *Çinar v. Turkey* (dec.), no. 28602/95, 13 November 2003).

75. It remains to be determined, however, whether grounds of appeal on questions of fact or law that the applicant might possibly have relied on with regard to the allegedly retrospective imposition of life imprisonment and its negative repercussions on the fairness of the proceedings had any prospects of success. In that connection, Legislative Decree no. 341 of 2000 had the force of law in the Italian legal system and that the judges of the Court of Appeal and the Court of Cassation were required to apply it in proceedings before them. It should also be pointed out that, in the Italian system, an individual is not entitled to apply directly to the Constitutional Court: only a court which is hearing the merits of a case has the possibility of making a reference to the Constitutional Court, at the request of a party or of its own motion. Accordingly, such an application cannot be a remedy whose exhaustion is required under the Convention (see *Brozicek v. Italy*, 19 December 1989, § 34, Series A no. 167, and *C.I.G.L. and Cofferati v. Italy*, no. 46967/07, § 48, 24 February 2009).

76. The Court observes that the Government submitted that the applicant could have relied on Article 2 § 3 of the Criminal Code, which set forth the principle of the retrospective application of the criminal law more favourable to the accused (see paragraphs 32 and 66 above). However, even supposing that such a principle could apply to the provisions of the Code of Criminal Procedure, it should be noted that Article 2 of the Criminal Code is only a provision of ordinary law, set out in a code adopted in 1930. Under Italian law, more recent laws may, as a general rule, derogate from previous laws. The Government did not argue that such a rule was not applicable in the present case, and have failed to explain why a subsequent law, such as Legislative Decree no. 341, might not have legitimately derogated from Article 2 of the Criminal Code. Moreover, they did not produce any example of cases in which that provision had been successfully relied on in a situation comparable with that of the applicant. Nor have the Government established that it was possible to avoid application of Legislative Decree no. 341 on the ground that it was incompatible with the Convention.

77. In the light of the foregoing, the Court considers that the Government have not established that the remedies the applicant could

have used to contest the application of Legislative Decree no. 341 of 2000 had any prospects of success.

78. It follows that the Government's preliminary objection on the ground of non-exhaustion cannot be accepted.

B. Merits of the complaint

1. Arguments of the parties

79. The applicant alleged that Article 7 of the Convention had been breached in three different respects, summarised below.

(a) Allegedly retrospective application of criminal law

(i) The applicant's argument

80. The applicant noted in the first place that, according to the case-law of the Italian courts (Court of Cassation, combined divisions, judgment of 6 March 1992 in the *Merletti* case), Article 442 of the Code of Criminal Procedure, which sets out the penalty to be imposed when the summary procedure has been adopted is – despite its inclusion in the CCP – a provision of substantive criminal law. He argued that, unlike the provisions examined by the Grand Chamber in the *Kafkaris v. Cyprus* case (no. 21906/04, 12 February 2008), that clause did not concern the procedure for execution of sentence but the fixing of the sentence. It should therefore be considered a "criminal law" for the purposes of Article 7 of the Convention.

81. The applicant emphasised that the last hearing before the Rome preliminary hearings judge began on 24 November 2000 at 10.19 a.m. (see paragraph 12 above). The preliminary hearings judge gave judgment immediately after the hearing. On the same day Legislative Decree no. 341 was published in the Official Gazette and came into force. The Official Gazette appeared during the afternoon (see paragraph 33 above). The applicant argued on that basis that when the preliminary hearings judge gave judgment Legislative Decree no. 341 was not yet in force and could not have been known of.

82. The applicant accordingly submitted that he had been the victim of a retrospective application of the criminal law since he had first been sentenced to thirty years' imprisonment and then, pursuant to Legislative Decree no. 341, to life imprisonment.

(ii) The Government's arguments

83. The Government rejected that argument, observing that Article 7 of the Convention did no more than prohibit any retrospective application of

criminal law in relation to "the time the criminal offence was committed". They observed that the provisions of the Criminal Code which established penalties for the offences of which the applicant was convicted had not been amended after 2 September 1999, the date when they were committed. They noted in particular that the offences concerned were punishable by life imprisonment with daytime isolation and that the penalty imposed by the national courts had not exceeded that limit.

84. The provisions of the Code of Criminal Procedure should not be taken into account when examining the term penalty contained in Article 7, as it would be inappropriate to enable an individual to weigh up the consequences of a crime he might commit by calculating what reduction of sentence he might be entitled to depending on his choice of procedure. Such an approach would make it impossible to amend the CCP. The *nullum crimen sine lege* principle concerned only the provisions of substantive criminal law, whereas procedural provisions were normally retrospective, being governed by the *tempus regit actum* principle. Any other finding would amount to granting a reduction of sentence every time the provisions of the CCP were repealed or amended. Moreover, unlike Article 6, which applied to criminal matters ("*matière pénale*" in the French version), Article 7 of the Convention referred to "the criminal offence". That showed that Article 7 concerned only criminal law, not procedural rules.

85. In any event, the procedural rules had not been applied retrospectively to the applicant's detriment. The Government observed in that connection that at the time when the crimes were committed (on 2 September 1999), the law did not provide for the possibility of requesting the summary procedure when the offences charged were punishable with life imprisonment. That possibility had been introduced only by Law no. 479 of 16 December 1999. The purpose of the principle enshrined in Article 7 of the Convention was to ensure that offenders knew in advance what acts engaged their criminal responsibility and what penalties they might make themselves liable to, and it could not be accepted that an individual should also be able to take decisions about whether to commit an offence with an eye to what might happen subsequently.

(b) Alleged infringement of the principle of the retrospective application of the more lenient criminal law

(i) The applicant's argument

86. The applicant submitted that Article 7 of the Convention guaranteed not only the non-retrospectiveness of the criminal law but also the principle – set forth explicitly in Article 15 of the United Nations Covenant on Civil and Political Rights, by Article 49 of the European Union's Charter of Fundamental rights and by Article 9 of the American Convention on Human Rights (see paragraphs 35-37 above) – that, in the event of a difference

between the law in force at the time of the commission of an offence and later laws, the law to be applied was the law more favourable to the accused. That meant that Article 7 was breached whenever courts imposed a heavier penalty than the one prescribed by the law in force at any time between the commission of the offence and the delivery of judgment. The applicant referred on that point to the dissenting opinion of Judge Popović annexed to the *Achour v. France* judgment ([GC], n° 67335/01, ECHR 2006-..).

87. He pointed out that in the present case the Code of Criminal Procedure, as amended by Law no. 479 of 1999, provided from 2 January 2000 that where the summary procedure was adopted for offences punishable by life imprisonment (with or without isolation), that penalty was to be replaced with thirty years' imprisonment. However, Legislative Decree no. 341 of 2000 had changed the applicable penalty to the defendant's detriment, requiring a sentence of life imprisonment without isolation. As a result, following an appeal on points of law by the Principal Public Prosecutor, the penalty imposed at first instance had been increased to life imprisonment, which was not the penalty prescribed by the law in force at the time when the applicant had agreed to be tried under the summary procedure.

88. The applicant submitted that the retrospective application of a provision imposing a “heavier penalty” could not be justified by the fact that the Italian parliament had described Legislative Decree no. 341 of 2000 as a “law of authentic interpretation”. Any other conclusion would be incompatible with the principle of the rule of law. Moreover, Legislative Decree no. 341 had not provided an interpretation of the CCP, whose provisions were clear; they had previously been interpreted in the sense that the words “life imprisonment” designated any sentence of imprisonment for life, whether with or without daytime isolation. In reality parliament had used a subterfuge in order to change the rules on the severity of sentence in the context of trial under the summary procedure. That was evidenced by the numerous criticisms made of Legislative Decree no. 341 of 2000 at the time when it was converted into statute law.

(ii) The Government's arguments

89. The Government rejected that argument. They observed that, unlike Article 15 of the United Nations Covenant on Civil and Political Rights, Article 7 of the Convention did not set forth the right to retrospective application of the more lenient criminal law.

(c) Alleged lack of clarity of the law on the basis of which the sentence of life imprisonment was imposed

(i) The applicant's argument

90. The applicant observed that, if the Court were to accept the Government's argument that Article 442 of the CCP, as amended by Law no. 479 of 1999, was an unclear provision requiring official interpretation, it would have to find a violation of the Convention on the ground that the relevant criminal law lacked clarity and foreseeability. That much was proved by the fact that, in his case, the preliminary hearings judge had interpreted it in the sense that the appropriate sentence was thirty years' imprisonment, whereas the Assize Court of Appeal, with the assistance of the "authentic interpretation" provided by the Government, had decided that life imprisonment was the correct sentence.

(ii) The Government's arguments

91. The Government submitted that Legislative Decree no. 341 of 2000 was a genuine law of interpretation, meaning a law intended to settle a contested point in domestic law, on which the national courts had given different rulings.

2. The Court's assessment

(a) Interpretation of Article 7 of the Convention in the Court's case-law

(i) The nullum crimen, nulla poena sine lege *principle*

92. 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, § 34 and § 32 respectively, Series A nos. 335-B and 335-C, and *Kafkaris*, cited above, § 137).

93. Article 7 § 1 of the Convention goes beyond prohibition of the retrospective application of criminal law to the detriment of the accused. It also sets forth, more generally, 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 (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).

94. 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 (see *Kokkinakis v. Greece*, 25 May 1993, § 52, Series A no. 260-A; *Achour*, cited above, § 41; and *Sud Fondi Srl and Others v. Italy*, no. 75909/01, § 107, 20 January 2009).

95. 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*, cited above, § 43).

(ii) The notion of "penalty"

96. The notion of "penalty" in Article 7 § 1 of the Convention, like those of "civil rights and obligations" and "criminal charge" in Article 6 § 1, has an autonomous meaning (see in particular, regarding "civil rights", *X v. France*, 31 March 1992, § 28, Series A no. 234-C, and, on the subject of "criminal charges", *Demicoli v. Malta*, 27 August 1991, § 31, Series A no. 210). 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" within the meaning of this provision (see *Welch v. the United Kingdom*, 9 February 1995, § 27, Series A no. 307-A).

97. 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).

98. 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 *Kafkaris*, cited above, § 142).

(iii) Foreseeability of the criminal law

99. 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 *Kokkinakis*, cited above, §§ 40-41, *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).

100. In consequence of the principle that laws must be of general application, 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. That means that many laws are inevitably couched in terms which, to a greater or lesser extent are vague, and their interpretation and application depend on practice (see *Cantoni*, cited above, § 31, and *Kokkinakis*, cited above, § 40). Consequently, in any system of law, however clearly drafted a legal provision may be, including a criminal law provision, 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.

101. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain (see *Kafkaris*, cited above, § 141). Moreover, it is a firmly established part of the legal tradition of the States party to the Convention that case-law, as one of the sources of the law, necessarily contributes to the gradual development of the criminal law (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 *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, § 50, ECHR 2001-II).

102. Foreseeability depends to a considerable degree on the content of the law concerned, 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" 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 *Achour*, cited above, § 54).

103. In 1978 the European Commission of Human Rights expressed the opinion that, unlike Article 15 § 1 *in fine* of the United Nations Covenant on Civil and Political Rights, Article 7 of the Convention did not guarantee the right to a more lenient penalty provided for in a law subsequent to the

offence (see *X v. Germany*, no. 7900/77, Commission decision of 6 March 1978, *Decisions and Reports* (DR) 13, pp. 70-72). It accordingly declared manifestly ill-founded the complaint of an applicant who alleged that, after their commission, some of the offences he had been charged with had been decriminalised. That ruling has been repeated by the Court, which has reiterated that Article 7 does not afford the right of an offender to application of a more favourable criminal law (see *Le Petit v. the United Kingdom* (dec.), no. 35574/97, 5 December 2000, and *Zaprianov v. Bulgaria* (dec.), no. 41171/98, 6 March 2003).

104. While the Court is not formally bound to follow any of its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without cogent reason, from precedents laid down in previous cases (see, for example, *Chapman v. the United Kingdom* [GC], no. 27238/95, § 70, ECHR 2001-I). Since the Convention is first and foremost a system for the protection of human rights, the Court must however have regard to the changing conditions in the respondent State and in the Contracting States in general and respond, for example, to any emerging consensus as to the standards to be achieved (see, among other judgments, *Cossey v. the United Kingdom*, 27 September 1990, § 35, Series A no. 184, and *Stafford v. the United Kingdom* [GC], no. 46295/99, §§ 67-68, ECHR-2002-IV). 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. A failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement (see *Stafford,* cited above, § 68, and *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 74, ECHR 2002-VI).

105. The Court considers that a long time has elapsed since the Commission gave the above-mentioned *X v. Germany* decision and that during that time there have been important developments internationally. In particular, apart from the entry into force of the American Convention on Human Rights, Article 9 of which guarantees the retrospective effect of a law providing for a more lenient penalty enacted after the commission of the relevant offence (see paragraph 36 above), mention should be made of the proclamation of the European Union's Charter of Fundamental Rights. The wording of Article 49 § 1 of the Charter differs – and this can only be deliberate (see, *mutatis mutandis*, *Christine Goodwin*, cited above, § 100 *in fine*) – from that of Article 7 of the Convention in that it states: “If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable” (see paragraph 37 above). In the case of *Berlusconi and Others*, the Court of Justice of the European Communities, whose ruling was endorsed by the French Court of Cassation (see paragraph 39 above), held that this principle formed part of the constitutional traditions common to the member States (see paragraph 38

above). Lastly, the applicability of the more lenient criminal law was set forth in the statute of the International Criminal Court and affirmed in the case-law of the ICTY (see paragraphs 40 and 41 above).

106. The Court therefore concludes that since the *X v. Germany* decision a consensus has gradually emerged in Europe and internationally around the view that application of a criminal law providing for a more lenient penalty, even one enacted after the commission of the offence, has become a fundamental principle of criminal law. It is also significant that the legislation of the respondent State had recognised that principle since 1930 (see Article 2 § 3 of the Criminal Code, cited in paragraph 32 above).

107. Admittedly, Article 7 of the Convention does not expressly mention an obligation for Contracting States to grant an accused the benefit of a change in the law subsequent to the commission of the offence. It was precisely on the basis of that argument relating to the wording of the Convention that the Commission rejected the applicant's complaint in the case of *X v. Germany*. However, taking into account the developments mentioned above, the Court cannot regard that argument as decisive. Moreover, it observes that in prohibiting the imposition of “a heavier penalty ... than the one that was applicable at the time the criminal offence was committed”, paragraph 1 *in fine* of Article 7 does not exclude granting the accused the benefit of a more lenient sentence, prescribed by legislation subsequent to the offence.

108. In the Court's opinion, it is consistent with the principle of the rule of law, of which Article 7 forms an essential part, to expect a trial court to apply to each punishable act the penalty which the legislator considers proportionate. Inflicting a heavier penalty for the sole reason that it was prescribed at the time of the commission of the offence would mean applying to the defendant's detriment the rules governing the succession of criminal laws in time. In addition, it would amount to disregarding any legislative change favourable to the accused which might have come in before the conviction and continuing to impose penalties which the State – and the community it represents – now consider excessive. The Court notes that the obligation to apply, from among several criminal laws, the one whose provisions are the most favourable to the accused is a clarification of the rules on the succession of criminal laws, which is in accord with another essential element of Article 7, namely the foreseeability of penalties.

109. In the light of the foregoing considerations, the Court takes the view that it is necessary to depart from the case-law established by the Commission in the case of *X v. Germany* and affirm that Article 7 § 1 of the Convention guarantees not only the principle of non-retrospectiveness of more stringent criminal laws but also, and implicitly, the principle of retrospectiveness of the more lenient criminal law. That principle is embodied in the rule that where there are differences between the criminal law in force at the time of the commission of the offence and subsequent

criminal laws enacted before a final judgment is rendered, the courts must apply the law whose provisions are most favourable to the defendant.

(c) Whether Article 442 of the CCP contains provisions of substantive criminal law

110. The Court reiterates that the rules on retrospectiveness set out in Article 7 of the Convention apply only to provisions defining offences and the penalties for them; on the other hand, in other cases, the Court has held that it is reasonable for domestic courts to apply the *tempus regit actum* principle with regard to procedural laws (see, with reference to new regulations on time-limits for appeals, *Mione v. Italy* (dec.), no. 7856/02, 12 February 2004, and *Rasnik v. Italy* (dec.), no. 45989/06, 10 July 2007; see also *Martelli v. Italy* (dec.), no. 20402/03, 12 April 2007, concerning implementation of a law containing new rules on the assessment of evidence, and *Coëme and Others*, cited above, §§ 147-149, on the immediate application to pending proceedings of laws amending the rules on limitation). The Court must therefore determine whether the text which, in the present case, underwent the legislative changes complained of, namely Article 442 § 2 of the CCP, contained provisions of substantive criminal law, and in particular provisions influencing the length of the sentence to be imposed.

111. The Court notes that Article 442 is part of the Code of Criminal Procedure, whose provisions normally govern the procedure for the prosecution and trial of offenders. However, the classification in domestic law of the legislation concerned cannot be decisive. Although it is true that Articles 438 and 441 to 443 of the CCP describe the scope and procedural stages of the summary procedure, paragraph 2 of Article 442 is entirely concerned with the length of the sentence to be imposed when the trial is conducted in accordance with that simplified process. In particular, at the time when the applicant committed the offences, Article 442 § 2 provided that, in the event of conviction, the penalty fixed by the court was to be reduced by one-third. Law no. 479 of 1999, which came into force before the preliminary hearing in the applicant's case, then specified that life imprisonment was to be replaced by thirty years' imprisonment (see paragraph 29 above).

112. There is no doubt that the penalties mentioned in Article 442 § 2 of the CCP were those to be imposed following conviction for a criminal offence (see *Welch*, cited above, § 28), that they were qualified as “criminal” in domestic law and that their purpose was both deterrent and punitive. In addition, they constituted the “penalty” imposed for the acts with which the defendant was charged, and not measures concerning the “execution” or “enforcement” of a penalty (see *Kafkaris*, cited above, § 142).

113. In the light of the foregoing, the Court considers that Article 442 § 2 of the CCP is a provision of substantive criminal law concerning the length of the sentence to be imposed in the event of conviction following trial under the summary procedure. It therefore falls within the scope of the last sentence of Article 7 § 1 of the Convention.

(d) Whether the applicant was granted the benefit of the more lenient criminal law

114. The applicant did not dispute that at the time when he committed the offences (on 2 September 1999) the acts he stood accused of were punishable by life imprisonment with daytime isolation and that, in view of the Constitutional Court's judgment no. 176 of 1991 (see paragraph 28 above), that was an impediment to adoption of the summary procedure.

115. However, the impediment was removed four months later, on 2 January 2000, while the criminal proceedings against the applicant were pending at the preliminary investigations stage, through the entry into force of Law no. 479 of 1999. As noted above, section 30 of Law no. 479 amended Article 442 of the CCP by providing that in the event of conviction following trial under the summary procedure, "life imprisonment [was to be] replaced by thirty years' imprisonment" (see paragraph 29 above). Having regard to the fact that, at the applicant's request, the preliminary hearings judge subsequently agreed to apply the summary procedure (see paragraphs 11 and 12 above), the Court considers that section 30 of Law no. 479 of 1999 is a subsequent criminal-law provision prescribing a more lenient penalty. Article 7 of the Convention, as interpreted in the present judgment (see paragraph 109 above), therefore required the applicant to be granted the benefit thereof.

116. That, moreover, is what happened in the first-instance proceedings. In a judgment of 24 November 2000 the Rome preliminary hearings judge sentenced the applicant to thirty years' imprisonment, granting him the reduction of sentence provided for in Article 442 § 2 of the CCP, as amended by Law no. 479 of 1999 (see paragraph 13 above).

117. However, that application in favour of the accused of a provision prescribing a more lenient penalty which had come into force after the commission of the offences was set aside by the Rome Court of Appeal and by the Court of Cassation. Those courts took the view that it was necessary to apply Legislative Decree no. 341 of 2000, which specified that, where there were cumulative offences, if an offender was liable – like the applicant – to life imprisonment with daytime isolation, that penalty was to be replaced not by thirty years' imprisonment but by life imprisonment without isolation (see paragraphs 19-21, 24, 30 and 31 above).

118. The Court cannot accept the Government's argument that Legislative Decree no. 341 was not a provision introducing new rules on the penalty applicable in the context of the summary procedure but a law

interpreting earlier legislation (see paragraph 91 above). In that connection, it observes that, as amended by Law no. 479 of 1999, Article 442 § 2 of the CCP did not contain any particular ambiguity; it clearly stated that life imprisonment was to be replaced by thirty years' imprisonment, and made no distinction between life imprisonment with and life imprisonment without daytime isolation. Moreover, the Government have not produced any examples of judicial decisions which could be alleged to have been based on conflicting interpretations of Article 442.

119. It follows that the applicant was given a heavier sentence than the one prescribed by the law which, of all the laws in force during the period between the commission of the offence and delivery of the final judgment, was most favourable to him.

(e) Conclusion

120. In the light of the foregoing, the Court considers that the respondent State failed to discharge its obligation to grant the applicant the benefit of the provision prescribing a more lenient penalty which had come into force after the commission of the offence.

121. It follows that in this case there has been a violation of Article 7 § 1 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

122. The Court reiterates its finding that it has jurisdiction to examine the facts that gave rise to the complaint declared admissible from the standpoint of Article 6 § 1 of the Convention also (see paragraph 57 above).

123. The relevant parts of that provision read as follows:

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

124. The Government rejected this complaint.

A. The Government's plea of non-exhaustion of domestic remedies

125. The Government observed that the applicant had not availed himself of the possibility of withdrawing his request for adoption of the summary procedure, provided for in Article 8 § 2 of Legislative Decree no. 341 of 2000 (see paragraph 31 above). Under the terms of Article 8 § 2 the applicant had until 21 February 2001 to exercise his right to withdraw his request, and if he had done so he would have been entitled to an ordinary trial attended by all the safeguards enshrined in Article 6 of the Convention.

126. The Court considers that the Government's objection raises questions closely bound up with those raised by the applicant's complaint under Article 6 of the Convention. It therefore decides to join the plea of

non-exhaustion of domestic remedies to the merits (see, *mutatis mutandis* and among many other authorities, *Isaak v. Turkey*, no. 44587/98, § 78, 24 June 2008).

B. Merits of the complaint

1. Arguments of the parties

(a) The applicant

127. The applicant submitted that the circumstances that had led to the violation of Article 7 of the Convention had also breached the principles of fair trial. In February 2000 he had opted for the summary procedure, and in doing so had waived a number of procedural safeguards, because he knew, on the basis of the Code of Criminal Procedure in force at the time, that in the event of his conviction he would be punished by thirty years' imprisonment and not a life sentence. However, the CCP had been amended unfavourably, and in exchange for his waiver he had not been granted a reduction of his sentence (the only advantage being that he had avoided daytime isolation). But adoption of the summary procedure implied a "public-law contract" between the defendant and the State; once entered into, that "contract" could not be rescinded or varied unilaterally.

128. The applicant observed that when Legislative Decree no. 341 came into force and when it was converted into statute law, he was in prison. He was therefore not aware of the possibility of withdrawing his request for adoption of the summary procedure, which related to the exercise of a personal right of the defendant. The possibility had not been mentioned in the prosecution's appeal on points of law. As he was not familiar with the finer points of judicial proceedings, he had not had the real possibility of reconsidering his procedural choices. The assertion in the *Hermi v. Italy* judgment ([GC], no. 18114/02, § 92, ECHR 2006-...), to the effect that the State could not be required to spell out in detail, at each step in the procedure, the defendant's rights and entitlements, were not relevant in the present case, which concerned the retrospective application of a heavier penalty.

(b) The Government

129. The Government accepted that, at the time when the applicant requested adoption of the summary procedure (on 18 February 2000), Article 442 § 2 of the CCP provided that, if the penalty to be imposed was life imprisonment, the judge should reduce it to thirty years' imprisonment. Moreover, it was possible that when the applicant was found guilty in the first-instance judgment (24 November 2000) he was not aware of the

existence of Legislative Decree no. 341 of 2000, which had come into force that very day. However, parliament had foreseen that eventuality and had given defendants the right to withdraw a request for adoption of the summary procedure and to elect to stand trial under the ordinary procedure instead (see Article 8 of Legislative Decree no. 341 of 2000, cited in paragraph 31 above).

130. The right in question had to be exercised within thirty days, beginning either with the entry into force of the Act of parliament converting Legislative Decree no. 341 into statute law (that is by 21 February 2001) or with notification of an appeal on points of law by the prosecution. The applicant had therefore had almost three months to reconsider his decision to stand trial under the summary procedure but had chosen not to avail himself of that possibility. If he had done so, the proceedings would have reverted to the preliminary hearing stage and the trial would have been conducted in accordance with the ordinary rules.

131. As Legislative Decree no. 341 had been published in the Official Gazette, it had to be considered to be known to everyone. As the Grand Chamber had held in the *Hermi* case (cited above), the applicant's lawyer had a statutory and professional obligation to inform his client on this subject. Moreover, the prosecution's appeal on points of law, copies of which had been sent to both the applicant and his lawyer, mentioned the new legislation.

2. The Court's assessment

132. The Court observes first of all that, in the context of civil disputes, it has repeatedly ruled 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* 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-...). The Court considers that those principles, which are essential elements of the concepts of legal certainty and protection of litigants' legitimate trust (see *Unedic v. France*, no. 20153/04, § 74, 18 December 2008), are applicable, *mutatis mutandis*, to criminal proceedings.

133. In the present case the applicant complained that, although he had opted for a simplified trial – the summary procedure – he had been deprived of the most important advantage stemming from that choice under the law in force at the time when he had made it, namely the replacement of life imprisonment with a thirty-year sentence.

134. The Court has already had occasion to examine the particular features of the summary procedure provided for in the Italian Code of Criminal Procedure. It has noted that the procedure entails undoubted advantages for the defendant: if convicted, he receives a substantially reduced sentence, and the prosecution cannot lodge an appeal against a decision to convict which does not alter the legal characterisation of the offence (see *Hermi*, cited above, § 78, and *Hany v. Italy* (dec.), no. 17543/05, 6 November 2007). However, the summary procedure also entails a diminution of the procedural safeguards afforded by domestic law, particularly public hearings and the possibility to adduce evidence and have witnesses summoned (see *Kwiatkowska v. Italy* (dec.), no. 52868/99, 30 November 2000). In a trial under the summary procedure the production of new evidence is in principle ruled out, as the court's decision has to be taken, subject to exceptions, on the basis of the documents contained in the file held by the Public Prosecutor's Office (see *Hermi*, cited above, § 87; see also paragraph 27 above).

135. The safeguards mentioned above are fundamental aspects of the right to a fair trial enshrined in Article 6 of the Convention. Neither the letter nor the spirit of Article 6 prevents a person from waiving them of his own free will, either expressly or tacitly. However, such a waiver must, if it is to be effective for Convention purposes, be established in an unequivocal manner and be attended by minimum safeguards commensurate with its importance (see *Poitrimol v. France*, 23 November 1993, § 31, Series A no. 277-A, and *Hermi*, cited above, § 73). In addition, it must not run counter to any important public interest (see *Håkansson and Sturesson v. Sweden*, 21 February 1990, § 66, Series A no. 171-A, and *Sejdovic,* cited above, § 86).

136. The Court considers that by requesting the adoption of the summary procedure the applicant – who was assisted by a lawyer of his choice, and was therefore in a position to ascertain what the consequences of his request would be – unequivocally waived his rights to a public hearing, to have witnesses called, to produce new evidence and to examine prosecution witnesses. Nor does it appear that the case raised any public-interest issues militating against such a waiver (see, *mutatis mutandis*, *Kwiatkowska*, decision cited above).

137. However, as pointed out above, the waiver was made in exchange for certain advantages, which included non-imposition of life imprisonment, as it was clear from the text of Article 442 of the CCP, as amended by Law no. 479 of 1999, that in the event of conviction under the summary

procedure the sentence to be imposed was to be reduced by one-third and life imprisonment replaced by a thirty-year sentence. On the basis of that legal framework, in force at the time when he requested adoption of the simplified procedure, the applicant could legitimately expect that, thanks to the procedural choice he had made, the maximum sentence to which he was liable was a term of imprisonment not exceeding thirty years.

138. But that legitimate expectation on the applicant's part was frustrated by Legislative Decree no. 341 of 2000, which provided that, where a judge considered that the appropriate sentence should be life imprisonment with daytime isolation, the penalty to be imposed should be life imprisonment without isolation. From the date of the entry into force of Legislative Decree no. 341 (24 November 2000), it was clear that that penalty could be imposed even on defendants tried under the summary procedure. Yet, the change in the rules on fixing of sentence was applied not only to defendants making new requests for trial under the summary procedure but also to persons who, like the applicant, had made that request and stood trial at first instance before the publication of Legislative Decree no. 341 in the Official Gazette.

139. The Court considers that a person charged with an offence must be able to expect the state to act in good faith and take due account of the procedural choices made by the defence, using the possibilities made available by law. It is contrary to the principle of legal certainty and the protection of the legitimate trust of persons engaged in judicial proceedings for a State to be able to reduce unilaterally the advantages attached to the waiver of certain rights inherent in the concept of fair trial. As such a waiver is made in exchange for the advantages mentioned, it cannot be regarded as fair if, once the competent domestic authorities have agreed to adopt a simplified procedure, a crucial element of the agreement between the State and the defendant is altered to the latter's detriment without his consent. In that connection, the Court notes that, although the Contracting States are not required by the Convention to provide for simplified procedures (see *Hany*, decision cited above), where such procedures exist and have been adopted, the principles of fair trial require that defendants should not be deprived arbitrarily of the advantages attached to them.

140. In the present case application of the provisions of Legislative Decree no. 341 after the end of the first-instance proceedings deprived the applicant of an essential advantage which was guaranteed by law and which had prompted his decision to elect to stand trial under the summary procedure. That is incompatible with the principles embodied in Article 6 of the Convention.

141. It remains to be determined whether the applicant's right under Article 8 of Legislative Decree no. 341 to withdraw his request for adoption of the summary procedure was capable of remedying the prejudice he suffered.

142. The Court observes first of all that it cannot accept the applicant's argument that because the authorities did not inform him of this right he had no real possibility of availing himself of it. It reiterates that the State cannot be made responsible for spelling out in detail, at each step in the procedure, the defendant's rights and entitlements, and that it is for the legal counsel of the accused to inform his client as to the progress of the proceedings against him and the steps to be taken in order to assert his rights (see *Hermi*, cited above, § 92). Although deprived of his liberty, at the time of the publication of Legislative Decree no. 341 and the appeal on points of law lodged by the prosecution, the applicant was assisted by two lawyers of his choice who, moreover, on 5 February 2001, had appealed against the first-instance judgment (see paragraph 16 above). As the Government rightly pointed out, those lawyers had received a copy of the prosecution's appeal in which Legislative Decree no. 341 was expressly mentioned. They therefore had the opportunity to inform their client about it and discuss with him the most appropriate defence against the prosecution's submissions. In addition, they had enough time (thirty days from the entry into force of the Act of parliament converting the legislative decree into statute law or from notification of the prosecution's appeal on points of law) to study the question.

143. However, it should be pointed out that if the applicant had withdrawn his request for adoption of the summary procedure, the result would have been the reopening of the proceedings against him under the ordinary procedure and the resumption of his trial at the preliminary hearing stage. He would thus have had the benefit of the rights he had waived by opting for the summary procedure, but would not have been able to compel the State to honour the agreement previously entered into, whereby the waiver of procedural safeguards was to be offered in exchange for a reduced sentence.

144. In the Court's opinion it would be excessive to require a defendant to give up the possibility of a simplified procedure accepted by the authorities which had resulted at first instance in his obtaining the advantages he had hoped for. In that connection, the Court observes that for more than nine months (from 18 February to 24 November 2000), the applicant legitimately believed that, as he had opted to stand trial under the summary procedure, the maximum sentence to which he was liable was thirty years' imprisonment, and that that legitimate expectation was frustrated by factors beyond his control, such as the length of the domestic proceedings and the adoption of Legislative Decree no. 341 of 2000.

145. It follows that the Government's preliminary objection on the ground of non-exhaustion (see paragraphs 125-126 above) cannot be accepted and that there has been a violation of Article 6 of the Convention.

IV. APPLICATION OF ARTICLES 46 AND 41 OF THE CONVENTION

A. Article 46 of the Convention

146. Article 46 provides:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

147. By Article 46 of the Convention the High Contracting Parties undertake to abide by the final judgments of the Court in any case to which they are parties, execution being supervised by the Committee of Ministers. It follows, *inter alia*, that a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction under Article 41, but also to choose the general and/or, if appropriate, individual measures to be adopted. As the Court's judgments are essentially declaratory, the respondent State remains free, subject to the supervision of the Committee of Ministers, 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 v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII; *Sejdovic*, cited above, § 119; and *Aleksanyan v. Russia*, no. 46468/06, § 238, 22 December 2008).

148. However, exceptionally, with a view to helping the respondent State to fulfil its obligations under Article 46, the Court will seek to indicate the type of measure that might be taken in order to put an end to a situation it has found to exist (see, for example, *Broniowski v. Poland* [GC], no. 31443/96, § 194, ECHR 2004-V). In other exceptional cases, where the very nature of the violation found is such as to leave no real choice between measures capable of remedying it, the Court may decide to indicate only one such measure (see *Aleksanyan*, cited above, § 239, and *Abbasov v. Azerbaijan*, no. 24271/05, § 37, 17 January 2008).

149. In the present case, the Court does not consider it necessary to indicate general measures required at national level for the execution of its judgment.

150. As regards individual measures, the Court observes that in many cases in which it found a violation of Article 6 of the Convention because an applicant had not been tried by an independent and impartial tribunal (see, among other judgments, *Gençel v. Turkey*, no. 53431/99, § 27, 23 October 2003, and *Tahir Duran v. Turkey*, no. 40997/98, § 23, 29 January 2004), or because of an interference with the right to participate in the trial (see

Somogyi v. Italy, no. 67972/01, § 86, ECHR 2004-IV, and *R.R. v. Italy*, no. 42191/02, § 76, 9 June 2005) or with the right to examine prosecution witnesses (see *Bracci v. Italy*, no. 36822/02, § 75, 13 October 2005) the Court indicated in Chamber judgments that in principle the most appropriate remedy would be for the applicant to be given a retrial without delay if he or she so requested. The Grand Chamber has endorsed the general approach taken in the cases cited above (see *Öcalan v. Turkey* [GC], no. 46221/99, § 210, ECHR 2005-IV, and *Sejdovic*, cited above, §§ 126-127).

151. Nevertheless, the aim of individual measures should be to put the applicant, as far as possible, in the position he would have been in had the requirements of the Convention not been disregarded (see *Piersack v. Belgium* (Article 50), 26 October 1984, § 12, Series A no. 85). A judgment in which the Court finds a violation imposes on the respondent State a legal obligation under Article 46 of the Convention to put an end to the violation found and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (see *Menteş and Others v. Turkey* (just satisfaction), 24 July 1998, § 24, *Reports* 1998-IV; *Scozzari and Giunta*, cited above, § 249; *Maestri v. Italy* [GC], no. 39748/98, § 47, ECHR 2004-I; and *Assanidze v. Georgia* [GC], no. 71503/01, § 198, ECHR 2004-II).

152. The State preserves discretion as to the manner of execution of a judgment, provided that it discharges its primary obligation under the Convention, which is to secure the rights and freedoms guaranteed (see *Assanidze*, cited above, § 202). At the same time, in ratifying the Convention the Contracting States undertake to ensure that their domestic legislation is compatible with it, so that it is for the respondent State to remove any obstacles in its domestic legal system that might prevent the applicant's situation from being adequately redressed (see *Maestri*, cited above, § 47, and *Assanidze*, cited above, § 198).

153. The Court has found in the present case that the retrospective application to the applicant's detriment of the provisions of Legislative Decree no. 341 of 2000 infringed the rights guaranteed by Articles 6 and 7 of the Convention. In particular, after a trial that the Court has found to have been unfair (see paragraph 145 above), the applicant received a sentence (life imprisonment) heavier than the maximum sentence to which he was liable at the time when he requested and was granted the right to be tried under the summary procedure (thirty years' imprisonment).

154. Having regard to the particular circumstances of the case and the urgent need to put an end to the breach of Articles 6 and 7 of the Convention, the Court therefore considers that the respondent State is responsible for ensuring that the applicant's sentence of life imprisonment is replaced by a penalty consistent with the principles set out in the present judgment, which is a sentence not exceeding thirty years' imprisonment.

B. Article 41 of the Convention

155. Article 41 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.”

1. Damage

156. The applicant claimed 250,000 euros (EUR) for non-pecuniary damage. He observed that in the present case his sentence of thirty years' imprisonment had been replaced with a life sentence, which amounted to “a moral death sentence”, and moreover one imposed on him although he was seriously ill.

157. The Government did not submit observations on this point.

158. The Court considers that the applicant undoubtedly sustained non-pecuniary damage. Ruling on an equitable basis, as required by Article 41 of the Convention, it awards him EUR 10,000 under this head.

2. Costs and expenses

159. Relying on a bill of costs made out by his lawyer, the applicant requested EUR 15,623.50 for the costs and expenses he had incurred before the Court.

160. The Government did not submit observations on this point.

161. According to the Court's established case-law, an award can be made in respect of costs and expenses incurred by the applicant only in so far as they have been actually and necessarily incurred and are reasonable as to quantum (see *Belziuk v. Poland*, 25 March 1998, § 49, *Reports of Judgments and Decisions* 1998-II).

162. The Court considers the amount requested in respect of costs and expenses for the proceedings before it excessive and decides to award EUR 10,000 under this head.

3. Default interest

163. 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 it has jurisdiction to examine the case submitted to it from the standpoint of Article 6 of the Convention also;

2. *Dismisses* unanimously the Government's plea of non-exhaustion of domestic remedies grounded on the fact that the applicant did not raise before the national courts his complaints under Article 7 of the Convention;

3. *Holds* by eleven votes to six that there has been a violation of Article 7 of the Convention;

4. *Joins to the merits* unanimously the Government's plea of non-exhaustion of domestic remedies grounded on the fact that the applicant did not avail himself of the possibility of withdrawing his request for adoption of the summary procedure and rejects it;

5. *Holds* unanimously that there has been a violation of Article 6 of the Convention;

6. *Holds*
(a) unanimously that the respondent State is responsible for ensuring that the sentence of life imprisonment imposed on the applicant is replaced by a penalty consistent with the principles set out in the present judgment (see paragraph 154 above);
(b) by sixteen votes to one that the respondent State is to pay the applicant, within three months, EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
(c) unanimously that the respondent State is to pay the applicant, within three months, EUR 10,000 (ten thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
(d) unanimously 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;

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 17 September 2009.

Michael O'Boyle	Jean-Paul Costa
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 Malinverni, joined by judges Cabral Barreto and Šikuta;

(b) partly dissenting opinion of Judge Nicolaou, joined by judges, Bratza, Lorenzen, Jočiené, Villiger and Sajó.

J.-P. C.
M. O.B.

CONCURRING OPINION OF JUDGE MALINVERNI, JOINED BY JUDGES CABRAL BARRETO AND ŠIKUTA

(Translation)

I agree with all the arguments that led the Grand Chamber to find a violation of Article 7 of the Convention. I regret, however, that the judgment does not look more deeply into what to my mind constitutes the particularity of this case, namely the circumstances surrounding the prosecution's appeal on points of law.

Those circumstances are as follows. The first-instance judgment was delivered on 24 November 2000, that is, on the same day as the entry into force of Legislative Decree no. 341 (see paragraph 13 of the judgment). According to the applicant's assertions, which the Government did not contest, the trial before the Rome preliminary hearings judge began at 10.19 a.m. As judgment was delivered immediately after the trial hearing (see paragraph 81), it is very probable that the decision of the preliminary hearings judge was given during the morning of 24 November 2000.

Legislative Decree no. 341 was published in the Official Gazette on the same day, but during the afternoon (see paragraph 33). It follows that at the time when the first-instance judgment was delivered the decree in question could not have been known of by anyone, and the fact is that a legislative instrument cannot take effect before its publication in the Official Gazette (see paragraph 34).

In the appeal on points of law of 12 January 2001 the public prosecutor's office at the Rome Court of Appeal argued that the preliminary hearings judge should have applied Article 7 of Legislative Decree no. 341 and that that omission should be considered a “manifest error of law”. The prosecution service accordingly asked for the sentence imposed on the applicant – thirty years' imprisonment – to be replaced by life imprisonment (see paragraphs 14 and 15). That application, as we know, was allowed by the Rome Assize Court of Appeal.

In my opinion, the principles of legal certainty, the rule of law and the non-retrospective application of a harsher law require the authorities not to apply, to a defendant's detriment, a law which could not have been known of at the time when judgment was delivered.

When he requested adoption of the summary procedure, and right up to the end of the first-instance proceedings, the applicant could not have foreseen the consequences of the application of Legislative Decree no. 341. Accordingly, in the particular circumstances described above, the penalty imposed by the appellate court at the prosecution's request had no legal basis whatsoever and was therefore, on that account too, contrary to Article 7 of the Convention.

PARTLY DISSENTING OPINION OF JUDGE NICOLAOU, JOINED BY JUDGES BRATZA, LORENZEN, JOČIENĖ, VILLIGER AND SAJÓ

The Grand Chamber is unanimously in agreement that in the present case there has been a violation of Article 6 § 1 of the Convention. The reasoning set out in the part of the judgment dealing specifically with Article 6 § 1, with which we are in full agreement, should in our view be read in the light also of the principles already recognised by the Court and discussed by the majority in connection with Article 7 § 1, for it is in the broader context that the fairness issue under Article 6 § 1 acquires its full significance.

At the time when the offences were committed the penalty was life imprisonment with daytime isolation. For offences carrying this penalty the summary procedure, which entailed a reduced sentence, did not apply. It did, however, subsequently become available. On 19 February 2000 the applicant opted for it and, with the consent of the prosecution, the criminal court agreed that it should follow it. The case was twice adjourned and it was not dealt with until 24 November 2000, which was more than eight months later, even though for both trial and sentence less than a morning's sitting was required. The law-decree providing for a higher penalty, published later on the same day, meant to undo what had already been done. Having met with judicial approval, it resulted in an increase in the applicant's sentence. It is in these circumstances that we have concluded that there was a lack of fairness.

However, although the needs of the present case are fully met by Article 6 § 1, the majority are not content with that. They take the view that the matter should primarily be treated under Article 7 § 1. They not only regard the terms of Article 7 § 1 as encompassing the more favourable law – the *lex mitior* - principle; they also consider that the case warrants the complete reversal of the Court's case-law by a new interpretation of Article 7 § 1 more consonant with the times. In our opinion Article 7 § 1 does not admit of such interpretation.

Although there is, seemingly, a thematic link between the legality principle of Article 7 § 1 and the more favourable law principle, a link which is, perhaps, strengthened by the fact that subsequent human rights instruments treat the two together, there is a vital difference between them. The former principle works at a higher level than the latter. It represents an integral part of the rule of law. *Nullum crimen nulla poena sine praevia lege poenali:* no one is to be convicted or punished without a pre-existing criminal law in force. Nothing is more fundamental than that. It is peremptory and inevitable. It is an essential condition of freedom. That is why Article 15 does not allow derogation from Article 7 § 1. The *lex mitior* principle does not form part of nor can it be considered an extension or a corollary of this rule of law requirement. It is a different kind of norm. It

expresses a choice that reflects the development of a social process in the context of criminal law. It circumscribes the scope of criminal law by preserving benefits accruing to defendants as a result of substantive laws subsequent to the commission of the offence and applicable while the case was pending. It remains, in the absence of some specific provision, a matter of policy or choice in the discretionary area enjoyed by the State in criminal matters.

It is clear that when Article 7 § 1 was adopted the *lex mitior* principle was not included in it; and it has not been suggested that anyone had then thought that it was covered by the *nullum crimen nulla poena sine lege* principle, often stated in this shortened form. Article 7 § 1 of the Convention, adopted in 1950, was modelled on Article 11 § 2 of the Universal Declaration of Human Rights, with which it is almost identical, adopted by the General Assembly of the United Nations in 1948. The Travaux Preparatoires of Article 7 § 1 reveal (at page 7, item (5)) that the possibility had been canvassed of adding to it the *lex mitior* principle but that it was abandoned. It is significant that when the corresponding provision of the International Covenant on Civil and Political Rights was being prepared, the draft at the initial phase contained only the *nullum crimen nulla poena sine lege* principle, the same as Article 7 § 1 of the Convention. The proposal to include the *lex mitior* principle came later, whereupon the following third sentence was added to give effect to it:

> "If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty the offender shall benefit thereby".

Views differed on whether it was right to do that. The Guide to the *Travaux Préparatoires* of the International Covenant on Civil and Political Rights, by Marc J. Bossuyt, contains an interesting account of the various considerations involved:

> "Commission on Human Rights, 5th Session (1949) 6th Session (1950), 8th Session (1952)
>
> A/2929, Chapt. VI, § 95: It was argued that the third sentence of paragraph 1 contradicted the assumption underlying the second sentence, namely that a penalty must be that which was authorized by the law in force at the time of its imposition [E/CN.4/SR.159, §§ 46-48 (USA); E/CN.4/SR.324, p. 4 & p. 7 & p. 15 (GB), p. 5 (USA), p. 9 (IND)]. It was also said that, notwithstanding the praiseworthiness of the goal at which the third sentence aimed, it was not appropriate to make provision for it in the covenant, since it would seem to mean that convicted persons would be enabled as of right to demand that they should benefit from any change made in the law after their conviction [E/CN.4/SR.112, p. 3 (GB), p. 5 (GCA); E/CN.4/SR.324, p. 5 (USA)]. It was asserted that the executive authority of States parties to the covenant should retain an absolute discretion in applying the benefits of subsequently enacted legislation to such persons [E/CN.4/SR. 159, §§ 61-62 (USA), § 65 (GB), § 72 (RCH); E/CN.4/SR.324, p. 16 (GB)]. In opposition to these views it was observed that the tendency in modern criminal law was to allow a person to enjoy the benefit of such lighter penalties as might be imposed after the commission of the offence with

which he was charged [E/CN.4/SR.112, p. 4 (USA), p. 6 (RCH) p. 7 (SU); E/CN.4SR.159, § 83 (ET), § 86 (U), § 88 (F); E/CN.4/SR.199, § 151 (GB), § 153 (F), § 156 (ET); E/CN.4/SR.324, pp. 4-5 & p. 8 (SU), p. 5(B), p. 9 (YU), p. 11 (RCH) & (F), p. 12 (PL), p. 14 (IL)]; the laws imposing new and lighter penalties were often the concrete expression of some change in the attitude of the community towards the offence in question [E/CN.4/SR.112, p. 8 (F); E/CN.4/SR.324, p. 7 (RCH)]."

The argument that Article 7 § 1 of the Convention should be interpreted as including the most favourable law principle was examined and dismissed by the Commission in *X. v. the Federal Republic of Germany*, no. 7900/77, decision of 6 March 1978, Decisions and Reports no. 13, pp.70-72. The applicant was found guilty of the breach of a fiscal provision and a fine was imposed on him. He appealed. Before the appeal was heard the provision on which his conviction had been based was repealed. He submitted that he should be given the benefit of that change. He alleged a violation of Article 7 and he referred, in support, to Article 15 of the United Nations Covenant on Civil and Political Rights. It may be useful to note in this connection that the American Convention on Human Rights, already adopted in 1969 though it came into force on 18 July 1978, a few months after the decision in that case, also contained a sentence embodying the more favourable law principle. In a short decision the Commission pointed out what was obvious and expressed it in this way:

"However, Article 7 of the Convention does not contain a provision similar to Article 15, paragraph 1 in fine of the United Nations Covenant which is, moreover, based on a different hypothesis because it guarantees the convicted person the right to benefit from the application of a lighter penalty imposed by a law enacted subsequent to the commission of the offence. In the present case, some of the charges against the applicant are to a certain extent no longer criminal offences. Nevertheless, at the time that the offence was committed the action of the applicant constituted a crime according to national law within the meaning of Article 7, paragraph 1, so that this complaint is (also) manifestly ill-founded..."

The decision in *X. v. the Federal Republic of Germany* (above) was, relatively recently, followed by the Court in *Ian Le Petit v. the United Kingdom* (dec.), no. 35574/97, 5 December 2000, and in *Zaprianov v. Bulgaria*, (dec.), no. 41171/98, 6 March 2003, where it was categorically stated that:

"Article 7 does not guarantee the right to have a subsequent and favourable change in the law applicable to an earlier offence".

The conflict of opinion in the present case should not be attributed to a difference in our interpretative approach to Article 7 § 1 of the Convention. We all profess adherence to the relevant international rules embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969 and the view that we, as minority, take of Article 7 § 1 does not call in question the Court's case-law, to which the majority briefly refer, either on reversing previous decisions, where necessary, or of adapting to changing

conditions and responding to some emerging consensus on new standards since, as is often emphasised, the Convention is a living instrument requiring a dynamic and evolutive approach that renders rights practical and effective, not theoretical and illusory. But no judicial interpretation, however creative, can be entirely free of constraints. Most importantly it is necessary to keep within the limits set by Convention provisions. As the Court pointed out in *Johnston and Others v. Ireland* (18 December 1986, § 53, Series A no.112):

> "It is true that the Convention and its Protocols must be interpreted in the light of present- day conditions (see, amongst several authorities the above-mentioned *Marckx judgment, Series A no. 31, p. 26,* para. 58). However, the Court cannot, by means of an evolutive interpretation, derive from these instruments a right which was not included therein at the outset. This is particularly so here, where the omission was deliberate."

This is a matter on which the Court should be particularly sensitive. And yet, although the present case does not require it, the majority has gone on to examine the case under Article 7 § 1 and, in order to apply it, has had it re-written in order to accord with what they consider it ought to have been. This, with respect, oversteps the limits.