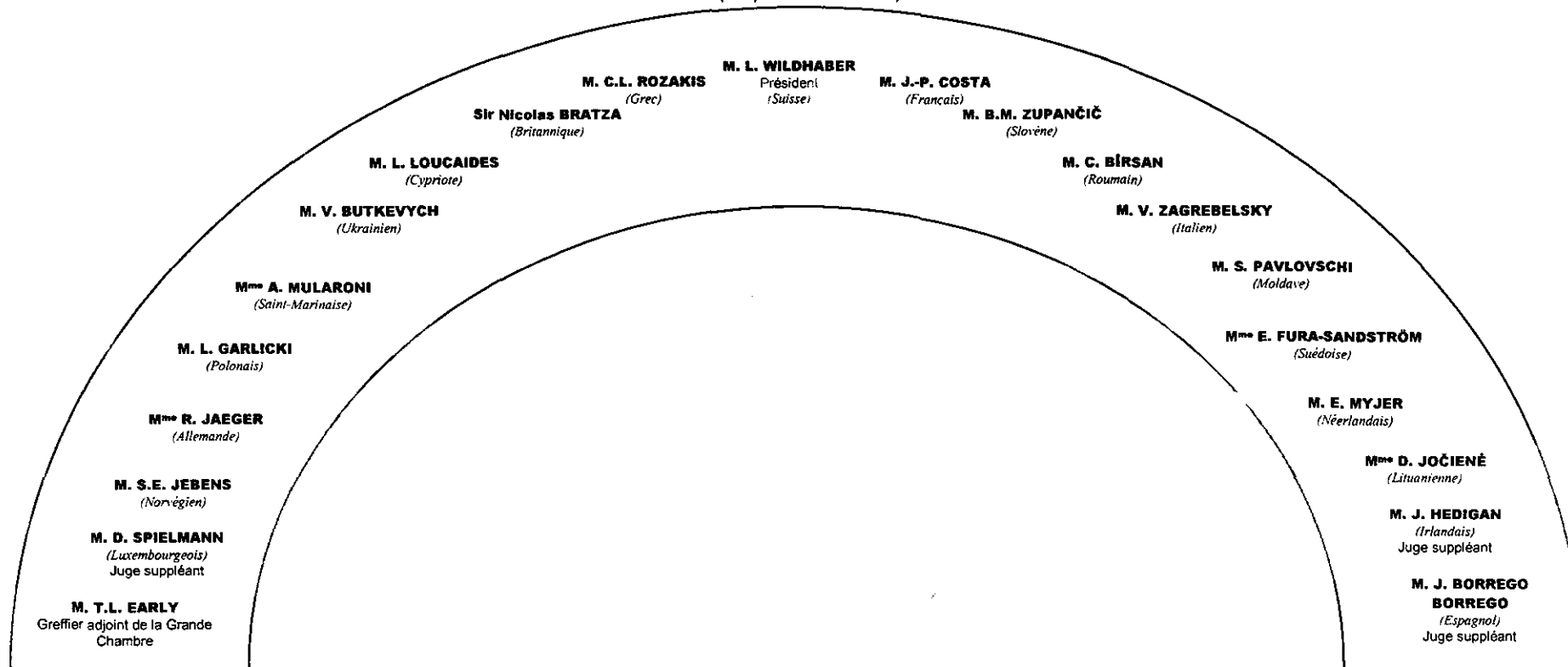


COUR EUROPÉENNE DES DROITS DE L'HOMME
(GRANDE CHAMBRE)

Audience publique du 12 octobre 2005 à 9 heures

AFFAIRE SEJDOVIĆ c. ITALIE

(Requête n° 56581/00)



PARTIE REQUÉRANTE

M^e B. BARTHOLDY, Conseil
M^e U. WIENER, Conseil

GREFFE

M. A. TAMIETTI
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M. F. CRISAFULLI, Co-Agent



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

Case of Sejdovic v. Italy

(Application no. 56581/00)

Judgment

Pour copie conforme/Certified copy
Strasbourg, 1 March 2006 *TJP*

Strasbourg, 1 March 2006



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

CASE OF SEJDOVIC v. ITALY

(Application no. 56581/00)

JUDGMENT

STRASBOURG

1 March 2006

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

In the case of Sejdovic v. Italy,

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

Mr L. WILDHABER, *President*,
Mr C.L. ROZAKIS,
Mr J.-P. COSTA,
Sir Nicolas BRATZA,
Mr B.M. ZUPANČIČ,
Mr L. LOUCAIDES,
Mr C. BÎRSAN,
Mr V. BUTKEVYCH,
Mr V. ZAGREBELSKY,
Mrs A. MULARONI,
Mr S. PAVLOVSKI,
Mr L. GARLICKI,
Mrs E. FURA-SANDSTRÖM,
Mrs R. JAEGER,
Mr E. MYJER,
Mr S.E. JEBENS,
Mrs D. JOČIENĖ, *judges*,

and Mr T.L. EARLY, *Deputy Grand Chamber Registrar*,

Having deliberated in private on 12 October 2005 and on 8 February 2006,

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

PROCEDURE

1. The case originated in an application (no. 56581/00) 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 a national of the then Federal Republic of Yugoslavia, Mr Ismet Sejdovic ("the applicant"), on 22 March 2000.

2. The applicant was represented by Mr B. Bartholdy, a lawyer practising in Westerstede (Germany). The Italian Government ("the Government") were represented by their Agent, Mr I.M. Braguglia, and their co-Agent, Mr F. Crisafulli.

3. The applicant complained, in particular, that he had been convicted *in absentia* without having had the opportunity to present his defence before the Italian courts, in breach of Article 6 of the Convention.

4. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). On 11 September 2003 it was declared partly admissible by a Chamber of that Section, composed of Mr C.L. Rozakis, *President*, Mr P. Lorenzen, Mr G. Bonello, Mrs N. Vajić, Mrs S. Botoucharova, Mr V. Zagrebelsky, Mrs E. Steiner, *judges*, and Mr S. Nielsen, then *Deputy Section Registrar*.

5. On 10 November 2004 a Chamber of the same Section, composed of Mr C.L. Rozakis, *President*, Mr P. Lorenzen, Mr G. Bonello, Mr A. Kovler, Mr V. Zagrebelsky, Mrs E. Steiner, Mr K. Hajiyeu, *judges*, and Mr S. Nielsen, *Section Registrar*, delivered a judgment in which it held unanimously that there had been a violation of Article 6 of the Convention. It further considered that the finding of a violation constituted in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant, that the violation had originated in a systemic problem connected with the malfunctioning of domestic legislation and practice and that the respondent State should, through appropriate measures, secure the right of persons convicted *in absentia* to obtain a fresh determination of the merits of the charge against them by a court which had heard them in accordance with the requirements of Article 6 of the Convention.

6. On 9 February 2005 the Government requested, in accordance with Article 43 of the Convention and Rule 73, that the case be referred to the Grand Chamber. A panel of the Grand Chamber accepted that request on 30 March 2005.

7. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

8. The Government filed a memorial, but the applicant did not, referring to the observations he had submitted during the proceedings before the Chamber. In addition, third-party comments were received from the Slovakian Government, who had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2).

9. A hearing took place in public in the Human Rights Building, Strasbourg, on 12 October 2005 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr F. CRISAFULLI, *magistrato*, Ministry of Foreign Affairs, *co-Agent*;

(b) *for the applicant*

Mr B. BARTHOLDY,

Ms U. WIENER,

Counsel,

Adviser.

The Court heard addresses by them and also their replies to questions put by several of its members.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The applicant was born in 1972 and lives in Hamburg (Germany).

11. On 8 September 1992 a Mr S. was fatally injured by a shot fired at a travellers' encampment (*campo nomadi*) in Rome. The initial statements taken by the police from witnesses indicated that the applicant had been responsible for the killing.

12. On 15 October 1992 the Rome investigating judge made an order for the applicant's detention pending trial. However, the order could not be enforced as the applicant had become untraceable. As a result, the Italian authorities considered that he had deliberately sought to evade justice and on 14 November 1992 declared him to be a "fugitive" (*latitante*). The applicant was identified as Cloce (or Kroce) Sejdovic (or Sajdovic), probably born in Titograd on 5 August 1972, the son of Jusuf Sejdovic (or Sajdovic) and the brother of Zaim (ou Zain) Sejdovic (or Sajdovic).

13. As the Italian authorities had not managed to contact the applicant to invite him to choose his own defence counsel, they assigned him a lawyer, who was informed that his client and four other persons had been committed for trial on a specified date in the Rome Assize Court.

14. The lawyer took part in the trial, but the applicant was absent.

15. In a judgment of 2 July 1996, the text of which was deposited with the registry on 30 September 1996, the Rome Assize Court convicted the applicant of murder and illegally carrying a weapon and sentenced him to twenty-one years and eight months' imprisonment. One of the applicant's fellow defendants was sentenced to fifteen years and eight months' imprisonment for the same offences, while the other three were acquitted.

16. The applicant's lawyer was informed that the Assize Court's judgment had been deposited with the registry. He did not appeal. The applicant's conviction accordingly became final on 22 January 1997.

17. On 22 September 1999 the applicant was arrested in Hamburg by the German police under an arrest warrant issued by the Rome public prosecutor's office. On 30 September 1999 the Italian Minister of Justice requested the applicant's extradition. He added that, once he had been extradited to Italy, the applicant would be entitled to apply under Article 175 of the Code of Criminal Procedure ("the CCP") for leave to appeal out of time against the Rome Assize Court's judgment.

18. At the request of the German authorities, the Rome public prosecutor's office stated that it did not appear from the evidence that the applicant had been officially notified of the charges against him. The public prosecutor's office was unable to say whether the applicant had contacted the lawyer assigned to represent him. In any event, the lawyer had attended the trial and had played an active role in conducting his client's defence, having called a large number of witnesses. Furthermore, the Rome Assize Court had clearly established that the applicant, who had been identified by numerous witnesses as Mr S.'s killer, was guilty. In the opinion of the public prosecutor's office, the applicant had absconded immediately after Mr S.'s death precisely to avoid being arrested and tried. Lastly, the public prosecutor's office stated: "A person who is to be extradited may seek leave to appeal against the judgment. However, for a court to agree to re-examine the case it has to be proved that the accused was wrongly deemed to be a 'fugitive'. To sum up, a new trial, even in the form of an appeal (during which new evidence may be submitted), is not granted automatically."

19. On 6 December 1999 the German authorities refused the Italian Government's extradition request on the ground that the requesting country's domestic legislation did not guarantee with sufficient certainty that the applicant would have the opportunity of having his trial reopened.

20. In the meantime, the applicant had been released on 22 November 1999. He has never lodged an objection to execution (*incidente d'esecuzione*) or an application for leave to appeal out of time (see "Relevant domestic law and practice" below) in Italy.

II. RELEVANT DOMESTIC LAW AND PRACTICE

21. The validity of a conviction may be contested by means of an objection to execution under Article 670 § 1 of the CCP, the relevant parts of which provide:

"Where the judge supervising enforcement establishes that a judgment is invalid or has not become enforceable, he shall, [after] assessing on the merits [*nel merito*] whether the safeguards in place for a convicted person deemed to be untraceable have been observed, ... suspend its enforcement, ordering, where necessary, that the person be released and that defects in the service of process be remedied. In such cases the time allowed for appealing shall begin to run again."

22. Article 175 §§ 2 and 3 of the CCP provides for the possibility of applying for leave to appeal out of time. The relevant parts of that provision were worded as follows at the time of the applicant's arrest:

"In the event of conviction *in absentia* ..., the defendant may request the reopening of the time allowed for appeal against the judgment where he can establish that he had no effective knowledge [*effettiva conoscenza*] [of it] ... [and] on condition that no appeal has been lodged by his lawyer and there has been no negligence on his part or, in the case of a conviction *in absentia* having been served ... on his lawyer ..., that he did not deliberately refuse to take cognisance of the procedural steps.

A request for the reopening of the time allowed for appeal must be lodged within ten days of the date ... on which the defendant learned [of the judgment], failing which it shall be declared inadmissible."

23. When called upon to interpret this provision, the Court of Cassation has held that the refusal of an application for leave to appeal out of time cannot be justified by mere negligence or lack of interest on the defendant's part but that, on the contrary, there must have been "intentional conduct designed to avoid taking cognisance of the procedural steps" (see the First Section's judgment of 6 March 2000 (no. 1671) in the *Collini* case, and also the Court of Cassation's judgment no. 5808/1999). More specifically, where a judgment has been served on the accused in person, the accused must prove that he or she was unaware of it and that there has been no negligence on his or her part; however, where the judgment has been served on an absent defendant's lawyer, it is for the court to establish whether the defendant deliberately avoided taking cognisance of the relevant steps (see the Second Section's judgment of 29 January 2003 (no. 18107) in the *Bylyshi* case, where the Court of Cassation set aside an order in which the Genoa Court of Appeal had held that negligence could only be due to the wish not to receive any information, thereby treating negligent conduct as intentional without giving any arguments in support of that position).

24. In its judgment of 25 November 2004 (no. 48738) in the *Soldati* case, the Court of Cassation (First Section) observed that leave to appeal out of time could be granted on two conditions: if the accused had not had any knowledge of the proceedings and if he or she had not deliberately avoided taking cognisance of the procedural steps. It was for the convicted person to prove that the first condition was satisfied, whereas the burden of proof in respect of the second lay with the "representative of the prosecution or with the court". Accordingly, a lack of evidence as regards the second condition could only work to the defendant's advantage. The Court of Cassation accordingly held that before declaring defendants to be "fugitives", the authorities should not only search for them in a manner appropriate to the circumstances of the case but should also establish whether they had intentionally avoided complying with a measure ordered by the court, such as a measure entailing deprivation of liberty (see the First Section's judgment of 23 February 2005 (no. 6987) in the case of *Flordelis and Pagnanelli*).

25. On 22 April 2005 Parliament approved Law no. 60/2005, by which Legislative Decree no. 17 of 21 February 2005 became statute. Law no. 60/2005 was published in Official Gazette (*Gazzetta ufficiale*) no. 94 of 23 April 2005. It came into force the following day.

26. Law no. 60/2005 amended Article 175 of the CCP. The new version of paragraph 2 reads as follows:

"In the event of conviction *in absentia* ... the time allowed for appeal against the judgment shall be reopened, on an application by the defendant, unless he had

effective knowledge [*effettiva conoscenza*] of the proceedings [against him] or of the judgment [*provvedimento*] and has deliberately refused to appear or to appeal against the judgment. The judicial authorities shall carry out all necessary checks to that end."

27. Law no. 60/2005 also added a paragraph 2 *bis* to Article 175 of the CCP, worded as follows:

"An application referred to in paragraph 2 above must be lodged within thirty days of the date on which the defendant had effective knowledge of the judgment, failing which it shall be declared inadmissible. In the event of extradition from another country, the time allowed for making such an application shall run from the point at which the defendant is handed over [to the Italian authorities] ..."

III. RECOMMENDATION R(2000)2 OF THE COMMITTEE OF MINISTERS

28. In Recommendation R(2000)2 on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights, the Committee of Ministers of the Council of Europe encouraged the Contracting Parties "to examine their national legal systems with a view to ensuring that there exist adequate possibilities of re-examination of the case, including reopening of proceedings, in instances where the Court has found a violation of the Convention, especially where: (i) the injured party continues to suffer very serious negative consequences because of the outcome of the domestic decision at issue, which are not adequately remedied by the just satisfaction and cannot be rectified except by re-examination or reopening, and (ii) the judgment of the Court leads to the conclusion that (a) the impugned domestic decision is on the merits contrary to the Convention, or (b) the violation found is based on procedural errors or shortcomings of such gravity that a serious doubt is cast on the outcome of the domestic proceedings complained of".

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

29. The Government objected, firstly, that domestic remedies had not been exhausted in that the applicant had not used the remedies provided for in Articles 175 and 670 of the CCP.

A. Decision of the Chamber

30. In its decision of 11 September 2003 on admissibility the Chamber dismissed the Government's objection that the applicant had failed to use the remedy in Article 175 of the CCP, holding that in the particular circumstances of the case, an application for leave to appeal out of time would have had little prospect of success and there were objective obstacles to his using it.

B. The parties' submissions

1. The Government

31. The Government observed that in Italian law, persons who had been convicted *in absentia* had two remedies available. Firstly, they could lodge an objection to execution under Article 670 of the CCP in order to contest the judgment's existence or validity. This remedy was not subject to any time-limit; however, there had to have been an irregularity in the proceedings capable of rendering the judgment void. The irregularity could concern, in particular, a breach of the rules on service of process and, more specifically, failure to observe the safeguards afforded to defendants deemed to be untraceable. If the objection was declared admissible, the court had to suspend the enforcement of the sentence. If it was allowed, the statutory period for appealing against the judgment was reopened. The applicant could have availed himself of this remedy if he had shown that the police had been negligent in their searches or that the safeguards for defendants deemed to be untraceable had not been observed.

32. The Government further noted that if the objection to execution was dismissed, the court still had to examine the application for leave to appeal out of time which persons convicted *in absentia* were entitled to lodge separately from or jointly with the objection. If such an application was granted, the time allowed for appealing was reopened and the defendant had the opportunity to submit any arguments in support of his or her case – in person or through counsel – before a court with jurisdiction to deal with all matters of fact and law. Unlike an objection to execution, an application for leave to appeal out of time did not require there to have been any formal or substantive irregularity in the proceedings, particularly as regards searches and service of process.

33. The Government submitted that the remedy provided for in Article 175 of the CCP, as in force at the material time, had been effective and accessible since it had been specifically intended to apply to cases where accused persons claimed to have had no knowledge of their conviction. It was true that an application for leave to appeal out of time had to be lodged within ten days. However, such a period, which had not been

peculiar to Italian law, had been sufficient to allow persons on trial to exercise their right to defend themselves, as its starting-point had been fixed as the moment at which they had had "effective knowledge of the decision" (as the Court of Cassation had held on 3 July 1990 in the *Rizzo* case). Furthermore, the time-limit had not concerned the lodging of the appeal itself but merely the lodging of the application for leave to appeal out of time, a much less complex process.

34. Although the fact of not being an Italian national, together with linguistic and cultural difficulties, could make it harder to comply with a procedural requirement in the time allowed, national laws could not be expected to make all their time-limits flexible in order to adapt them to the infinite variety of factual circumstances in which defendants might find themselves.

35. The Government further pointed out that, in accordance with the Court's case-law, it could not be presumed that defendants had intended to escape trial where there had been manifest shortcomings in the efforts to trace them. Defendants should also have the opportunity to rebut any presumption to that effect without being unduly obstructed or having to bear an excessive burden of proof. The system laid down in Article 175 of the CCP had satisfied those requirements.

36. It followed from a grammatical analysis of paragraph 2 of Article 175 (as in force before the 2005 reform), supported by the case-law of the Court of Cassation which the Government produced to the Court (see paragraphs 23 and 24 above), that persons applying for leave to appeal out of time had been required to prove merely that they had not had effective knowledge of their conviction. Evidence of this had been very easy to provide since in most cases it resulted from the actual manner in which the conviction had been served. It had been sufficient for applicants to state – without having to supply proof – the reasons why they had not been informed of the judgment in time to lodge an appeal. The fact that they might have been aware of other procedural steps, or that the reasons they gave might have resulted from their own lack of diligence, had not meant that the application should be refused. Indeed, the time allowed for appealing could be reopened even where their ignorance of the judgment had been their own fault. In such cases leave to appeal out of time had been precluded only where their lawyer had already lodged an appeal (an exception which was not relevant to the present case).

37. In addressing the allegations submitted by the convicted person, the prosecuting authorities had been required to provide evidence (for assessment by the courts) that the person was a fugitive and had therefore consciously and deliberately avoided being served with the relevant documents. In other words, to ensure that an application for leave to appeal out of time was refused, they had had to show that where the judgment had been served on the defendant's lawyer, the defendant's ignorance had not

been merely negligent but wilful. In order to prove intentional fault on the part of the defendant, the prosecution had not been able to rely on mere presumptions.

2. *The applicant*

38. The applicant contested the Government's arguments. He submitted that he had not had any opportunity to have his case reopened and that he had not been informed of the existence of a domestic remedy. He had also been unaware that he had been deemed to be a "fugitive" and that criminal proceedings had been pending against him.

39. The applicant observed that he had never had any knowledge of the Rome Assize Court's judgment. The judgment had never been served on him, since at the time of his arrest in Germany he had simply been the subject of an international arrest warrant indicating that he had been sentenced to twenty-one years and eight months' imprisonment. It had, moreover, been impossible for him to prove that he had not known about the facts of the case or about the proceedings against him.

C. The Court's assessment

40. The Court observes that the Government's objection that domestic remedies have not been exhausted is based on two elements, namely the applicant's failure to use the remedies provided for in Articles 670 and 175 of the CCP.

41. In so far as the Government have cited the first of these provisions, the Court reiterates that under Rule 55 of the Rules of Court, any plea of inadmissibility must be raised by the respondent Contracting Party in its written or oral observations on the admissibility of the application (see *K. and T. v. Finland* [GC], no. 25702/94, § 145, CEDH 2001-VII, and *N.C. v. Italy* [GC], no. 24952/94, § 44, ECHR 2002-X). However, in their written observations on the admissibility of the application the Government did not argue that the applicant could have availed himself of the remedy in Article 670 of the CCP. Moreover, the Court cannot discern any exceptional circumstances that could have dispensed the Government from the obligation to raise their preliminary objection before the adoption of the Chamber's admissibility decision of 11 September 2003 (see *Prokopovich v. Russia*, no. 58255/00, § 29, 18 November 2004).

42. Consequently, the Government are estopped at this stage of the proceedings from raising the preliminary objection of failure to use the domestic remedy in Article 670 of the CCP (see, *mutatis mutandis*, *Bracci v. Italy*, no. 36822/02, §§ 35-37, 13 October 2005). It follows that the Government's preliminary objection must be dismissed in so far as it concerns the failure to lodge an objection to execution.

43. With regard to the remedy provided for in Article 175 of the CCP, the Court reiterates that the purpose of the rule on exhaustion of domestic remedies is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to it (see, among many other authorities, *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V, and *Remli v. France*, 23 April 1996, *Reports of Judgments and Decisions* 1996-II, p. 571, § 33). That rule is based on the assumption, reflected in Article 13 of the Convention – with which it has close affinity – that there is an effective remedy available in respect of the alleged breach in the domestic system (see *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*, judgment of 16 September 1996, *Reports* 1996-IV, p. 1210, § 65).

44. In the context of machinery for the protection of human rights the rule on exhaustion of domestic remedies must be applied with some degree of flexibility and without excessive formalism. At the same time it requires in principle that the complaints intended to be made subsequently at international level should have been aired before those same courts, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law (see, among many other authorities, *Azinas v. Cyprus* [GC], no. 56679/00, § 38, ECHR 2004-III, and *Fressoz and Roire v. France* [GC], no. 29183/95, § 37, ECHR 1999-I).

45. However, the obligation under Article 35 requires only that an applicant should have normal recourse to the remedies likely to be effective, adequate and accessible (see *Sofri and Others v. Italy* (dec.), no. 37235/97, ECHR 2003-VIII). In particular, the only remedies which the Convention requires to be exhausted are those that relate to the breaches alleged and at the same time are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness (see *Dalia v. France*, judgment of 19 February 1998, *Reports* 1998-I, pp. 87-88, § 38). In addition, according to the “generally recognised rules of international law”, there may be special circumstances which absolve the applicant from the obligation to exhaust the domestic remedies at his disposal (see *Aksoy v. Turkey*, judgment of 18 December 1996, *Reports* 1996-VI, p. 2276, § 52). However, the existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust domestic remedies (see *Sardinas Albo v. Italy* (dec.), no. 56271/00, ECHR 2004-I, and *Brusco v. Italy* (dec.), no. 69789/01, ECHR 2001-IX).

46. Lastly, Article 35 § 1 of the Convention provides for a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success (see *Akdivar and Others*, cited above, p. 1211, § 68).

47. In the instant case the Court observes that if an application under Article 175 of the CCP for leave to appeal out of time is granted, the time allowed for appealing is reopened, so that persons who have been convicted *in absentia* at first instance are given the opportunity to substantiate their grounds of appeal in the light of the reasoning set out in the judgment against them and to submit the factual and legal arguments they consider necessary for their defence in the course of the appeal proceedings. However, in the particular circumstances of the instant case, in which the judgment delivered *in absentia* had been served on the applicant's officially assigned counsel, an application to that effect could be granted only if two conditions were satisfied: if the convicted person could establish that he had not had effective knowledge of the judgment and if he had not deliberately refused to take cognisance of the procedural steps.

48. While the applicant could have proved that he satisfied the first of these conditions purely because his conviction had not been served on him in person before the date on which it had become final, the position is different regarding the second condition. The applicant had become untraceable immediately after the killing of Mr S., which had taken place in the presence of eyewitnesses who had accused him of being responsible, and this could have led the Italian authorities to conclude that he had deliberately sought to escape trial.

49. Before the Court the Government attempted to show, on the basis of a grammatical analysis of the wording of Article 175 § 2 of the CCP in force at the time of the applicant's arrest, that the burden of proof in respect of the second condition did not rest with the convicted person. They argued that, on the contrary, it was for the prosecution to provide evidence, if any existed, from which it could be inferred that the accused had wilfully refused to take cognisance of the charges and the judgment. However, such an interpretation appears to be belied by the note from the Rome public prosecutor's office, which states: "for a court to agree to re-examine the case it has to be proved that the accused was wrongly deemed to be a 'fugitive'" (see paragraph 18 above).

50. It is true that the Government have provided the Grand Chamber with domestic case-law confirming their interpretation. However, it should be noted that only the judgment of the First Section of the Court of Cassation in the *Soldati* case explicitly states how the burden of proof is to be distributed in a situation similar to that of the applicant. That judgment,

which does not cite any precedent on the issue, was not delivered until 25 November 2004, more than five years after the applicant was arrested in Germany (see paragraphs 17 and 24 above). Doubts may therefore arise as to the rule that would have been applied at the time when, it was submitted, the applicant should have used the remedy provided for in Article 175 of the CCP.

51. The Court considers that the uncertainty as to the distribution of the burden of proof in respect of the second condition is a factor to be taken into account in assessing the effectiveness of the remedy relied on by the Government. In the instant case the Court is not persuaded that, as a consequence of the above-mentioned uncertainty about the burden of proof, the applicant would not have encountered serious difficulty in providing convincing explanations, when requested to do so by the court or challenged by the prosecution, as to why, shortly after the killing of Mr S., he had left his home without leaving a contact address and travelled to Germany.

52. It follows that in the particular circumstances of the case an application for leave to appeal out of time would have had little prospect of success.

53. The Court considers it appropriate to examine in addition whether the remedy in question was accessible to the applicant in practice. It notes in this connection that he was arrested in Germany on 22 September 1999, slightly more than seven years after the killing of Mr S. (see paragraphs 11 and 17 above). It finds it reasonable to believe that, during his detention pending extradition, the applicant was informed of the reasons why he had been deprived of his liberty, and in particular of his conviction in Italy. Furthermore, on 22 March 2000, six months after being arrested, the applicant lodged an application in Strasbourg through his lawyer, in which he complained that he had been convicted *in absentia*. His lawyer has produced to the Court extracts from the Rome Assize Court's judgment of 2 July 1996.

54. It follows that the applicant could have been deemed to have had "effective knowledge of the judgment" shortly after being arrested in Germany, and that from that point on, in accordance with the third paragraph of Article 175 of the CCP, he had only ten days to apply for leave to appeal out of time. There is no evidence to suggest that he had been informed of the possibility of reopening the time allowed for appealing against his conviction, which had officially become final, and of the short time available for attempting such a remedy. Nor should the Court overlook the difficulties which a person detained in a foreign country would probably have encountered in rapidly contacting a lawyer familiar with Italian law in order to enquire about the legal procedure for obtaining the reopening of his trial, while at the same time giving his counsel a precise account of the facts and detailed instructions.

55. In the final analysis, the Court considers that in the present case the remedy referred to by the Government was bound to fail and there were objective obstacles to its use by the applicant. It therefore finds that there were special circumstances dispensing the applicant from the obligation to avail himself of the remedy provided for in Article 175 § 2 of the CCP.

56. It follows that the second limb of the Government's preliminary objection, concerning the failure to apply for leave to appeal out of time, must likewise be dismissed.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

57. The applicant complained that he had been convicted *in absentia* without having had the opportunity to present his defence before the Italian courts. He relied on Article 6 of the Convention, the relevant parts of which provide:

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

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

A. The Chamber judgment

58. The Chamber found a violation of Article 6 of the Convention. It considered that the applicant, who had never been officially informed of the proceedings against him, could not be said to have unequivocally waived his right to appear at his trial. Furthermore, the domestic legislation had not afforded him with sufficient certainty the opportunity of appearing at a new

trial. That possibility had been subject to the submission of evidence by the prosecuting authorities or by the convicted person regarding the circumstances in which he had been declared to be a fugitive, and had not satisfied the requirements of Article 6 of the Convention.

B. The parties' submissions

1. The Government

59. The Government observed that the Court had found a violation of Article 6 of the Convention in cases where a defendant's failure to appear at the trial had been governed by the former Code of Criminal Procedure (they cited *Colozza v. Italy*, judgment of 12 February 1985, Series A no. 89; *T. v. Italy*, judgment of 12 October 1992, Series A no. 245-C; and *F.C.B. v. Italy*, judgment of 28 August 1991, Series A no. 208-B). The new procedural rules introduced subsequently and the special circumstances of Mr SejdoVIC's case, they argued, set it apart from those cases, in which there had been cause to doubt that the applicants had deliberately sought to evade justice, or that they had had the opportunity to take part in the trial, or grounds to believe that the authorities had been negligent in ascertaining the accused's whereabouts.

60. Under the former system an untraceable defendant had been deemed to be a fugitive, and if notice had been served in due form there had been no possibility of appealing out of time. Under the system introduced by the new CCP, however, the authorities had to conduct thorough searches for the accused at every stage of the proceedings, and the time allowed for appealing could be reopened even where there had been no irregularities in notification.

61. In the present case, notice of the procedural steps had been served on the applicant's lawyer because the applicant had been deemed to be a "fugitive" (*latitante*). Before designating him thus, the authorities had searched for him at the travellers' encampment where he was thought to be living.

62. In the Government's submission, the particular circumstances of the case showed that the applicant had deliberately sought to escape trial. A number of factors supported that conclusion: the applicant had been in a delicate position and it had clearly been in his interests not to appear at the trial; he had not advanced any plausible reason as to why, immediately after a killing for which he had been responsible according to eyewitnesses, he had suddenly moved from his usual place of residence without leaving an address or the slightest trace of his whereabouts; and before being arrested by the German police, he had never come forward and had never sought a retrial.

63. It followed from the judgment in *Medenica v. Switzerland* (no. 20491/92, ECHR 2001-VI) that the intention to escape trial extinguished the right of a person convicted *in absentia* to a new trial under the Convention. In that connection, the Government pointed out that the Court had endorsed the view of the Swiss authorities that Mr Medenica's trial *in absentia* had been lawful and that it had not been necessary to reopen the proceedings because his inability to appear had been his own fault and he had not provided any valid excuse for his absence. Furthermore, the presumption that a defendant had sought to evade justice was not irrebuttable. Convicted persons could always provide explanations by arguing that they had never been aware of the proceedings and consequently had not intended to abscond, or by citing a legitimate impediment. In such cases it was for the prosecution to seek to prove the contrary where appropriate, and for the judicial authorities to assess the relevance of the convicted person's explanations.

64. It was true that, unlike the applicant, Mr Medenica had been officially informed of the proceedings against him and of the date of his trial. The Chamber had inferred from this that the applicant could not be said to have intended to escape trial. Its conclusion had been based on the cases of *T. and F.C.B. v. Italy*, in which the Court had refused to attach any importance to the indirect knowledge which the applicants had had or might have had of the proceedings against them and of the date of their trial. Although the Court's excessive formalism and severity in the above two cases were understandable in the light of the legislation in force in Italy at the material time, they were not acceptable today.

65. Admittedly, a purely formal notification (as in the present case, where the relevant documents had been served on the officially appointed lawyer) could not give rise to an irrebuttable statutory presumption that the accused had been aware of the proceedings. However, a presumption to the contrary was equally unjustified. That would amount to denying that the accused might be aware of the proceedings where there was evidence that they were guilty and had absconded (for example, where criminals escaped from police officers pursuing them immediately after the offence, or where defendants produced a written statement declaring their guilt, their contempt towards the victims and their intention to remain untraceable). In the Government's submission, the mere fact that an applicant had not been notified of the conviction did not in itself constitute sufficient proof that he or she had acted in good faith; further evidence of negligence on the part of the authorities was required.

66. It would therefore be advisable, they argued, to take a more balanced, common-sense approach consisting in assuming – at least provisionally – that the accused had absconded if such an inference was justified by the particular circumstances of the case, regard being had to logic and to ordinary experience, and seeking to substantiate this through

concrete evidence. In particular, it was not contrary to the presumption of innocence to assume that persons accused of an offence had absconded where it proved impossible to ascertain their whereabouts immediately after the offence had been committed. Such an assumption was reinforced if they were subsequently found guilty on the basis of evidence adduced at the trial and did not provide any relevant explanation as to what had caused them to leave their home address. That was precisely what had happened in the applicant's case, in which the Rome Assize Court had carefully established the facts, basing its findings on statements by several eyewitnesses.

67. If convicted persons were acknowledged as having the "unconditional" right "in all cases" to a new trial when they had not been officially notified of the charges and the date of the hearing, the State would be denied the opportunity to adduce evidence of a simple fact: knowledge that a prosecution had been brought. That would, however, be contrary to the purpose of all judicial proceedings – namely establishing the truth – and would mean that justice was denied or the victims were caused additional anguish. There would also be paradoxical consequences: defendants who were quicker and more skilful at escaping would be at an advantage in relation to those who were caught unawares by an initial summons. If that were so, only the accused would have the power to review the validity of their own trial, and the guilty would be in a more favourable position than the innocent. Furthermore, people who had consciously sought to evade trial could claim a right "which logic and any sense of justice suggest[ed] should not be theirs": the right to clutter the courts' lists of cases and to inconvenience victims and witnesses at a later stage.

68. Nor should it be forgotten, the Government submitted, that in the cases of *Poitrinol v. France* (judgment of 23 November 1993, Series A no. 277-A), and *Lala and Pelladoah v. the Netherlands* (judgments of 22 September 1994, Series A nos. 297-A and 297-B) the Court had coupled the right to appear in court with a corresponding duty. It had accordingly accepted that unjustified absences could be discouraged and that States were entitled to impose on defendants the burden of justifying their absence and, subsequently, to assess the validity of such explanations. It was true that in the above cases the Court had held that the sanctions imposed on the defendants (the impossibility of being represented by counsel) had been disproportionate; however, it had implicitly accepted that Article 6 would not have been infringed if the restrictions on the absent defendants' rights had struck a fair balance.

69. In the cases cited above, the Court had also laid emphasis on the defence conducted by a lawyer. In particular, it had held that the "crucial" importance of defending the accused should prevail over the "capital" importance of their appearing at the trial. The active presence of a defence lawyer was therefore sufficient to restore the balance between the State's

legitimate reaction to a defendant's unjustified absence and respect for the rights set forth in Article 6 of the Convention.

70. In the instant case the applicant had been represented in the Rome Assize Court by an officially appointed lawyer, who had conducted his defence effectively and adequately, having called a number of witnesses. The same lawyer had represented other defendants in the same proceedings, some of whom had been acquitted.

71. In any event, the Government submitted that Italian law had afforded the applicant a genuine possibility of appearing at a new trial. In this connection, two distinct scenarios were possible. If notice had not been served in accordance with the formal requirements, the proceedings were null and void and, by virtue of Articles 179 and 670 of the CCP, the judgment thus became unenforceable.

72. If, however, as in the present case, the summons had been served in accordance with domestic legislation, Article 175 of the CCP was applicable. In that connection, the Government reiterated the observations relating to their preliminary objection (see paragraphs 32 to 37 above) and pointed out that the applicant belonged to a population group with a traditionally nomadic culture, which might serve to explain why he had not been present at his home address.

73. In the Government's submission, the system provided for in Article 175 of the CCP and the evidentiary rules deriving from it did not in any way contravene the general principle that the burden of proof rested with the accuser and not with the accused. In the case of *John Murray v. the United Kingdom* (judgment of 8 February 1996, *Reports* 1996-I) the Court had considered that it was legitimate to require explanations from the accused and to draw inferences from their silence where the circumstances manifestly called for such explanations. If that was acceptable in relation to the merits of a charge, it should be all the more so when it came to establishing a fact – namely, whether the applicant's ignorance had been wilful – which was incidental and procedural in nature.

2. *The applicant*

74. The applicant argued that his right to a fair trial had been infringed in that he had not been informed of the accusations against him. He submitted that the defence conducted by his officially appointed lawyer could not be regarded as effective and adequate in view of the fact that, among the defendants whom the lawyer had represented, those who had been present had been acquitted and those who had not had been convicted. Furthermore, the applicant had not known that he was being represented by that lawyer. He had therefore had no reason to contact him or the Italian authorities. If he had known that he had been charged with a criminal offence, he could have made a fully informed choice as to his legal counsel.

75. The applicant alleged that the Italian authorities had proceeded on the assumption that he was guilty because he was absent. Since the proceedings against him had not complied with the Convention, however, his right to be presumed innocent had been infringed. Nor could it be inferred that he had sought to evade justice when he had not first been questioned. Such an inference by the authorities had been all the more unreasonable in that at the time of his arrest he had been lawfully resident in Germany with his family and his address had been officially registered with the police. In any event, the Government could not prove that he had fled in order to escape the proceedings against him.

76. The applicant lastly asserted that his identification by the Italian authorities had been imprecise and dubious and that the file on him had not contained either his photograph or his fingerprints.

C. Third party

77. The Government of the Slovak Republic observed that in the case of *Medenica v. Switzerland* the Court had held that there had been no violation of Article 6 of the Convention as the applicant had failed to show good cause for his absence and there had been no evidence to suggest that he had been absent for reasons beyond his control. Denying him the right to a retrial had therefore not been a disproportionate response.

78. If the right to a new trial were held to be automatic in the absence of official notification, those who had been informed of their prosecution would enjoy less extensive guarantees than those who became untraceable immediately after committing the offence. Only in the former case would the Court authorise the domestic authorities to examine whether the convicted person had actually waived the safeguards of a fair trial. In the latter case they would be precluded from assessing, on the facts, the reasons why the defendant could not be traced. A defendant who had not been notified would always be treated as someone who was untraceable for reasons beyond his or her control and not as someone who had escaped trial after being informed that a prosecution had been brought.

79. In the Slovakian Government's submission, it was questionable whether that was in line with the precedent established in the *Colozza* judgment, in which the Court had pointed out that prohibiting all trials *in absentia* could paralyse the conduct of criminal proceedings in that it could lead, for example, to dispersal of the evidence, expiry of the time allowed for prosecution or a miscarriage of justice. Furthermore, the distinction outlined above meant that people would be treated in the same manner in different situations, and differently in similar situations, without any objective or reasonable justification. The consequences were therefore unfair. In that connection, the Slovakian Government observed that Mr Medenica would have enjoyed more rights if he had become untraceable

immediately after the offence had been committed. Regard should also be had to the fact that sometimes people who were caught in flagrante delicto managed to escape.

80. In the Slovakian Government's submission, the authorities should always have the right, firstly, to examine in the particular circumstances of each case why it was impossible to ascertain the accused's whereabouts and, secondly, to rule that they had waived the safeguards of Article 6 or had sought to evade justice. In the latter case it should be legitimate to refuse them a new trial under domestic law, regard being had to the higher interests of the community and the achievement of the aims of prosecution. The Court's task would then be to ensure that the conclusions reached by the national authorities were not arbitrary or based on manifestly erroneous assumptions.

D. The Court's assessment

1. General principles concerning trial in absentia

(a) Right to take part in the hearing and to obtain a new trial

81. Although this is not expressly mentioned in paragraph 1 of Article 6, the object and purpose of the Article taken as a whole show that a person "charged with a criminal offence" is entitled to take part in the hearing. Moreover, sub-paragraphs (c), (d) and (e) of paragraph 3 guarantee to "everyone charged with a criminal offence" the right "to defend himself in person", "to examine or have examined witnesses" and "to have the free assistance of an interpreter if he cannot understand or speak the language used in court", and it is difficult to see how he could exercise these rights without being present (see *Colozza*, cited above, p. 14, § 27; *T. v. Italy*, cited above, p. 41, § 26; *F.C.B. v. Italy*, cited above, p. 21, § 33; and *Belziuk v. Poland*, judgment of 25 March 1998, *Reports* 1998-II, p. 570, § 37).

82. Although proceedings that take place in the accused's absence are not of themselves incompatible with Article 6 of the Convention, a denial of justice nevertheless undoubtedly occurs where a person convicted *in absentia* is unable subsequently to obtain from a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact, where it has not been established that he has waived his right to appear and to defend himself (see *Colozza*, cited above, p. 15, § 29; *Einhorn v. France* (dec.), no. 71555/01, § 33, ECHR 2001-XI; *Krombach v. France*, no. 29731/96, § 85, ECHR 2001-II; and *Somogyi v. Italy*, no. 67972/01, § 66, ECHR 2004-IV) or that he intended to escape trial (see *Medenica*, cited above, § 55).

83. The Convention leaves Contracting States wide discretion as regards the choice of the means calculated to ensure that their legal systems are in compliance with the requirements of Article 6. The Court's task is to determine whether the result called for by the Convention has been achieved. In particular, the procedural means offered by domestic law and practice must be shown to be effective where a person charged with a criminal offence has neither waived his right to appear and to defend himself nor sought to escape trial (see *Somogyi*, cited above, § 67).

84. The Court has further held that the duty to guarantee the right of a criminal defendant to be present in the courtroom – either during the original proceedings or in a retrial – ranks as one of the essential requirements of Article 6 (see *Stoichkov v. Bulgaria*, no. 9808/02, § 56, 24 March 2005). Accordingly, the refusal to reopen proceedings conducted in the accused's absence, without any indication that the accused has waived his or her right to be present during the trial, has been found to be a "flagrant denial of justice" rendering the proceedings "manifestly contrary to the provisions of Article 6 or the principles embodied therein" (*ibid.*, §§ 54-58).

85. The Court has also held that the reopening of the time allowed for appealing against a conviction *in absentia*, where the defendant was entitled to attend the hearing in the court of appeal and to request the admission of new evidence, entailed the possibility of a fresh factual and legal determination of the criminal charge, so that the proceedings as a whole could be said to have been fair (see *Jones v. the United Kingdom* (dec.), no. 30900/02, 9 September 2003).

(b) Waiver of the right to appear at the trial

86. Neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial (see *Kwiatkowska v. Italy* (dec.), no. 52868/99, 30 November 2000). However, if it is to be effective for Convention purposes, a waiver of the right to take part in the trial must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance (see *Poitrimol v. France*, judgment of 23 November 1993, Series A no. 277-A, pp. 13-14, § 31). Furthermore, it must not run counter to any important public interest (see *Håkansson and Sturesson v. Sweden*, judgment of 21 February 1990, Series A no. 171-A, p. 20, § 66).

87. The Court has held that where a person charged with a criminal offence had not been notified in person, it could not be inferred merely from his status as a "fugitive" (*latitante*), which was founded on a presumption with an insufficient factual basis, that he had waived his right to appear at the trial and defend himself (see *Colozza*, cited above, pp. 14-15, § 28). It has also had occasion to point out that before an accused can be said to have

implicitly, through his conduct, waived an important right under Article 6 of the Convention it must be shown that he could reasonably have foreseen what the consequences of his conduct would be (see *Jones*, cited above).

88. Furthermore, a person charged with a criminal offence must not be left with the burden of proving that he was not seeking to evade justice or that his absence was due to *force majeure* (see *Colozza*, cited above, pp. 15-16, § 30). At the same time, it is open to the national authorities to assess whether the accused showed good cause for his absence or whether there was anything in the case file to warrant finding that he had been absent for reasons beyond his control (see *Medenica*, cited above, § 57).

(c) Right of a person charged with a criminal offence to be informed of the accusations against him

89. By paragraph 3 (a) of Article 6 of the Convention, everyone charged with a criminal offence has the right "to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him". This provision points to the need for special attention to be paid to the notification of the "accusation" to the defendant. An indictment plays a crucial role in the criminal process, in that it is from the moment of its service that the defendant is formally put on notice of the factual and legal basis of the charges against him (see *Kamasinski v. Austria*, judgment of 19 December 1989, Series A no. 168, pp. 36-37, § 79).

90. The scope of the above provision must in particular be assessed in the light of the more general right to a fair hearing guaranteed by Article 6 § 1 of the Convention. In criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair (see *Pélissier and Sassi v. France* [GC], no. 25444/94, § 52, ECHR 1999-II).

(d) Representation by counsel of defendants tried *in absentia*

91. Although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial (see *Poitrinol*, cited above, p. 14, § 34). A person charged with a criminal offence does not lose the benefit of this right merely on account of not being present at the trial (see *Mariani v. France*, no. 43640/98, § 40, 31 March 2005). It is of crucial importance for the fairness of the criminal justice system that the accused be adequately defended, both at first instance and on appeal (see *Lala*, cited above, p. 13, § 33, and *Pelladoah*, cited above, pp. 34-35, § 40).

92. At the same time, it is of capital importance that a defendant should appear, both because of his right to a hearing and because of the need to verify the accuracy of his statements and compare them with those of the

victim – whose interests need to be protected – and of the witnesses. The legislature must accordingly be able to discourage unjustified absences, provided that any sanctions used are not disproportionate in the circumstances of the case and the defendant is not deprived of his right to be defended by counsel (see *Krombach*, cited above, §§ 84, 89 and 90; *Van Geyseghem v. Belgium* [GC], no. 26103/95, § 34, ECHR 1999-I; and *Poitrimol*, cited above, p. 15, § 35).

93. It is for the courts to ensure that a trial was fair and, accordingly, that counsel who attends trial for the apparent purpose of defending the accused in his absence is given the opportunity to do so (see *Van Geyseghem*, cited above, § 33; *Lala*, cited above, p. 14, § 34; and *Pelladoah*, cited above, p. 35, § 41).

94. While it confers on everyone charged with a criminal offence the right to “defend himself in person or through legal assistance ...”, Article 6 § 3 (c) does not specify the manner of exercising this right. It thus leaves to the Contracting States the choice of the means of ensuring that it is secured in their judicial systems, the Court’s task being to ascertain whether the method they have chosen is consistent with the requirements of a fair trial (see *Quaranta v. Switzerland*, judgment of 24 May 1991, Series A no. 205, p. 16, § 30). In this connection, it must be remembered that the Convention is designed to “guarantee not rights that are theoretical or illusory but rights that are practical and effective” and that assigning counsel does not in itself ensure the effectiveness of the assistance he may afford an accused (see *Imbrioscia v. Switzerland*, judgment of 24 November 1993, Series A no. 275, p. 13, § 38, and *Artico v. Italy*, judgment of 13 May 1980, Series A no. 37, p. 16, § 33).

95. Nevertheless, a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal-aid purposes or by the accused. It follows from the independence of the legal profession from the State that the conduct of the defence is essentially a matter between the defendant and his counsel, whether appointed under a legal-aid scheme or privately financed (see *Cuscani v. the United Kingdom*, no. 32771/96, § 39, 24 September 2002). The competent national authorities are required under Article 6 § 3 (c) to intervene only if a failure by legal-aid counsel to provide effective representation is manifest or is sufficiently brought to their attention in some other way (see *Daud v. Portugal*, judgment of 21 April 1998, *Reports* 1998-II pp. 749-50, § 38).

2. Application of the above principles in the present case

96. The Court observes that in the instant case the Rome investigating judge made an order on 15 October 1992 for the applicant’s detention pending trial. Since he had become untraceable, he was deemed to be a “fugitive” (*latitante*) (see paragraph 12 above). A lawyer was appointed to represent him and was notified of the various steps in the proceedings,

including the applicant's conviction. The Government did not dispute that the applicant had been tried *in absentia* and that before his arrest he had not received any official information about the charges or the date of his trial.

97. Relying on the line of case-law developed in the *Medenica v. Switzerland* case, the Government argued, however, that the applicant had lost his entitlement to a new trial as he had sought to evade justice, or in other words that he had known or suspected that he was wanted by the police and had absconded.

98. The Court observes at the outset that the instant case differs from *Medenica* (cited above, § 59), in which the applicant had been informed in good time of the proceedings against him and of the date of his trial. He also had the assistance of and was in contact with a lawyer of his own choosing. Lastly, the Court found that Mr Medenica's absence had been due to his own culpable conduct and agreed with the Swiss Federal Court that he had misled the American court by making equivocal and even knowingly inaccurate statements with the aim of securing a decision that would make it impossible for him to attend his trial (*ibid.*, § 58). His position was therefore very different from that of the applicant in the instant case. In the particular circumstances of the present case the question arises whether, if official notice was not served on him, Mr SejdoVIC may be regarded as having been sufficiently aware of his prosecution and the trial to be able to decide to waive his right to appear in court, or to evade justice.

99. In previous cases concerning convictions *in absentia*, the Court has held that to inform someone of a prosecution brought against him is a legal act of such importance that it must be carried out in accordance with procedural and substantive requirements capable of guaranteeing the effective exercise of the accused's rights; vague and informal knowledge cannot suffice (see *T. v. Italy*, cited above, p. 42, § 28, and *Somogyi*, cited above, § 75). The Court cannot, however, rule out the possibility that certain established facts might provide an unequivocal indication that the accused is aware of the existence of the criminal proceedings against him and of the nature and the cause of the accusation and does not intend to take part in the trial or wishes to escape prosecution. This may be the case, for example, where the accused states publicly or in writing that he does not intend to respond to summonses of which he has become aware through sources other than the authorities, or succeeds in evading an attempted arrest (see, among other authorities, *Iavarazzo v. Italy* (dec.), no. 50489/99, 4 December 2001), or when materials are brought to the attention of the authorities which unequivocally show that he is aware of the proceedings pending against him and of the charges he faces.

100. In the Court's view, no such circumstances have been established in the instant case. The Government's argument is not based on any objective factors other than the applicant's absence from his usual place of residence, viewed in the light of the evidence against him; it assumes that

the applicant was involved in, or indeed responsible for, the killing of Mr S. The Court is therefore unable to accept this argument, which also runs counter to the presumption of innocence. The establishment of the applicant's guilt according to law was the purpose of criminal proceedings which, at the time when the applicant was deemed to be a fugitive, were at the preliminary investigation stage.

101. In those circumstances, the Court considers that it has not been shown that the applicant had sufficient knowledge of his prosecution and of the charges against him. It is therefore unable to conclude that he sought to evade trial or unequivocally waived his right to appear in court. It remains to be determined whether the domestic legislation afforded him with sufficient certainty the opportunity of appearing at a new trial.

102. In that connection, the Government referred, firstly, to the remedy provided for in Article 670 of the CCP. The Court observes at the outset that it has found that the Government are estopped from raising a preliminary objection of failure to exhaust domestic remedies on the basis of this provision (see paragraph 42 above). However, such a finding does not preclude the Court from taking the remedy referred to by the Government into consideration in its examination of the merits of the complaint (see, *mutatis mutandis*, *N.C. v. Italy*, cited above, §§ 42-47 and 53-58). It notes that in Italian law an objection to execution is admissible only where it is established that there has been an irregularity in the proceedings capable of rendering the judgment void, particularly with regard to the service of process on defendants who cannot be traced (see paragraphs 31 and 71 above). However, the Government themselves admitted that in the present case the summons had been served in accordance with domestic law (see paragraph 72 above). Use by the applicant of the remedy in Article 670 of the CCP would therefore have had no prospect of success.

103. In so far as the Government referred to the possibility for the applicant to apply for leave to appeal out of time, the Court would simply reiterate the observations it set out in connection with the preliminary objection (see paragraphs 47-56 above). It notes again that the remedy provided for in Article 175 §§ 2 and 3 of the CCP, as in force at the time of the applicant's arrest and detention pending extradition, was bound to fail and there were objective obstacles to his using it. In particular, the applicant would have encountered serious difficulties in satisfying one of the legal preconditions for the grant of leave to appeal, namely in proving that he had not deliberately refused to take cognisance of the procedural steps or sought to escape trial. The Court has also found that there might have been uncertainty as to the distribution of the burden of proof in respect of that precondition (see paragraphs 49-51 above). Doubts therefore arise as to whether the applicant's right not to have to prove that he had no intention of evading trial was respected. The applicant might have been unable to provide convincing explanations, when requested to do so by the court or

challenged by the prosecution, as to why, shortly after the killing of Mr S., he had left his home without leaving a contact address and travelled to Germany. Moreover, the applicant, who could have been deemed to have had "effective knowledge of the judgment" shortly after being arrested in Germany, had only ten days to apply for leave to appeal out of time. There is no evidence to suggest that he had been informed of the possibility of reopening the time allowed for appealing against his conviction and of the short time available for attempting such a remedy. These circumstances, taken together with the difficulties that a person detained in a foreign country would have encountered in rapidly contacting a lawyer familiar with Italian law and in giving him a precise account of the facts and detailed instructions, created objective obstacles to the use by the applicant of the remedy provided for in Article 175 § 2 of the CCP (see paragraphs 53-55 above).

104. It follows that the remedy provided for in Article 175 of the CCP did not guarantee with sufficient certainty that the applicant would have the opportunity of appearing at a new trial to present his defence. It has not been argued before the Court that the applicant had any other means of obtaining the reopening of the time allowed for appealing, or a new trial.

3. Conclusion

105. In the light of the foregoing, the Court considers that the applicant, who was tried *in absentia* and has not been shown to have sought to escape trial or to have unequivocally waived his right to appear in court, did not have the opportunity to obtain a fresh determination of the merits of the charge against him by a court which had heard him in accordance with his defence rights.

106. There has therefore been a violation of Article 6 of the Convention in the instant case.

107. This finding makes it unnecessary for the Court to examine the applicant's allegations that the defence conducted by his lawyer had been defective and that his identification by the Italian authorities had been imprecise and dubious.

III. ARTICLES 46 AND 41 OF THE CONVENTION

A. Article 46 of the Convention

108. Article 46 provides:

“1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.”

1. The Chamber judgment

109. The Chamber held that the violation it had found had originated in a systemic problem connected with the malfunctioning of domestic legislation and practice caused by the lack of an effective mechanism to secure the right of persons convicted *in absentia* – where they had not been informed effectively of the proceedings against them and had not unequivocally waived their right to appear at their trial – to obtain a fresh determination of the merits of the charge against them by a court which had heard them in accordance with the requirements of Article 6 of the Convention. It accordingly held that the respondent State had to secure the right in question, through appropriate measures, to the applicant and to other persons in a similar position.

2. The Government's submissions

110. The Government argued that if the Court remained persuaded that there had been a violation, it should conclude that the violation stemmed solely from reasons relating to the particular circumstances of the case (in other words, to the applicant's personal situation), without calling into question the entire Italian legislation on the subject.

111. They contended that the Italian system fully complied with the requirements of the Convention, as outlined by the Court, and with all the principles listed in Resolution (75) 11 of the Committee of Ministers of the Council of Europe on the criteria governing proceedings held in the absence of the accused. The system required every effort to be made to ensure that accused persons were aware of the proceedings against them, the nature of the charges, and the date and place of the essential steps in the proceedings. Furthermore, those convicted *in absentia* were afforded an ample opportunity – more so than in other European States – to appeal out of time if they could prove that they had not had any knowledge of the judgment. The only exception to that rule which was relevant in the present case

occurred where it was established that convicted persons deemed to be untraceable or fugitives had deliberately sought to evade trial.

112. Furthermore, even supposing that the Italian system in force at the material time had been incompatible with the requirements of the Convention, any possible shortcomings had been remedied by the reform introduced by Law no. 60/2005.

113. In the event of the Court's finding a structural defect in the domestic legal system, the Government pointed out that the obligation to grant a new trial to a person convicted *in absentia* might make it impossible to gather all the evidence (in particular, witness statements) obtained during the first trial. In such circumstances, the national authorities would face two alternatives. They could either make use of evidence and statements obtained during the original trial (although this could entail an infringement of the accused's right not to be convicted on the basis of statements by persons whom he or she had never had the opportunity to examine), or acquit the accused in spite of the existence of sufficient evidence to satisfy the court beyond reasonable doubt of his or her guilt (which would amount to a potential breach of the positive obligation to protect other rights guaranteed by the Convention).

114. It would therefore be advisable, the Government contended, for the Court to clarify how the second trial was to proceed: was it sufficient to examine the defendant? Did the entire trial phase need to be repeated? Or were more balanced, intermediate solutions desirable? The Court would thus be able to give the respondent State clear and detailed indications as to how to ensure that its legislation or practice complied with the Convention.

115. The Government stated that they were not opposed in principle to the Court's giving fairly detailed indications of the general measures to be taken. However, the new practice pursued by the Court ran the risk of nullifying the principle that States were free to choose the means of executing judgments. It also ran counter to the spirit of the Convention and lacked a clear legal basis.

116. The Court's judgments were essentially declaratory in nature. The only exception to that rule was Article 41 of the Convention, which empowered the Court to impose what amounted to "sentences" on Contracting States. Article 46, however, did not contain any such provision but merely stated that the Court's final judgment was transmitted to the Committee of Ministers for supervision of its execution. The Committee of Ministers was therefore the only Council of Europe body empowered to say whether a general measure was necessary, adequate and sufficient.

117. In the Government's submission, this distribution of powers was confirmed by Article 16 of Protocol No. 14, which, in amending Article 46 of the Convention, introduced two new remedies: a request for interpretation and infringement proceedings. According to the explanatory report, the aim of the first of these was "to enable the Court to give an

interpretation of a judgment, not to pronounce on the measures taken by a High Contracting Party to comply with that judgment". As regards the second, it was stated that where the Court found a violation, it should refer the case to the Committee of Ministers "for consideration of the measures to be taken". Lastly, in Resolution Res(2004)3 the Committee of Ministers had invited the Court to identify any underlying systemic problems in its judgments, but not to indicate appropriate solutions as well. The distribution of powers between the Committee of Ministers and the Court as envisaged by the drafters of the Convention had therefore not been altered.

118. In any event, if the practice of indicating general measures were to be continued, it should at least become institutionalised in the Rules of Court or in the questions which the Court put to the parties, so that the parties could submit observations on whether a violation was "systemic".

3. *The Court's assessment*

119. The Court observes that under Article 46 of the Convention the Contracting Parties undertake to abide by the final judgments of the Court in any case to which they are parties, execution being supervised by the Committee of Ministers. It follows, among other things, that a judgment in which the Court finds a violation imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction under Article 41, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects. Subject to monitoring by the Committee of Ministers, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment (see, *mutatis mutandis*, *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII).

120. In the case of *Broniowski v. Poland* ([GC], no. 31443/96, §§ 188-194, ECHR 2004-V) the Court considered that where it found that a violation had originated in a systemic problem affecting a large number of people, general measures at national level could be called for in the execution of its judgments. This kind of adjudicative approach by the Court to systemic or structural problems in the national legal order has been described as a "pilot-judgment procedure". The procedure is primarily designed to assist the Contracting States in fulfilling their role in the Convention system by resolving such problems at national level, thereby securing to the persons concerned the Convention rights and freedoms as required by Article 1 of the Convention, offering them more rapid redress and, at the same time, easing the burden on the Court, which would otherwise have to take to judgment large numbers of applications similar in

substance (see *Broniowski v. Poland* (friendly settlement) [GC], no. 31443/96, §§ 34-35, ECHR 2005-...).

121. The Court observes that in the present case the unjustified obstacle to the applicant's right to a fresh determination by a court of the merits of the charge against him appears to result from the wording of the provisions of the CCP in force at the material time on the conditions for applying for leave to appeal out of time. This might suggest that there was a defect in the Italian legal system such that anyone convicted *in absentia* who had not been effectively informed of the proceedings against them could be denied a retrial.

122. However, it should be borne in mind that after the applicant's trial had ended, various legislative reforms were implemented in Italy. In particular, Law no. 60/2005 amended Article 175 of the CCP. Under the new provisions, the time allowed for appealing against a judgment may be reopened at the convicted person's request. The only exception to this rule occurs where the accused had "effective knowledge" of the proceedings against them or of the judgment and have deliberately waived the right to appear in court or to appeal. In addition, the time available for persons in a similar position to the applicant to apply for leave to appeal out of time has been increased from ten to thirty days and now begins to run from the point at which the accused are handed over to the Italian authorities (see paragraphs 26-27 above).

123. It is true that these new provisions did not apply to the applicant or to anyone else in a similar position who had had effective knowledge of their conviction or had been handed over to the Italian authorities more than thirty days before the date on which Law no. 60/2005 came into force. The Court considers that it would be premature at this stage, in the absence of any domestic case-law concerning the application of the provisions of Law no. 60/2005, to examine whether the reforms outlined above have achieved the result required by the Convention.

124. The Court therefore considers it unnecessary to indicate any general measures at national level that could be called for in the execution of this judgment.

125. Furthermore, the Court observes that in Chamber judgments in cases against Turkey concerning the independence and impartiality of national security courts it has held that, in principle, the most appropriate form of redress would be for the applicant to be given a retrial without delay if he or she requests one (see, among other authorities, *Gençel v. Turkey*, no. 53431/99, § 27, 23 October 2003, and *Tahir Duran v. Turkey*, no. 40997/98, § 23, 29 January 2004). It should also be noted that a similar position has been adopted in cases against Italy where the finding of a breach of the fairness requirements in Article 6 resulted from an infringement of the right to take part in the trial (see *Somogyi*, cited above, § 86, and *R.R. v. Italy*, cited above, § 76) or the right to examine prosecution

witnesses (see *Bracci*, cited above, § 75). The Grand Chamber has endorsed the general approach adopted in the cases cited above (see *Öcalan v. Turkey* [GC], no. 46221/99, § 210, ECHR 2005-...).

126. The Court accordingly considers that where, as in the instant case, an individual has been convicted following proceedings that have entailed breaches of the requirements of Article 6 of the Convention, a retrial or the reopening of the case, if requested, represents in principle an appropriate way of redressing the violation (see the principles set forth in Recommendation R(2000)2 of the Committee of Ministers, as outlined in paragraph 28 above). However, the specific remedial measures, if any, required of a respondent State in order for it to discharge its obligations under the Convention must depend on the particular circumstances of the individual case and be determined in the light of the Court's judgment in that case, and with due regard to the Court's case-law as cited above (see *Öcalan*, *loc. cit.*).

127. In particular, it is not for the Court to indicate how any new trial is to proceed and what form it is to take. The respondent State remains free, subject to monitoring by the Committee of Ministers, to choose the means by which it will discharge its obligation to put the applicant, as far as possible, in the position he would have been in had the requirements of the Convention not been disregarded (see *Piersack v. Belgium* (former Article 50), judgment of 26 October 1984, Series A no. 85, p. 16, § 12), provided that such means are compatible with the conclusions set out in the Court's judgment and with the rights of the defence (see *Lyons and Others v. the United Kingdom* (dec.), no. 15227/03, ECHR 2003-IX).

B. Article 41 of the Convention

128. Under Article 41 of the Convention,

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

1. Damage

129. The applicant observed that he had been detained in Germany with a view to extradition from 22 September to 22 November 1999, a period of 62 days. If the Italian authorities had attempted to contact him in Germany at his officially registered address, that deprivation of liberty would not have occurred. He submitted that redress for the damage and inconvenience caused by his detention should be afforded at a rate of 100 euros (EUR) per day, and accordingly claimed a total sum of EUR 6,200.

130. The Government observed that the applicant had not established any causal link between the violation of the Convention and the damage he alleged. As regards non-pecuniary damage, the finding of a violation would in itself provide sufficient just satisfaction.

131. The Court reiterates that it will award sums for just satisfaction under Article 41 where the loss or damage alleged has been caused by the violation it has found, but that the State is not expected to pay for damage not attributable to it (see *Perote Pellon v. Spain*, no. 45238/99, § 57, 25 July 2002, and *Bracchi*, cited above, § 71).

132. In the instant case the Court has found a violation of Article 6 of the Convention in that the applicant, who had been convicted *in absentia*, was unable to have his trial reopened. It has not observed any shortcomings in the efforts to trace the applicant and is unable to find that the Italian authorities should be held responsible for his detention pending extradition. Furthermore, the applicant has not cited any information that might have given the Italian authorities cause to suppose that he was in Germany.

133. Accordingly, the Court does not consider it appropriate to make an award to the applicant in respect of pecuniary damage. No causal link has been established between the violation it has found and the detention complained of by the applicant.

134. With regard to non-pecuniary damage, the Court considers that, in the circumstances of the case, the finding of a violation constitutes in itself sufficient just satisfaction (see *Brozicek v. Italy*, judgment of 19 December 1989, Series A no. 167, p. 20, § 48; *F.C.B. v. Italy*, cited above, p. 22, § 38; and *T. v. Italy*, cited above, p. 43, § 32).

2. Costs and expenses

135. The applicant sought the reimbursement of the costs incurred in the extradition proceedings in Germany, amounting to EUR 4,827.11. He further claimed EUR 7,747.94 in respect of the proceedings before the Court. In particular, he submitted that the sum of EUR 3,500.16 (comprising EUR 3,033.88 for fees and EUR 466.28 for translations) had been incurred in connection with the Chamber proceedings, and that the subsequent proceedings before the Grand Chamber, including his lawyers' participation in the hearing on 12 October 2005, had cost EUR 4,247.78.

136. The Government failed to see a causal link between the breach of the Convention and the costs incurred in Germany. With regard to those incurred in the Strasbourg proceedings, the Government left the matter to the Court's discretion, while emphasising that the applicant's case was a straightforward one. They further submitted that the amount claimed for the Grand Chamber proceedings was excessive, in view of the small amount of work that this phase had entailed for the applicant's counsel, who had not filed a memorial.

137. The Court notes that before applying to the Convention institutions, the applicant had to take part in extradition proceedings in Germany, during which the issue of the impossibility of reopening his trial was raised. It accordingly accepts that the applicant incurred expenses in respect of proceedings linked to the Convention violation. However, it considers the sums claimed for the proceedings in the German courts to be excessive (see, *mutatis mutandis*, *Sakkopoulos v. Greece*, no. 61828/00, § 59, 15 January 2004, and *Cianetti v. Italy*, no. 55634/00, § 56, 22 April 2004). Having regard to the information in its possession and to its relevant practice, the Court considers it reasonable to award the applicant the sum of EUR 2,500 under this head.

138. The Court likewise considers excessive the amount claimed in respect of the costs and expenses incurred in the proceedings before it (EUR 7,747.94) and decides to make an award of EUR 5,500 under this head. It should be pointed out in this connection that the applicant's counsel did not file written pleadings before the Grand Chamber (see paragraph 8 above). The total amount awarded to the applicant for costs and expenses is therefore EUR 8,000.

3. *Default interest*

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Dismisses* the Government's preliminary objection;
2. *Holds* that there has been a violation of Article 6 of the Convention;
3. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;
4. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months, EUR 8,000 (eight thousand euros) in respect of costs and expenses, plus any tax that may be chargeable;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 1 March 2006.



T.L. EARLY

Deputy to the Registrar



Luzius WILDHABER

President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the concurring opinion of Mrs Mularoni is annexed to this judgment.

L.W. 
T.L.E. 

CONCURRING OPINION OF JUDGE MULARONI

(Translation)

While I share the opinion of the majority that there has been a violation of Article 6 of the Convention, I should like to emphasise the following.

1. As regards the Government's preliminary objection that the applicant did not avail himself of the domestic remedy provided for in Article 175 of the Code of Criminal Procedure, I should like to point out, bearing in mind the somewhat varying expressions used in paragraphs 52, 55, 103 and 104 of the judgment, that I am not persuaded that this remedy was bound to fail. I voted with the majority in finding that there were special circumstances dispensing the applicant from the obligation to use the remedy in question and that this limb of the Government's preliminary objection should therefore be dismissed. While I acknowledge that there was some uncertainty as to this remedy's prospects of success, I nevertheless reached this conclusion on account of the objective obstacles referred to in paragraph 54 of the judgment. Had those obstacles not been present I would have concluded – in accordance with our case-law to the effect that the existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust domestic remedies (see *Akdivar and Others v. Turkey*, judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, p. 1212, § 71, and *Brusco v. Italy* (dec.), no. 69789/01, ECHR 2001-IX) – that the applicant had not exhausted domestic remedies.

2. With regard to paragraphs 101 to 104 of the judgment, I must admit that I have difficulty in following an approach that amounts to examining twice the same preliminary objections raised by the Government, the first time as to admissibility and the second as to the merits; such an approach entails the possibility of finding that the Government are estopped from raising the objections in question as to their admissibility but that there has been no violation of the Convention on the merits. I consider that it would have been sufficient to examine them at the admissibility stage without returning to them at the merits stage.