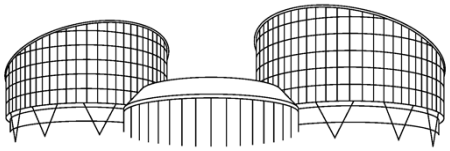

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

BIG ROOM

CASE OF MARGUŠ v. CROATIA

(Request no4455/10)

STOP

STRASBOURG

May 27, 2014

In the case of Marguš v. Croatia,

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

Dean Spielmann,*president*,
Josep Casadevall,
Guido Raimondi,
Ineta Ziemele,*judge*ad hoc,
Mark Villiger,
Isabelle Berro-Lefèvre,
Corneliu Bîrsan,
Jan Šikuta,
Ann Power-Forde,
Işıl Karakaş,
Nebojša Vučinić,
Kristina Pardalos,
Angelika Nußberger,
Helena Jäderblom,
Krzysztof Wojtyczek,
Faris Vehabovic,
Dmitry Dedov,*judges*,

and Lawrence Early,*jurisconsult*,

After having deliberated in private on June 26 and October 23, 2013 as well as March 19, 2014,

Renders the following judgment, adopted on the latter date:

PROCEDURE

1. At the origin of the case is a request (no4455/10) directed against the Republic of Croatia and of which a national of that State, Mr Fred Marguš ("the applicant"), applied to the Court on 31 December 2009 under Article 34 of the Convention for the Protection of Human Rights and fundamental freedoms ("the Convention").

2. The applicant, who was admitted to legal aid, was represented by MeP. Sabolić, lawyer in Osijek. The Croatian Government ("the Government") was represented by its Agent, Ms.meŠ. Stažnik.

3. In his application, Mr Marguš, who had been tried twice in criminal proceedings, complained that his trial had both times been presided over by the same magistrate and that the latter had decided to expel him from the courtroom during the closing hearing. He saw it as a violation of his right to a fair trial. He also claimed to be the victim of a violation of his right not to be tried twice for the same facts.

4. The application was assigned to the first section of the Court (Article 52 § 1 of the Rules of Court – "the Rules"). On September 5, 2011, the vice-president of the section decided to communicate the request to the Government.

5. On November 13, 2012, a chamber of the said section composed of Anatoly Kovler, president, Nina Vajić, Peer Lorenzen, Elisabeth Steiner, Khanlar Hajiyev, Linos-Alexandre Sicilianos, Erik Møse, judges, as well as Søren Nielsen, section registrar, delivered a conclusive judgment, unanimously, at the admissibility of the complaints under Article 6 of the Convention concerning the alleged lack of impartiality of Judge MK and the expulsion of the applicant from the courtroom as well as the complaint under Article 4 of Protocol No.o7 and the non-violation of these two provisions.

6. On December 27, 2012, the applicant requested the referral of the case before the Grand Chamber under Article 43 of the Convention. The panel of the Grand Chamber granted this request on March 18, 2013.

7. The composition of the Grand Chamber was then decided in accordance with Articles 26 §§ 4 and 5 of the Convention and 24 of the Regulations.

8. Both the applicant and the Government filed observations additional written submissions (article 59 § 1 of the regulations) on the merits of the case.

9. Comments were also received from a group of experts academics attached to Middlesex University in London, whom the President of the Grand Chamber had authorized to intervene in the written procedure (Articles 36 § 2 of the Convention and 44 § 2 of the Rules of Procedure).

10. A hearing took place in public at the Human Rights Palace man, in Strasbourg, June 26, 2013 (article 59 § 3 of the regulations).

Appeared:

– for the Government
MmyŠ. STAŽNIK, *agent*,
J.DOLMAGIĆ,
N.KATIC, *advisors*;

– for the applicant
MP SABOLIĆ, *advice*.

The Court heard Mr Sabolić and MrmeStažnik in their statements as well as in their responses to questions posed by Judges Kalaydjieva, Vučinić and Turković.

11. At the end of the hearing, it was decided that Ksenija Turković, judge elected in respect of Croatia, could not participate in the examination of the case (Rule 28). The Government then appointed to sit on its

place Ineta Ziemele, judge elected in respect of Latvia (Articles 26 § 4 of the Convention and 29 § 1 of the Rules). As a result, Ann Power-Forde, first substitute, became a full member of the Grand Chamber. Zdravka Kalaydjieva withdrew and was replaced by Ján Šikuta, second substitute. André Potocki also left and was replaced by Angelika Nußberger, third substitute (article 28 of the regulations).

ACTUALLY

I. THE CIRCUMSTANCES OF THE CASE

12. The applicant was born in 1961; he is currently serving a sentence of imprisonment in the Lepoglava State Prison.

A. The first criminal proceedings brought against the applicant (no K-4/97)

13. On 19 December 1991 the Osijek police seized the Osijek County Court of a criminal complaint against the applicant and five other persons; they alleged that the applicant, a member of the Croatian army, had killed several civilians.

14. On 20 April 1993 the Osijek military prosecutor charged the applicant before the Osijek County Court on several counts of murder, grievous bodily harm, endangering the life and property of others, and theft. The relevant passages of the indictment read as follows:

> "The first accused, Fred Marguš,
>
> 1. On November 20, 1991 around 7 a.m., in Čepin, (...) fired four times with an automatic weapon at SB (...), thus causing his death;
>
> (...)
>
> 2. At the same time and place as those indicated in point 1 above (...) fired several times with an automatic weapon at VB (...), thus causing his death;
>
> (...)
>
> 3. On December 10, 1991, took NV to the "Vrbik" forest between Čepin and Ivanovac (...) and fired twice with an automatic weapon at NV (...), thus causing his death. -this ;
>
> (...)
>
> 4. At the same place and at the same time as indicated in point 3 above, fired from an automatic weapon at Ne.V. (...), thus causing her death;

(...)

6. On August 28, 1991 around 3 a.m., threw an explosive device into commercial premises in Čepinski Martinovec (...), thus causing material damage;

(...)

7. On November 18, 1991 at 12:35 a.m., in Čepin, placed an explosive device inside a house (...) thus causing material damage (...);

(...)

8. The 1erAugust 1991 at 3:30 p.m., in Čepin, (...) shot RC, slightly injuring him, then (...) hit V.Ž. kicked (...), seriously injuring him (...) and inflicted the same treatment on RC (...), causing him other minor injuries (...);

(...)

9. Between September 26 and October 5, 1991, in Čepin, (...) stole weapons and bullets (...);

(...) »

The applicant was also charged with the theft of several tractors and other machinery belonging to others.

15. On January 25, 1996, the Deputy Military Prosecutor of Osijek dropped the charges listed in items 3, 4, 6, 7 and 9 of the indictment, as well as the charges of theft of another person's property. He charged the applicant with a new count of serious bodily injury for having shot a child, Sl.B., on 20 November 1991 at around 7 a.m. in Čepin. The former point 8 of the indictment therefore became point 4.

16. On September 24, 1996, the general amnesty law was promulgated, which provided that a general amnesty should apply to all criminal offenses committed in connection with the war in Croatia between 17 August 1990 and 23 August 1996, except for acts constituting very serious violations of humanitarian law or crimes of war, in particular the crime of genocide (paragraph 27 below).

17. On June 24, 1997, a panel of the Osijek County Court presided by Judge MK decided to terminate the proceedings against the applicant in application of the general amnesty law. The relevant passages of this decision read as follows:

"The Osijek County Court (...) decides today, June 24, 1997, that it is appropriate to terminate, in accordance with Article 1 §§ 1 and 3 and Article 2 § 2 of the General Amnesty Law, to the criminal proceedings initiated on February 10, 1997 (...) by the indictment of the prosecution at the Osijek County Court against the accused Fred Marguš for two counts of murder (...), for serious assault and battery (...) and for endangering the life and property of others (...)

(...)

Explanatory memorandum

In his indictmentoKt-1/93 of April 20, 1993, the military prosecutor's office in Osijek charged Fred Marguš with three counts of aggravated murder under Article 35 § 1 of the Criminal Code, with one count of aggravated murder under Article 35 § 2, paragraph 2, of the penal code, two counts of endangering the life and property of others (...) under article 153 § 1 of the penal code, one one count of serious bodily injury under article 41 § 1 of the penal code, one count of theft of weapons and other combat equipment under article 223 §§ 1 and 2 of the penal code , and one count of aggravated theft under article 131 § 2 of the penal code (...)

The above indictment was substantially amended at the hearing held before the Osijek Military Court on January 25, 1996, during which the Deputy Military Prosecutor withdrew certain counts and amended the factual and legal description as well as the legal qualification of certain offenses.

Thus, the accused Fred Marguš was charged with two counts of murder under article 34 § 1 of the penal code, one count of serious bodily injury under article 41 § 1 of the code criminal and one count of endangering the life and property of others (...) under article 146 § 1 of the penal code (...)

After the abolition of the military courts, the case file was transferred to the prosecution at the Osijek County Court, which took over the prosecution of the same charges and requested that the proceedings continue before the County Court from Osijek. He sent the case to a panel of three judges as part of the application of the general amnesty law.

After examining the file, the panel concludes that the conditions provided for in Article 1 §§ 1 and 3 and Article 2 § 2 of the general amnesty law are met, and that the accused is not excluded of the benefit of amnesty.

The aforementioned law provides for a general amnesty for criminal offenses committed during aggression, armed rebellion or armed conflicts (...) in the Republic of Croatia. This general amnesty concerns criminal offenses committed between August 17, 1990 and August 23, 1996.

Only the perpetrators of the most serious violations of humanitarian law constituting war crimes and the perpetrators of certain criminal offenses listed in Article 3 of the general amnesty law are excluded from the benefit of the general amnesty. Also excluded are perpetrators of other criminal offenses covered by the Criminal Code (...) which were not committed during the aggression, armed rebellion or armed conflicts in Croatia and which do not present a link with these events.

The accused, Fred Marguš, is charged with three criminal offenses committed in Čepin on November 20, 1991 and one criminal offense committed in Čepin on 1erAugust 1991.

The first three offenses relate to the most difficult period, that of the harshest attacks against Osijek and eastern Croatia, immediately after the fall of Vukovar, and the toughest fighting for the capture of Laslovo. During these combats, the accused distinguished himself by his exceptional courage, and he was recommended for promotion to the rank of lieutenant by his superior at the time, the commander of the third battalion of the 106ebrigade of the Croatian army.

During the critical period relating to the first three offences, the accused was acting as a member of the Croatian army; in this particularly difficult period, he tried, in his capacity as commander of a unit, to prevent a

directly threatened village falls into the hands of the enemy. The fourth offense was committed on 1erAugust 1991, while the accused, a reservist serving in Čepin, was wearing camouflage military clothing and was equipped with weapons of war.

(...)

Having regard to the time and place of the events in question, the acts of the accused had a close connection with the aggression, armed rebellion and armed conflicts in Croatia, and they were committed during the period covered by the general amnesty law.

(...)

Under these conditions, the court considers that all the legal conditions for the application of the general amnesty law are met (...)"

18. On an unspecified date, the Attorney General refers the matter to the Supreme Court of an appeal in the interest of the law (*zahtjev za zaštitu zakonitosti*), requesting it to establish that there had been a violation of Article 3 § 2 of the general amnesty law.

19. The high court ruled on the appeal on September 19, 2007. It concludes that the decision taken by the Osijek County Court on June 24, 1997 violated Article 3 § 2 of the General Amnesty Law. The relevant passages of the judgment read as follows:

"(...)

Article 1 § 1 of the General Amnesty Law provides that perpetrators of criminal offenses which have a link with aggression, armed rebellion or armed conflicts (...) in Croatia benefit from a general amnesty regarding the criminal prosecutions and criminal proceedings against them. Under the third paragraph of the same article, the amnesty concerns criminal offenses committed between August 17, 1990 and August 23, 1996. (...)

If correctly interpreted, these provisions require, in addition to the general condition that the criminal offense in question must have been committed in the period between August 17, 1990 and August 23, 1996 (which is met in the present case), a direct and significant link between the offense, on the one hand, and the aggression, armed rebellion or armed conflict, on the other hand. This interpretation is consistent with the general principle that anyone who commits a criminal offense must be held accountable. Therefore, the above provisions must be interpreted in a reasonable manner and with the necessary caution, so that the amnesty does not come to contradict itself and call into question the very purpose for which the law in question cause was declared. Therefore, it is appropriate to interpret the expression "which has a link with aggression, armed rebellion or armed conflicts" appearing in the general amnesty law, which does not specifically define the nature of this link, as meaning that this link must be direct and significant.

(...)

Part of the factual description of the criminal offenses charged against the accused Fred Marguš (...), which seems to indicate a certain connection with the aggression against the Republic of Croatia or the armed rebellion and armed conflicts in Croatia, relates upon the arrival of the victims of these offenses (SB, VB and the minor Sl.B.) in Čepin, in the company of their neighbors, after their flight from the village of Ivanovac following the attack by "A [army of the] Y[ugoslav] People." It should be emphasized that

the membership of the accused Fred Marguš in the Croatian army is not disputed. However, these circumstances are not such as to constitute the direct link with aggression, armed rebellion or armed conflicts in Croatia required for the application of the general amnesty law.

According to the factual description of the criminal offenses set out in point 4 of the indictment, the accused committed these acts as a member of the reserve forces based in Čepin, after the end of his service. This circumstance alone does not establish a significant link between the offenses and the war because, if that were the case, the amnesty would extend to all criminal offenses committed between August 27, 1990 and August 23, 1996 by members of the Croatian army or by enemy units (except for offenses specifically listed in Article 3 § 1 of the General Amnesty Law); but this was certainly not the intention of the legislator.

Finally, the war actions of the accused, described in detail in the contested decision, cannot constitute a criterion for the application of the general amnesty law (...)

It does not appear from the factual description of the criminal offenses listed in the indictment ... that the acts in question were committed during aggression, armed rebellion or armed conflicts in Croatia, or that they present a link with these events.

(...) »

B. The second criminal proceedings brought against the applicant (n oK-33/06)

20. On April 26, 2006, the prosecution at the Osijek County Court charged the applicant with several counts of war crimes against the civilian population. The proceedings were conducted by a panel of three judges of the Osijek County Court, which included Judge MK. The applicant was represented by a lawyer throughout the proceedings.

21. A closing hearing was held on March 19, 2007 in the presence, in particular, the applicant and his lawyer. The applicant was expelled from the courtroom during the parties' final submissions. His lawyer remained in the courtroom and presented his closing arguments. The relevant passage from the minutes of the hearing reads as follows:

"The president of the panel notes that the accused Fred Marguš interrupted the deputy prosecutor at the Osijek County Court ("the deputy prosecutor") while he was presenting his final conclusions and that he was summoned by the college to calm down; when he interrupted the deputy prosecutor for the second time, the person concerned received an oral warning.

After the president of the college had warned him orally, the accused Fred Marguš continued to comment on the final conclusions of the deputy prosecutor. Consequently, by decision of the panel and by order of the president, the accused Fred Marguš was expelled from the courtroom until the judgment was delivered.

(...) »

22. After the applicant's expulsion from the courtroom, the prosecutor Deputy, the victims' lawyers, the defense lawyers and one of the accused presented their final arguments.

23. The delivery of judgment was set for March 21, 2007, after which the hearing was adjourned. The applicant was present when the judgment was delivered. He was found guilty of the charges against him and sentenced to fourteen years' imprisonment. The relevant part of the judgment reads as follows:

"(...)

The accused Fred Marguš (...)

and

the accused TD (...)

are guilty [in that]

in the period between November 20 and 25, 1991, in and around Čepin, in violation of Article 3 § 1 of the Geneva Convention of August 12, 1949 relative to the protection of civilian persons in time of war as well as of articles 4 §§ 1 and 2 a) and 13 of the Additional Protocol of June 8, 1977 to the Geneva Conventions of August 12, 1949 relating to the protection of victims of non-international armed conflicts (Protocol II), while they defended this territory against the armed attacks of local Serbian rebels and the "Yugoslav People's Army" as part of their joint aggression against the constitutional legal order and territorial integrity of the Republic of Croatia, Fred Marguš , in his capacity as commander of unit 2 of the 3e body of the 130ebrigade of the Croatian army, and the accused TD, a member of the unit commanded by Fred Marguš [committed the following acts] with the intention of killing Serbian civilians;

the accused Fred Marguš

a) on November 20, 1991 around 8 a.m., in Čepin, recognized VB and SB who were standing (...) in front of the Ivanovac fire station, after having fled their village due to attacks by the Yugoslav People's Army , (...) fired at them with an automatic weapon (...) and hit SB in the head (...) and neck, killing him instantly, while VB, injured, fell to the ground . The accused then drove away but returned shortly afterwards. Seeing that VB was still alive, with his nine-year-old son, Sl.B, by his side. (...) and his wife MB, fired at them again with an automatic weapon, hitting VB twice in the head (...) and twice in the arm (...), thus resulting in death of it shortly after, while Sl.B. was shot in the leg (...), the offense of serious injury being thus constituted;

b) in the period from 22 to 24 November 1991, in Čepin, arrested NV and Ne.V. and, at gunpoint, took their Golf-type vehicle (...) took them to the basement of a house (...) where he tied them up with ropes on chairs and left them locked up without water or food then, with the members of his unit (...) beat and insulted them, questioned them about their allegedly hostile activities and about the possession of a radio, while preventing others members of the unit to help them (...) after which he took them out of Čepin into a forest (...) where he fired several bullets at them (...), thus causing the death of NV and (...) by Ne.V. ;

(c) on 23 November 1991 at around 1.30 p.m., at the Čepin bus station, arrested SG and DG as well as their relative Lj. G., and drove them to a house ... tied their hands behind their backs and, together with TB (since deceased), questioned them about their allegedly hostile activities and, in the evening, while they were still hampered, drove them out of Čepin (...) where he fired shots at them (...), thus causing their death;

the accused Fred Marguš and TD, [acting] in [concert]

d) on November 25, 1991 around 1 p.m., in Čepin, seeing SP at the wheel of his Golf (...) stopped him at the request of Fred Marguš (...), took him by car to a field (.. .) where (...) Fred Marguš ordered TD to shoot SP, [order] which TD obeyed by shooting SP once (...), after which Fred Marguš shot him several times with a automatic weapon (...), thus causing the death of SP (...) whose vehicle he then appropriated.

(...) »

24. On September 19, 2007, the Supreme Court upheld the conviction of the applicant and increased his sentence, bringing it to fifteen years of imprisonment. The relevant passages of the high court's judgment are worded as follows:

“Under Article 36 § 1, paragraph 5, of the Code of Criminal Procedure (CPP), a judge withdraws if, in the context of the same case, he participated in the adoption of a decision of a lower court or if he participated in the adoption of the contested decision.

It is true that Judge MK took part in the proceedings in which the contested judgment was adopted. He chaired the panel of the Osijek County Court which adopted the decision (...) of June 24, 1997 terminating the proceedings against the accused Fred Marguš under Article 1 §§ 1 and 3 and article 2 § 2 of the general amnesty law (...)

Although both proceedings were brought against the same accused, they were not the same case. The judge in question participated in two different cases before the Osijek County Court against the same defendant. In the case which gave rise to this appeal, Judge MK did not participate in the adoption of a decision of a lower court or a decision which is the subject of an appeal or a extraordinary appeal.

(...)

The accused wrongly claims that, by holding the closing hearing in his absence and in the absence of his lawyer after having expelled him from the courtroom during the parties' final submissions, the court of first instance disregarded Article 346 § 4 and Article 347 §§ 1 and 4 of the CCP. The accused says he was thus prevented from formulating his final conclusions. He adds that he was not informed about the conduct of the hearing in his absence and that the decision to remove him from the courtroom was not adopted by the panel in charge of the case.

Contrary to the accused's allegations, it appears from the minutes of the hearing held on 19 March 2007 that the accused Fred Marguš interrupted the deputy prosecutor at the [Osijek] County Court while the latter was presenting his final conclusions, and he was warned twice by the president of the college. The accused having persisted in his behavior, the college decided to dismiss him from the courtroom (...)

Such a measure by the court of first instance is consistent with Article 300 § 2 of the CCP. The accused Fred Marguš began to disrupt the proceedings while the prosecutor [deputy at the Osijek County Court] was presenting his final conclusions and persisted in his behavior, as a result of which he was expelled from the courtroom by a decision of the college. He was present in the courtroom when the judgment was pronounced on March 21, 2007.

Since the trial court fully complied with Article 300 § 2 of the CCP, the accused's appeal is without merit. In this case, there was no violation of the rights of the defense and the expulsion of the accused from the courtroom during the parties' final submissions had no impact on the judgment.

(...)

The accused Fred Marguš further contends (...) that the contested judgment violated the principle "*non bis in idem*» (...)to the extent that the proceedings regarding some of the accusations which gave rise to this judgment have already been brought to an end (...)

(...)

Criminal proceedings were indeed carried out before the Osijek County Court, under number K-4/97, against the accused Fred Marguš concerning, in particular, four counts (...) of murder (...) on the persons of SB, VB, NV and Ne.V., as well as the offense (...) of endangering the life and property of others (...) The Osijek County Court has terminated this procedure by the final decision n°Kv-99/97 (K-4/97) of June 24, 1997 on the basis of the general amnesty law (...)

Although the consequences of the offenses which were the subject of the proceedings carried out before the Osijek County Court under number K-4/97, namely the homicides of persons from SB, VB, NV and Ne.V. , as well as the serious assault and battery inflicted on Sl.B., are also part of the factual context [of the offenses examined] in the context of the procedure at the end of which the contested judgment was adopted, the offenses [examined in the two criminal proceedings in question] are not the same.

The comparison between the factual contexts [of the criminal offenses examined] in the context of the two procedures shows that these offenses are not identical. The factual context [of the offenses in question] in the contested judgment contains an additional criminal element and is much broader in scope than that which gave rise to the proceedings before the Osijek County Court under number K-4/97. [In the present case], the accused Fred Marguš is accused of having violated the rules of the Geneva Convention of August 12, 1949 relating to the protection of civilian persons in time of war and of the Additional Protocol of June 8, 1977 to the Geneva Conventions of August 12, 1949 relating to the protection of victims of non-international armed conflicts (Protocol II), in that, in the period between November 20 and 25, 1991, while defending a territory against armed attacks by local Serb rebels and the “Yugoslav People's Army” as part of their joint aggression against the constitutional legal order and territorial integrity of the Republic of Croatia, he, in violation of the rules of international law, killed and tortured civilians, treated them inhumanely, arrested them illegally, ordered the murder of a civilian and stole property belonging to civilians. The acts described above constitute offenses contrary to the values protected by international law, and more specifically war crimes against the civilian population within the meaning of article 120 § 1 of the penal code.

Given that the factual context and legal characterization of the offenses in question differ from those of the offenses which were the subject of the previous proceedings, so that the scope of the charges against the accused Fred Marguš is different and significantly broader than in the previous case (file no.oK-4/97), the authority of res judicata cannot be invoked (...)"

25. The applicant subsequently submitted a constitutional appeal, which the Constitutional Court rejected it on September 30, 2009, agreeing with the reasoning of the Supreme Court.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The relevant law

26. The relevant provision of the Croatian Constitution (*Ustav Republic Hrvatske*, Official Journal nbone41/2001 and 55/2001) is worded as follows:

Section 31

"(...)

2. No one may be prosecuted or punished criminally because of an offense for which he has already been acquitted or convicted by a final judgment in accordance with the law.

The circumstances and grounds which may justify the reopening of proceedings under paragraph 2 of this article may only be defined by law, in accordance with the Constitution or an international agreement.

(...) »

27. The relevant provisions of the Code of Criminal Procedure (*Zakon o kaznenom postupku,*Official Journal nbone110/1997, 27/1998, 58/1999, 112/1999, 58/2002, 62/2003, 178/2004 and 115/2006) are as follows:

Article 300

"1. When the accused (...) disrupts the smooth running of a hearing or does not comply with the orders of the president of the court, the latter warns the accused (...) The panel may order that the accused be expelled from the courtroom (...)

2. The panel may order that the accused be removed from the courtroom for a limited time. If the accused again disrupts the proceedings, [he may be expelled from the courtroom] until the end of the presentation of evidence. The president then summons the accused before the close of this presentation and informs him about the conduct of the proceedings. If the accused continues to disrupt the hearing and is in contempt of court, the panel may again order his or her expulsion from the courtroom. In this case, the trial concludes in the absence of the accused, and the president or another member of the panel gives him, in the presence of a typist, information on the content of the judgment adopted.

(...) »

Article 350 (former article 336)

"1. The judgment may only relate to the accused and the offense referred to in the indictment as initially submitted at the hearing or as amended at the hearing.

2. The court is not bound by the legal qualification given to the facts by the prosecutor[1]. »

Types of judgments
Section 352

"1. A judgment concludes in the dismissal of the charges, in the acquittal of the accused or in the guilt of the accused.

(...) »

Section 354

"A judgment of acquittal is adopted in the following cases:

1. when the acts alleged against the accused are not criminalized by law;

2. when certain circumstances exclude the guilt of the accused;

3. when it is not demonstrated that the accused committed the criminal offense with which he is charged. »

Section 355

"1. A judgment concluding the guilt of the accused must mention the following elements:

1. the offense of which the accused is found guilty, as well as the facts and circumstances which form the constituent elements of this offense and those which base the application of a particular provision of the penal code;

2. the legal name and description of the criminal offense, as well as the provisions of the criminal code that were applied;

3. the penalty to be imposed, or the provisions of the penal code under which the application of a penalty is excluded or under which the prison sentence must be commuted to community service;

4. the possible decision to add a suspended sentence to the sentence;

5. the possible decision to adopt security measures or confiscate material gains;

6. the decision relating to costs and expenses as well as any possible civil action, as well as the possible decision to publish the final judgment in the media;

(...) »

1. The practice of the Supreme Court regarding this provision is described in paragraphs 32 to 34 below.

Article 367

“1. A serious defect in the criminal procedure is noted when (...)

3. a hearing was held in the absence of a person whose presence is obligatory under the law (...)

(...) »

Reopening of the procedure
Section 401

“A criminal proceeding which has ended with a final decision or a final judgment may only be reopened at the request of an authorized person in the circumstances and under the conditions defined in this code. »

Article 406

“1. Criminal proceedings which ended with a final judgment rejecting the charges may exceptionally be reopened to the detriment of the accused:

(...)

5. when it is established that amnesty, pardon, statute of limitations or other circumstances precluding criminal prosecution do not apply to the criminal offense referred to in the judgment dismissing the charges.

(...) »

Article 408

"1. The court competent to rule on a request for reopening of proceedings is the one which heard the case at first instance (...)

2. The request for reopening must indicate the legal basis and the evidence on which it is based (...)

(...) »

Appeal in the interest of law
Article 418

“1. The Attorney General may file an appeal in the interest of the law against a final judicial decision and the legal proceedings at the end of which such a decision was taken when these resulted in a violation of a law.

2. The Attorney General must file an appeal in the interest of the law against any judicial decision adopted following a procedure which has violated certain of the fundamental human rights and freedoms guaranteed by the Constitution, the law or international law.

(...) »

Article 419

“1. The Supreme Court of the Republic of Croatia is the competent court to decide on appeals in the interests of the law.

(...) »

Article 420

"1. When ruling on an appeal in the interest of the law, the [Supreme] Court examines only the violations of the law denounced by the Attorney General.

(...) »

Section 422

"2. When an appeal in the interest of the law is presented to the detriment of the accused and the [Supreme] Court judges it well founded, it limits itself to establishing the existence of a violation of the law without modify the final decision. »

28. In application of the penal code (*Kazeni zakon*, Official newspaper notbone53/1991, 39/1992 and 91/1992), the guilt of a person is excluded in the following circumstances: irresponsibility (*neubrojivost*), error of law or error of fact.

29. The relevant passages of the general amnesty law of September 24, 1996 (*Zakon o općem oprostu*, Official Journal no80/1996) read as follows:

Article 1

"Under this Law, perpetrators of criminal offenses which were committed during the aggression, armed rebellion or armed conflicts in the Republic of Croatia or which have a connection with these events are granted a general amnesty which extends to all prosecutions or criminal proceedings directed against them.

No amnesty is granted at the stage of execution of final judgments concerning the perpetrators of criminal offenses referred to in the first paragraph of this article.

The amnesty extends to all prosecutions and criminal proceedings relating to offenses committed between August 17, 1990 and August 23, 1996.

Article 2

"No prosecution or criminal procedure shall be instituted against the perpetrators of the criminal offenses referred to in Article 1 of this law.

Criminal proceedings already opened are abandoned and any criminal proceedings already initiated are automatically closed by decision of a court.

Any detainee amnestied under the first paragraph of this article is released. »

Section 3

"No amnesty is granted under article 1 of this law to the perpetrators of the most serious violations of humanitarian law which constitute war crimes, namely: the crime of genocide within the meaning of article 119 of the Basic Criminal Code of the Republic of Croatia (Official Gazette no.o31/1993, consolidated text, nbone35/1993, 108/1995, 16/1996 and 28/1996); war crimes against the civilian population within the meaning of article 120 of the same code; war crimes against wounded

or sick people within the meaning of article 121; war crimes against prisoners of war within the meaning of article 122; the organization of groups [for the purposes of committing] or helping to commit genocide or war crimes within the meaning of article 123; the unlawful infliction of death or injury on the enemy within the meaning of article 124; the illicit appropriation of property belonging to those killed or injured on the battlefield within the meaning of article 125; the use of illicit combat equipment within the meaning of Article 126; offenses committed against negotiators within the meaning of Article 127; the cruel treatment of wounded, sick or prisoners of war within the meaning of article 128; unjustified delays in the repatriation of prisoners of war within the meaning of Article 129; the destruction of cultural and historical heritage within the meaning of article 130; incitement to aggressive war within the meaning of Article 131; the undue use of international symbols within the meaning of Article 132; racial or other discrimination within the meaning of Article 133; the reduction into slavery and the transportation of slaves within the meaning of article 134; international terrorism within the meaning of article 135; endangering persons under international protection within the meaning of article 136; the taking of hostages within the meaning of article 137; and the criminal offense of terrorism within the meaning of the provisions of international law.

No amnesty is granted to perpetrators of other criminal offenses provided for in the Basic Penal Code (Official Gazette no.31/1993, consolidated text, nbone35/1993, 108/1995, 16/1996 and 28/1996) and by the penal code (Official Gazette no.32/1993, consolidated text, nbone38/1993, 28/1996 and 30/1996) of the Republic of Croatia which were not committed during the aggression, armed rebellion or armed conflicts in the Republic of Croatia and do not have any connection with these events.

(...) »

Article 4

"When a court has, on the basis of article 2 of this law, granted an amnesty to the author of a criminal offense covered by this law on the basis of the legal classification retained by the attorney general, he cannot appeal the decision. »

B. Relevant practice

1. The practice of the Constitutional Court

30. In its decision no.U-III/543/1999 of November 26, 2008, the Court Constitutional Court expressed itself as follows:

"6. The Constitutional Court must determine whether there was a second instance relating to an act constituting the offense for which the general amnesty law was applied, and therefore whether we are in the presence of the " same offense", case in which Article 31 § 2 of the Constitution prohibits the initiation of a new, separate and independent procedure. Such a procedure would infringe [the principle of] legal certainty and allow the imposition of multiple sanctions for the same conduct which can only be punished criminally once. To decide this question, the Constitutional Court must examine a) whether the descriptions of the facts constituting the offenses charged against the appellant in the first and second proceedings are similar, in order to verify whether the decision to apply the The amnesty and the final conviction in the second procedure relate to the same subject, that is to say to the same "penal quantity", independently of the question of

know whether or not they concern the same historical facts; and then (...) b) if the case in question concerns a situation in which it was not possible to bring new charges in relation to the facts which had already been the subject of the first decision of the courts (the one which granted amnesty) but in which, under Article 31 § 3 of the Constitution, it was possible to request the reopening of the proceedings in accordance with the relevant law. Article 406 § 1, paragraph 5, of the Code of Criminal Procedure allows the reopening of any procedure ended by a final judgment dismissing the charges when it is "established that amnesty, pardon, prescription or other circumstances precluding criminal prosecution do not apply to the criminal offense referred to in the judgment dismissing the charges."

6.1. The Constitutional Court can only examine the similar nature or not of the descriptions of the facts constituting the offenses with regard to normative rules. In doing so, it is bound, just like the lower courts, by the constituent elements of the offenses, whatever the legal classification retained. It is clear from the descriptions of the facts underlying the accusations contained in the judgment of the Bjelovar Military Court (noK-85/95-24) and in the judgment of the Supreme Court (noI Kž-257/96), as well as in the contested decisions of the Sisak County Court (no K-108/97) and the Supreme Court (noI Kž-211/1998-3), that the facts are the same but that they have simply been characterized differently. All relevant facts were established by the Bjelovar Military Court (which closed the proceedings) and no new facts were established in the subsequent proceedings before the Sisak County Court. The only discrepancy between the descriptions of the charges relates to the timing of the commission of the offenses, which indicates not a factual difference but the impossibility for the courts to establish when exactly these offenses were committed. It should also be noted that the Supreme Court, in the judgment under appeal, emphasized that the facts were the same: their identity is therefore not in doubt.

6.2. In its judgment, the Supreme Court concluded that the conduct in question constituted not only the offense of armed rebellion provided for in Article 235 § 1 of the Criminal Code of the Republic of Croatia and referred to in the judgment dismissing the charges, but also of the offense of war crime against the civilian population within the meaning of Article 120 §§ 1 and 2 of the Basic Criminal Code of the Republic of Croatia, of which [the appellant] was subsequently found guilty. It follows from the Supreme Court's reasoning that the same conduct forms the basis of two offenses and that we are faced with a situation where a single act constitutes several offenses.

6.3. For the Constitutional Court, it was wrong that, in the contested judgment, the Supreme Court concluded that the same person, after the adoption of a final judgment relating to a single act constituting a certain offense, could be judged again in a new procedure for the same act qualified differently. Under article 336 § 2 of the code of criminal procedure, the court is not bound by the classification given to the facts by the prosecutor. Consequently, if the Bjelovar Military Court considered that the facts giving rise to the charges constituted war crimes against the civilian population within the meaning of Article 120 § 1 of the Basic Criminal Code of the Republic of Croatia, it would have had to declare himself incompetent to decide the case (since he did not have jurisdiction to hear war crimes), and transmit the case to the competent court, which could have convicted [the appellant] for war crimes against the civilian population, an offense for which no amnesty can be granted. Since the military tribunal did not act in this way and its judgment was final, the decision rejecting the accusations is given legal authority.

judged. Therefore, the subsequent conviction of the accused in the present case violated the rule *non bis in idem* regardless of the fact that the operative part of the first judgment did not relate to "the merits" – sometimes simply understood as resolving the question of whether or not the accused committed the offense. The formal distinction between an acquittal and a judgment dismissing the charges cannot be the only criterion to be used to answer the question of whether a new separate criminal procedure can be initiated for the same "criminal quantity": while appearing in the judgment dismissing the charges, the decision to grant amnesty, in the legal sense, creates the same legal consequences as an acquittal, and in both cases a factual question remains unestablished.

6.4. Therefore, the Constitutional Court cannot subscribe to the reasoning adopted by the Supreme Court in its judgment no. I Kž-211/1998-3 of 1er April 1999, according to which the judgment or decision declaring the abandonment of the proceedings for the offense of armed rebellion concerning the same conduct did not prohibit the subsequent prosecution and conviction of the accused for war crimes against the civilian population in on the grounds that this latter offense represented a threat not only to the values of the Republic of Croatia but also to humanity in general and to international law. Moreover, the Supreme Court then departed from this position in its decision of September 18, 2002 relating to the case Kž-8/00-3, in which it considered that the judgment dismissing the accusations "undoubtedly concerned the same fact in all respects (time, place and method of operation), but that this fact was simply qualified differently in the contested judgment and in the decision of the Zagreb military court." The Supreme Court added: "*Since, in the case in question, the criminal proceedings were discontinued in relation to the offense provided for in Article 244 § 2 of the Criminal Code of the Republic of Croatia, and the acts (...) are identical to those of whom [the accused] was found guilty in the contested judgment (...), by virtue of the principle* non bis in idem *provided for by article 32 § 2 of the Constitution, new criminal proceedings cannot be initiated, the case having already been judged.*»

(...) »

31. Decision no. U-III-791/1997 rendered by the Constitutional Court on March 14, 2001 concerned a situation in which the criminal proceedings against the accused had been terminated under the general amnesty law. The relevant passages of this decision read as follows:

"16. The constitutional provision which excludes the possibility of an accused being tried a second time for an offense for which he has already been "acquitted or convicted by a final judgment in accordance with the law" refers exclusively to a situation in in which a judgment was passed following criminal proceedings in which the accused was acquitted or found guilty of the charges set out in the indictment.

(...)

19. (...) a decision which does not definitively acquit the accused but which puts an end to the criminal proceedings cannot legally base the application of the constitutional provisions on the prohibition of prosecuting or punishing a person twice (...) »

2. The practice of the Supreme Court

32. The relevant passage from judgment no.oI Kž-533/00-3 of December 11 2001 is worded as follows:

> "Under article 336 § 2 of the code of criminal procedure, a court is not bound by the legal classification given to the facts by the prosecutor, and it can therefore rule on a different criminal offense as long as it is more favorable [to the accused] (...)"

33. The relevant passage from judgment no.oI Kž-257/02-5 of October 12, 2005 reads as follows:

> "Given that under article 336 § 2 of the code of criminal procedure a court is not bound by the legal classification given to the facts by the prosecutor, and that the criminal offense of incitement to abuse of power in financial matters provided for by article 292 § 2 is punishable by a lighter penalty than that provided for the criminal offense referred to in article 337 § 4 of the penal code, the court of first instance had the power to say that the acts in question constituted the criminal offense provided for by article 292 § 2 of the penal code (...)"

34. The relevant passage from judgment no.oI Kž-657/10-3 of October 27, 2010 is worded as follows:

> "Even if the court of first instance rightly declared that a court is not bound by the legal characterization given to the facts by the prosecutor, it nevertheless went beyond the terms of the act of accusation since he put the accused in a less favorable situation by convicting him of two criminal offenses instead of just one (...)"

III. RELEVANT INTERNATIONAL LAW INSTRUMENTS

A. The Vienna Convention on the Law of Treaties of 1969

35. The relevant passage from the Vienna Convention on the Law of treaties of May 23, 1969 ("the Vienna Convention") reads as follows:

SECTION3. IINTERPRETATION OF TREATIES

Section 31
General rule of interpretation

> "1. A treaty must be interpreted in good faith according to the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. For the purposes of interpreting a treaty, the context includes, in addition to the text, preamble and annexes included:
>
> (a) any agreement relating to the treaty which was entered into between all the parties at the time of the conclusion of the treaty;
>
> (b) any instrument established by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument relating to the treaty.

3. The following will be taken into account, along with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any practice subsequently followed in the application of the treaty by which the agreement of the parties with regard to the interpretation of the treaty is established;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A term will be understood in a particular sense if it is established that this was the intention of the parties. »

Article 32
Additional means of interpretation

"Additional means of interpretation may be used, and in particular the preparatory work and the circumstances in which the treaty was concluded, with a view either to confirming the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation given in accordance with Article 31:

a) leaves the meaning ambiguous or obscure; Or

(b) leads to a result that is manifestly absurd or unreasonable. »

Article 33
Interpretation of authenticated treaties in two or more languages

"1. When a treaty has been authenticated in two or more languages, its text is authentic in each of these languages, unless the treaty provides or the parties agree that in the event of divergence a specific text is will take away.

2. A version of the treaty in a language other than one of those in which the text has been authenticated shall be considered as an authentic text only if the treaty so provides or if the parties have agreed so.

3. The terms of a treaty are presumed to have the same meaning in the various authentic texts.

4. Except in the case where a specific text prevails in accordance with paragraph 1, when the comparison of the authentic texts reveals a difference in meaning which the application of Articles 31 and 32 cannot eliminate, the meaning which will be adopted will be adopted. , taking into account the object and purpose of the treaty, best reconciles these texts. »

B. The Geneva Conventions of August 12, 1949 relating to the protection of victims of armed conflicts and their Additional Protocols

36. The relevant passage from Article 3 common to the Conventions of Geneva of 1949 reads as follows:

Section 3

"In the event of an armed conflict not of an international character and arising in the territory of one of the High Contracting Parties, each of the Parties to the conflict shall be required to apply at least the following provisions:

(1) Persons not taking direct part in the hostilities, including members of armed forces who have laid down their arms and persons who have been placed hors de combat by illness, injury, detention, or any other cause, shall, in all circumstances, treated humanely, without any adverse distinction based on race, color, religion or belief, sex, birth or wealth, or any other similar criterion.

To this end, the following are and remain prohibited, at all times and in all places, with regard to the persons mentioned above:

a) attacks on life and bodily integrity, in particular murder in all its forms, mutilations, cruel treatment, torture and torture;

b) hostage-taking;

c) attacks on personal dignity, in particular humiliating and degrading treatment;

d) convictions pronounced and executions carried out without a prior judgment, rendered by a regularly constituted tribunal, accompanied by the judicial guarantees recognized as indispensable by civilized peoples.

(...) »

37. The relevant parts of the Convention (I) for the improvement of fate of the wounded and sick in the armed forces in the field (Geneva, August 12, 1949) read as follows:

Chapter IX – Repression of abuses and offenses
Article 49

"The High Contracting Parties undertake to take any legislative measure necessary to establish appropriate criminal sanctions to be applied to persons having committed, or given orders to commit, one or other of the serious breaches of this Convention defined to the next article.

Each Contracting Party shall have the obligation to search for persons accused of having committed, or to have ordered to be committed, one or other of these serious offenses, and it shall refer them to its own courts, regardless of their nationality. It may also, if it prefers, and according to the conditions provided for by its own legislation, hand them over for trial to another Contracting Party interested in the proceedings, provided that this Contracting Party has brought sufficient charges against the said persons.

(...) »

Section 50

"The serious offenses referred to in the preceding article are those which involve one or other of the following acts, if committed against persons or property protected by the Convention: intentional homicide, torture or inhumane treatment, including biological experiments, intentionally causing

great suffering or serious harm to physical integrity or health, destruction and appropriation of property, not justified by military necessity and carried out on a large scale in an illicit and arbitrary manner. »

38. Articles 50 and 51 of the Convention (II) for the Improvement of Lot of the Wounded, Sick and Shipwrecked of Armed Forces at Sea (Geneva, August 12, 1949) have the same wording as Articles 49 and 50 of the first Geneva Convention.

39. Articles 129 and 130 of the Convention (III) relating to the treatment prisoners of war (Geneva, August 12, 1949) also uses the wording of Articles 49 and 50 of the first Geneva Convention.

40. The wording of articles 49 and 50 of the first Geneva Convention is also found in articles 146 and 147 of the Convention (IV) relating to the protection of civilian persons in time of war (Geneva, August 12, 1949).

41. The relevant passage from the Additional Protocol to the Conventions of Geneva relating to the protection of victims of non-international armed conflicts (Protocol II) (Geneva, June 8, 1977) reads as follows:

Article 4

"1. All persons who do not directly participate or no longer participate in hostilities, whether or not they are deprived of their liberty, have the right to respect for their person, their honor, their convictions and their religious practices. They will in all circumstances be treated humanely, without any unfavorable distinction. It is forbidden to order that there be no survivors.

2. Without prejudice to the general nature of the preceding provisions, are and remain prohibited at any time and in any place with regard to the persons referred to in paragraph 1:

a) attacks on the life, health and physical or mental well-being of people, in particular murder, as well as cruel treatment such as torture, mutilation or all forms of corporal punishment;

(...) »

Article 6

"(...)

5. Upon the cessation of hostilities, the authorities in power will endeavor to grant the broadest possible amnesty to persons who have taken part in the armed conflict or who have been deprived of their liberty for reasons relating to the armed conflict, whether they are interned or detained. »

Article 13

"1. The civilian population and civilian persons shall enjoy general protection against the dangers resulting from military operations. In order to make this protection effective, the following rules will be observed in all circumstances.

2. Neither the civilian population as such nor civilians shall be the object of attacks. Acts or threats of violence whose main aim is to spread terror among the civilian population are prohibited.

3. Civilians enjoy the protection granted by this Title, unless they participate directly in hostilities and for the duration of this participation. »

C. The Convention on the Prevention and Punishment of the Crime of Genocide[2]

42. The relevant passages of this instrument read as follows:

First article

"The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law, which they undertake to prevent and punish. »

Article IV

"Persons having committed genocide or any of the other acts listed in Article III will be punished, whether they are rulers, civil servants or individuals. »

Article V

"The Contracting Parties undertake to take, in accordance with their respective constitutions, the legislative measures necessary to ensure the application of the provisions of this Convention, and in particular to provide for effective criminal sanctions against persons guilty of genocide or any of the other acts listed in Article III. »

D. The Convention on the Imprescriptibility of War Crimes and Crimes Against Humanity[3]

43. The relevant passages of this instrument read as follows:

First article

"The following crimes are imprescriptible, regardless of the date on which they were committed:

a) War crimes, as defined in the Statute of the International Military Tribunal of Nuremberg of August 8, 1945 and confirmed by resolutions 3 (I) and 95 (I) of the General Assembly of the Organization of United Nations, dated February 13, 1946 and December 11, 1946, in particular the "grave breaches" listed in the Geneva Conventions of August 12, 1949 for the protection of victims of war;

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2. Adopted on December 9, 1948 by Resolution 260 A (III) of the United Nations General Assembly.

3. Adopted on November 26, 1968 and entered into force on November 11, 1970. This convention was ratified by Croatia on October 12, 1992.

b) Crimes against humanity, whether committed in time of war or in time of peace, as defined in the Statute of the International Military Tribunal of Nuremberg of August 8, 1945 and confirmed by resolutions 3 (I) and 95 (I) of the General Assembly of the United Nations, dated February 13, 1946 and December 11, 1946, eviction by armed attack or occupation and inhumane acts arising from the policy of apartheid, as well as the crime of genocide, as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, even if these acts do not constitute a violation of the internal law of the country where they were committed. clerk. »

Article II

"If any of the crimes mentioned in article 1 is committed, the provisions of the present Convention shall apply to representatives of State authority and to individuals who participate in it as perpetrators or as as accomplices, or who are guilty of direct incitement to the commission of any of these crimes, or who participate in an agreement with a view to committing it, whatever its degree of execution, as well as to representatives of state authority who would tolerate its perpetration. »

Article III

“The States Parties to this Convention undertake to adopt all domestic measures, legislative or otherwise, which may be necessary to enable the extradition, in accordance with international law, of the persons referred to in article 2 of this Convention. »

Article IV

“The States Parties to this Convention undertake to take, in accordance with their constitutional procedures, all legislative or other measures which may be necessary to ensure the imprescriptibility of the crimes referred to in Articles 1 and 2 of this Convention, both with regard to concerns prosecutions as regards punishment; where a prescription exists in the matter, by virtue of law or otherwise, it will be abolished. »

E. The Rome Statute of the International Criminal Court

44. Article 20 of the Statute reads as follows:

Ne bis in idem

“1. Except as otherwise provided in this Statute, no person may be tried by the Court for acts constituting crimes for which he has already been convicted or acquitted by it.

2. No person may be tried by another jurisdiction for a crime referred to in Article 5 for which he has already been convicted or acquitted by the Court.

3. Anyone who has been tried by another court for conduct also falling within the scope of Articles 6, 7 or 8 may only be tried by the Court if the proceedings before the other court:

(a) was intended to shield the person concerned from criminal liability for crimes falling within the jurisdiction of the Court; Or

(b) was not carried out in an independent or impartial manner, in compliance with the guarantees of a fair trial provided for by international law, but in a manner which, in the circumstances, was incompatible with the intention of bring the person concerned to justice. »

F. Customary rules of international humanitarian law

45. Mandated by the States gathered at the 26eInternational Conference of the Red Cross and Red Crescent, the International Committee of the Red Cross (ICRC) presented in 2005 a two-volume study on customary international humanitarian law[4]. This study presents a list of customary rules of international humanitarian law. Rule 159, which relates to non-international armed conflicts, reads as follows:

"Upon the cessation of hostilities, the authorities in power must endeavor to grant the broadest possible amnesty to persons who have taken part in a non-international armed conflict or who have been deprived of their liberty for reasons relating to the conflict armed, with the exception of persons suspected of or accused of war crimes or convicted of war crimes. »

G. The United Nations Security Council

Resolution on the situation in Croatia, 1120 (1997), July 14, 1997

46. The relevant passages of this resolution read as follows:

"The Security Council

(...)

7. Urges the Government of the Republic of Croatia to remove ambiguities regarding the implementation of the amnesty law and to apply it in a fair and objective manner in accordance with international standards, in particular by successfully completing all investigations on crimes subject to amnesty and immediately undertaking, with the participation of the United Nations and the local Serbian population, a full review of all charges against persons who committed violations serious matters of international humanitarian law which are not the subject of amnesty, in order to put an end to the proceedings initiated against all persons for whom the evidence is insufficient;

(...) »

4. *Customary international humanitarian law*, under the direction of J.-M. Henckaerts and L. Doswald-Beck, Cambridge University Press and ICRC, 2005.

H. The International Covenant on Civil and Political Rights of 1966

47. Article 7 of this instrument is worded as follows:

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, it is prohibited to subject a person without their free consent to a medical or scientific experiment. »

I. The United Nations Human Rights Committee

1. General observation no20, article 7 (forty-fourth session, 1992)

48. In 1992, the United Nations Human Rights Committee noted in its General Observation no20 concerning article 7 of the International Covenant on Civil and Political Rights that some States had granted amnesty for acts of torture, adding that "amnesty is generally incompatible with the duty of States to investigate such acts, ensure protection against such acts in their jurisdiction and ensure that they do not recur in the future. States cannot deprive individuals of the right to an effective remedy, including the right to compensation and the fullest possible rehabilitation. »

2. Concluding observations, Lebanon, 1erApril 1997

49. Paragraph 12 of these observations reads as follows:

"The Committee notes with concern the amnesty granted to civilian and military personnel who may have committed human rights violations against civilians during the civil war. Such a blanket amnesty may prevent the proper investigation and punishment of those responsible for past human rights violations, frustrate the effort to establish respect for human rights, and constitute a obstacle to the action undertaken to consolidate democracy. »

3. Concluding observations, Croatia, April 30, 2001

50. Paragraph 11 of these observations is worded as follows:

"The Committee is concerned about the consequences of the amnesty law. While it is true that the law specifies that amnesty does not apply to war crimes, the term "war crimes" is not defined, hence the risk that the law is applied in such a way as to ensure impunity for those accused of serious human rights violations. The Committee regrets that information has not been provided to it on cases in which the amnesty law has been interpreted and applied by the courts.

The State party should ensure that in practice the amnesty law is not applied or used to grant impunity to persons accused of serious human rights violations. »

4. General comment n°31 [80] – The nature of the general legal obligation imposed on States parties to the Covenant, March 29, 2004

"18. When the investigations mentioned in paragraph 15 reveal the violation of certain rights recognized in the Covenant, States parties must ensure that those responsible are brought to justice. As in the case of a State party failing to investigate, failure to bring perpetrators of such violations to justice could itself give rise to a separate violation of the Covenant. These obligations relate in particular to violations deemed to be crimes under national or international law, such as torture and similar cruel, inhuman or degrading treatment (article 7), summary and arbitrary executions (article 6) and enforced disappearances (article 7). Articles 7 and 9 and, often, Article 6). Moreover, the problem of impunity of the perpetrators of these violations, a question which continues to concern the Committee, may well be an important factor which contributes to the repetition of violations. When committed as part of a large-scale or systematic attack against a civilian population, these violations of the Covenant constitute crimes against humanity (see the Rome Statute of the International Criminal Court, article 7).

Therefore, where it appears that public officials or agents have violated the Covenant rights referred to in this paragraph, the States parties concerned shall not exonerate the perpetrators from personal responsibility, as is produced in the case of certain amnesties (see General Comment no.°20 (44)), and prior immunities. Furthermore, there is no official statute justifying the exoneration of those accused of being responsible for such violations from legal responsibility. (...) »

J. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[5]

51. The relevant passages of this instrument read as follows:

Article 4

"1. Each State Party shall ensure that all acts of torture constitute offenses under its criminal law. The same applies to the attempt to practice torture or any act committed by any person which constitutes complicity or participation in the act of torture.

2. Each State Party shall make such offenses punishable by appropriate penalties which take into consideration their seriousness. »

Article 7

"1. The State Party in the territory under whose jurisdiction the alleged perpetrator of an offense referred to in article 4 is discovered, if it does not extradite the latter, shall submit the case, in the cases referred to in Article 5, to its competent authorities for the exercise of criminal action.

5. Adopted and opened for signature, ratification and accession by resolution 39/46 of the United Nations General Assembly of December 10, 1984; entered into force on June 26, 1987.

(...) »

Article 12

"Each State Party shall ensure that the competent authorities immediately carry out an impartial investigation whenever there are reasonable grounds to believe that an act of torture has been committed in any territory under its jurisdiction. »

Article 13

"Each State Party shall ensure to any person who claims to have been subjected to torture in any territory under its jurisdiction the right to lodge a complaint before the competent authorities of that State who will immediately and impartially examine his case. Steps will be taken to ensure the protection of the complainant and witnesses against any ill-treatment or intimidation as a result of the complaint filed or any testimony given. »

Article 14

"1. Each State Party shall guarantee, in its legal system, to the victim of an act of torture, the right to obtain reparation and to be compensated fairly and adequately, including the means necessary for his or her most rehabilitation. complete possible. In the event of the victim's death as a result of an act of torture, the victim's successors are entitled to compensation.

2. This article does not exclude any right to compensation that the victim or any other person would have under national laws. »

K. The United Nations Commission on Human Rights

52. The relevant passages of the resolutions on impunity adopted by this organ reads as follows:

1. Resolution 2002/79, April 25, 2002, and resolution 2003/72, April 25, 2003

"The Commission on Human Rights (...)

2.*Also emphasizes*that it is important to take all necessary and possible measures to ensure that perpetrators of violations of international human rights law and international humanitarian law, as well as their accomplices, are held accountable for their actions, recognizes that there should be no amnesty for perpetrators of violations of international human rights law and international humanitarian law which constitute serious breaches and urges States to act in accordance with their obligations under the law international ;

(...) »

2. Resolution 2004/72, April 21, 2004

"The Commission on Human Rights

(...)

3.*Also considers*that perpetrators of violations of human rights and international humanitarian law which constitute crimes should not be granted amnesty, urges States to act in accordance with their obligations under international law, and welcomes the lifting and cancellation of amnesties and other immunities or the renunciation of both;

(...) »

3. Resolution 2005/81, April 21, 2005

"The Commission on Human Rights (...)

3.*Also considers*that perpetrators of violations of human rights and international humanitarian law which constitute crimes should not be granted amnesty, urges States to act in accordance with their obligations under international law, and welcomes the lifting, rescinding or waiver of amnesties and other immunities, and further notes the conclusion of the Secretary-General that peace agreements endorsed by the United Nations cannot under any circumstances promise amnesty for acts of genocide, crimes against humanity, war crimes, or serious violations of human rights;

(...) »

L. The European Parliament

Resolution A3-0056/93, March 12, 1993

53. The relevant passage from the Resolution on Human Rights in the world and Community policy in this area during the period 1991-1992 is worded as follows:

" The European Parliament

(...)

7. Considers that the problem of impunity (...) can take the form of amnesties, immunities as well as special jurisdictions and hinders democracy by excusing, in fact, human rights violations by those responsible and by disturbing their victims;

8. Declares that there can be no question of impunity for those responsible for war crimes in the former Yugoslavia (...)"

Mr. Special Rapporteur of the United Nations Commission on Human Rights on torture

Fifth report, UN doc. E/CN.4/1998/38, December 24, 1997

54. In 1998, in the conclusions and recommendations of its fifth report on the issue of human rights of all people

subjected to any form of detention or imprisonment, in particular torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur of the United Nations Commission on Human Rights said in relation to the draft statute of an international criminal court:

> "228. In this regard, the Special Rapporteur is aware that it has been insinuated that granting amnesty at the national level could obstruct the exercise of the jurisdiction of the envisaged court. He believes that such an initiative would not simply disrupt the project in question, but would subvert the legality of the international legal order in general. This would seriously undermine the very purpose of the court by allowing states, through their laws, to exclude nationals from its jurisdiction. This would undermine the legality of the international legal order because, as an absolute principle, States cannot invoke their domestic law to escape their obligations under international law. As international law requires States to punish the types of crimes contemplated in the draft statute of the court in general, and torture in particular, and to bring their perpetrators to justice, amnesty for these crimes constitutes *ipso facto* a violation of the obligation of the State concerned to bring the perpetrators to justice. (...) »

N. The International Criminal Tribunal for the Former Yugoslavia

55. The relevant passage from the Furundžija case (judgment of 10 December 1998) reads as follows:

> "155. The fact that torture is prohibited by a peremptory norm of international law has other effects at the interstate and individual levels. At the interstate level, it serves to deprive international legitimacy of any legislative, administrative or judicial act authorizing torture. It would be absurd to assert on the one hand that, given the value of *jus cogens* of the prohibition of torture, treaties or customary rules providing for torture are null and void *ab initio* and to allow, on the other hand, States which, for example, take national measures authorizing or tolerating the practice of torture or amnestying torturers. If such a situation were to arise, national measures violating the general principle and any relevant conventional provision would have the legal effects mentioned above and would, moreover, not be recognized by the international community. Potential victims could, if they have the legal capacity, initiate an action before a competent national or international judicial body in order to obtain that the national measure is declared contrary to international law; they could also initiate an action for compensation before a foreign jurisdiction which would thus be invited, in particular, to take no account of the legal value of the national act authorizing torture. More importantly, torturers carrying out or benefiting from these national measures can nevertheless be held criminally responsible for torture whether in a foreign state or in their own state under a subsequent regime. In summary, individuals are required to respect the principle of the prohibition of torture, even if national legislative or judicial bodies authorize its violation. As the International Military Tribunal at Nuremberg observed, "the international obligations imposed on individuals take precedence over their duty of obedience towards the State of which they are nationals. »

O. The American Convention on Human Rights[6]

56. The relevant passages of this instrument read as follows:

Article 1 – Obligation to respect rights

"1. The States Parties undertake to respect the rights and freedoms recognized in this Convention and to guarantee their free and full exercise to all persons within their jurisdiction, without any distinction based on race, color or sex. , language, religion, political or other opinions, national or social origin, economic situation, birth or any other social condition.

2. For the purposes of this Convention, every human being is a person. »

P. The Inter-American Commission on Human Rights[7]

1. Case 10.287 (El Salvador), report no.o26/92 of September 24, 1992

57. The massacres perpetrated in 1983 in Las Hojas, El Salvador, during of which approximately seventy-four people were allegedly killed by members of the Salvadoran armed forces with the participation of members of the civil defense, gave rise to a petition to the Inter-American Commission on Human Rights. In its report on the case in 1992, it made the following considerations:

"(...)

The application [of the Amnesty Law for National Reconciliation, adopted in 1987 by El Salvador] constitutes a flagrant violation of the obligation of the Salvadoran government to investigate the violations of the rights of the victims of Las Hojas, sanction those responsible and repair the damage resulting from these violations.

(...)

(...) The application in these cases of the amnesty law, with the exclusion of any possibility of judicial reparation in cases of murder, inhuman treatment and non-compliance with judicial guarantees, is a negation of the fundamental nature of the most basic human rights. It removes the means that are perhaps the most effective for giving effect to these rights, namely the trial and punishment of those responsible. »

2. Report on the situation of human rights in El Salvador, OEA/ Ser.L/V/II.85 doc. 28 rev. (February 11, 1994)

58. In 1994, in a report on the situation of human rights in Salvador, the Inter-American Commission on Human Rights spoke

6. Adopted on November 22, 1969 in San José, Costa Rica, at the Inter-American Specialized Conference on Human Rights.
7. Registry translations.

thus regarding the Salvadoran law of general amnesty for the consolidation of peace:

> “(...) regardless of the imperatives arising from the peace negotiations and purely political considerations, the very radical general amnesty law [for the consolidation of peace] adopted by the Salvadoran Legislative Assembly violates the international obligations incumbent on in El Salvador since its ratification of the American Convention on Human Rights, given that this law allows a "reciprocal amnesty" without any prior recognition of responsibilities (...), that it applies to crimes against humanity and that it excludes, primarily for the victims, any possibility of obtaining adequate financial reparation. »

3. Case 10.480 (El Salvador), report no.o1/99 of January 27, 1999

59. In 1999, in a report on a case concerning the amnesty law General for the Consolidation of Peace adopted by El Salvador in 1993, the Inter-American Commission on Human Rights held the following reasoning:

> “113. The Commission emphasizes that [the aforementioned law] was applied to serious human rights violations committed in El Salvador between 1erJanuary 1980 and 1erJanuary 1992, in particular to abuses examined and established by the Truth Commission. In particular, the effects of this law have been extended, in particular, to crimes such as summary executions, acts of torture and forced disappearances. Some of these crimes are considered to be so serious that they have justified the adoption of specific conventions and the introduction of special measures, notably universal jurisdiction and imprescriptibility, to prevent any impunity in this matter. (...)
>
> (...)
>
> 115. The Commission also notes that it appears that Article 2 of [the aforementioned law] was applied to all violations of common Article 3 [of the Geneva Conventions of 1949] and of [Additional Protocol II of 1977] committed by state agents during the armed conflict in El Salvador. (...)
>
> (...)
>
> 123. (...) by approving and implementing the general amnesty law, the Salvadoran State violated the right to judicial guarantees enshrined in Article 8 § 1 of the [1969 American Convention on human rights], to the detriment of the surviving victims of torture and the relatives of (...), who were unable to obtain compensation before the civil courts, all of which must be examined in the light of Article 1 § 1 of the Convention.
>
> (...)
>
> 129. (...) by promulgating and implementing the amnesty law, El Salvador violated the right to judicial protection enshrined in Article 25 of the [1969 American Convention on Human Rights], to the detriment of the victims who survived (...)”

In its findings, the Inter-American Commission on Human Rights declared that El Salvador had "also violated, with respect to

same persons, Article 3 common to the four Geneva Conventions of 1949 and Article 4 of [Additional Protocol II of 1977]". Furthermore, in order to preserve the rights of victims, it recommended that El Salvador, "if necessary, (...) annul this law with retroactive effect."

Q. The Inter-American Court of Human Rights[8]

60. In Barrios Altos v. Peru (merits), judgment of March 14, 2001, series C n°75, which dealt, among other things, with the question of the legality of Peruvian amnesty laws, the Inter-American Court of Human Rights formulated the following considerations:

> "41. This Court considers inadmissible the amnesty provisions, the limitation provisions and the establishment of provisions aimed at the exclusion of liability intended to prevent the investigation and punishment of those responsible for serious violations of human rights. human rights such as torture, summary, extrajudicial or arbitrary executions as well as enforced disappearances, all of which are prohibited because they contravene non-derogable rights recognized by international human rights law.
>
> 42. Considering the pleadings of the Commission and the absence of challenge from the State, the Court considers that the amnesty laws adopted by Peru prevented the families of the victims and the surviving victims in the present case from being heard by a judge (...) ; these laws violated the right to judicial protection (...), prevented the investigation, pursuit, capture, indictment and punishment of those responsible for the events that occurred in Barrios Altos, thus contravening article 1.1 of the [1969 American Human Rights] Convention, and have prevented the clarification of the facts in this case. Finally, the adoption of self-amnesty laws incompatible with the [American Convention on Human Rights of 1969] constitutes a failure to comply with the obligation to adopt measures of domestic law provided for in article 2 of this instrument.
>
> 43. The Court considers it necessary to emphasize that, in light of the general obligations enshrined in Articles 1.1 and 2 of the American Convention, States Parties have the duty to take measures, of whatever nature, to ensure that no one is deprived of judicial protection and the exercise of the right to a simple and effective remedy, in accordance with the terms of articles 8 and 25 of the [American Convention on Human Rights of 1969]. It is for this reason that States parties to the [1969 American Convention on Human Rights] which adopt laws with this effect, such as self-amnesty laws, violate Articles 8 and 25 by relationship with Articles 1.1 and 2 of the [1969 American Convention on Human Rights]. Self-amnesty laws imply, for victims, a denial of justice and the perpetuation of impunity; they are therefore clearly incompatible with the spirit and letter of the American Convention. This type of law prevents any identification of individuals responsible for violations of

8. NDT: French translations of the Barrios Altos v. Peru, Almonacid Arellano and others v. Chile and Gomes Lund and Others v. Brazil are taken from the website of the Inter-American Court of Human Rights. Regarding the Gelman v. Uruguay, the translation is taken from that of the Gomes Lund and others judgment. Footnotes have been omitted. The translation of the other passages cited was carried out by the registry.

human rights, because they hinder the investigation, access to justice and they prevent victims and their families from knowing the truth and obtaining the corresponding reparation.

44. Due to the manifest incompatibility existing between the self-amnesty laws and the American Convention on Human Rights, these laws have no legal effect and cannot remain an obstacle to the investigation of the facts of this case, the identification and punishment of those responsible, nor can they have equal or similar impact on other cases of violations of the rights enshrined in the American Convention which may have taken place in Peru. »

In his concurring opinion, Judge Antônio A. Cançado Trindade added:

"13. International responsibility of the State for violations of internationally enshrined human rights, including violations resulting from the adoption and application of self-amnesty laws, and criminal liability individuality of agents who are perpetrators of serious violations of human rights and international humanitarian law constitute two sides of the same coin in the fight against atrocities, impunity and injustice. We had to wait many years to arrive at this observation, which, if it is possible today, is also attributable, and I allow myself to insist on something which is very dear to me,*awakening of universal legal consciousness*inasmuch as *material source par excellence*of international law itself. »

61. In the case of Almonacid Arellano and others v. Chile (exceptions preliminary proceedings, merits, reparations, costs and expenses), judgment of September 26, 2006, series C no154, the Inter-American Court of Human Rights expressed itself as follows:

"154. With regard to the principle*non bis in idem*, although it is a human right recognized in Article 8.4 of the American Convention, it is not an absolute right and, therefore, is not applicable when: i) deliberations of the Tribunal which judged the case and decided to dismiss the case, or to absolve the person responsible for a violation of human rights or international law, obeyed the desire to shield the accused from his criminal liability; (ii) the investigation of the case was not carried out independently or impartially, in accordance with procedural guarantees, or (iii) there was no genuine intention to subject the responsible individual to action of Justice. A judgment rendered under these conditions renders the res judicata "apparent" or "fraudulent". Furthermore, this Court considers that if new facts or evidence appear, which can make it possible to find those responsible for human rights violations, and even more, the individuals responsible for crimes against humanity, there may be a reopening of the investigation even if there is an absolute judgment for res judicata, because the requirements of justice, the rights of victims and the spirit and letter of the American Convention modify the protection of the*non bis in idem*.

155. In the present case, two of the hypotheses mentioned exist. Firstly, the case was heard by courts without guarantee of competence, independence and impartiality. Secondly, the application of decree-law no.o2.191 aimed to shield those allegedly responsible from justice and to leave the crime committed against Mr. Almonacid Arellano unpunished. Consequently, the State cannot rely on the principle*non bis in idem*, for not carrying out the order of the Court (...) »

62. The Inter-American Court followed the same approach in the case La Cantuta v. Peru (merits, reparations, costs and expenses), judgment of November 29, 2006, series C no162, the relevant passage of which reads:

> “151. In this regard, the Commission and the representatives consider that the State invoked the notion of double criminality to avoid punishing some of the alleged perpetrators of these crimes; However, the rule of double criminality does not apply to the extent that the persons concerned were brought before a court which was incompetent, which was neither independent nor impartial, and which did not meet the conditions governing jurisdiction. Furthermore, the State maintains that "the involvement of other persons for whom criminal responsibility could be held is subject to any new conclusion that the*Ministerio Publico*[public prosecutor] and the courts could take in the context of the investigation and the determination of the sentence", and that "the decision of rejection taken by the military court has no legal value for the preliminary investigation of the public prosecutor's office . In other words, the rule of double criminality does not apply.”
>
> 152. The Court previously formulated the following considerations in its Barrios Altos judgment:
>
> “This Court considers inadmissible the amnesty provisions, the limitation provisions and the establishment of provisions aimed at exclusion of liability intended to prevent the investigation and punishment of those responsible for serious violations of human rights such as torture, summary, extrajudicial or arbitrary executions and enforced disappearances, all of which are prohibited because they contravene non-derogable rights recognized by international human rights law. »
>
> 153. Concerning in particular the notion of double criminality, the Court recently held that the principle*non bis in idem*is not applicable when the procedure in which the case was dismissed or the perpetrator of a human rights violation was acquitted in violation of international law has the effect of shielding the accused from his criminal liability, or when, in disregard of the applicable rules in this area, the procedure was not conducted in an independent and impartial manner. A judgment rendered under these conditions only offers “fictitious” or “fraudulent” grounds for invoking the rule of double criminality.
>
> 154. This is why, in his complaint against the alleged instigators of these crimes (...), who were acquitted by the military courts, the prosecutor*ad hoc*ruled that it was unacceptable to consider the order of acquittal issued by military judges in the context of a procedure aimed at granting impunity to those concerned as a legal obstacle preventing prosecutions or as a final judgment, being given that these judges were neither competent nor impartial and that, therefore, the order could not justify the application of the rule of double criminality. »

63. In the case of Anzualdo Castro v. Peru (preliminary objection, merits, reparations, costs and expenses), judgment of September 22, 2009, series C no202, the Inter-American Court reiterated the following considerations:

> “182. (...) [T]he State is required to remove all obstacles, both factual and legal, hindering the effective conduct of the investigation into the facts and the progress of the related procedure, and to employ all means at its disposal to speed up the investigation and the procedure in question, in order to guarantee that such facts do not

not reproduce. In particular, in a case like this, which concerns an enforced disappearance occurring in the context of a recurring pattern or systematic practice of disappearances attributable to agents of the State, the State must not have the possibility of invoking or applying a law or an internal legal provision, present or future, to avoid complying with the Court's decision ordering it to carry out an investigation and, where appropriate, to penalize those responsible for the acts incriminated. For this reason, in accordance with the Court's doctrine dating back to the Barrios Altos v. Peru, the State can no longer apply amnesty laws, which are devoid of any present or future legal effect (...), invoke principles such as the prescription of criminal actions, the authority of res judicata or double criminality, nor resort to any other measure of exemption from responsibility to avoid its obligation to investigate and punish those responsible. »

64. In the case of Gelman v. Uruguay (merits and reparations), judgment of February 24, 201, series C no221, the Inter-American Court of Human Rights undertook an in-depth analysis of international law as it relates to amnesties granted to perpetrators of serious violations of fundamental human rights. The judgment, in its relevant passages, reads as follows:

“184. The obligation to investigate violations of human rights is among the positive measures to be adopted by States in order to guarantee the rights recognized in the Convention. The duty to investigate is an obligation of means and not of results which must be assumed by the State as its own legal duty and not as a simple formality condemned in advance to be unsuccessful, or as a simple process of interests individuals which depends on the procedural initiative of victims, members of their families, or the private provision of evidentiary elements.

(...)

189. The obligation under international law to bring to trial the perpetrators of human rights violations and, if their criminal responsibility is determined, to adopt punitive measures against them, arises from the the guarantee obligation enshrined in Article 1.1 of the [American] Convention. This obligation implies the duty of States Parties to organize the entire governmental apparatus and, in general, all the structures through which the exercise of public power is manifested, in such a way that they are able to legally ensure the free and full exercise of human rights.

190. As a consequence of this obligation, States must prevent and investigate all violations of the rights recognized by the [American] Convention, punish them, try to restore, to the extent possible, the violated right, and according to the case, obtain reparations for damage caused by the violation of human rights.

191. If the State apparatus acts in such a way that such violations remain unpunished and the victim has not been able to see the fullness of his rights restored, as far as possible, it is possible to affirm that it has not fulfilled its duty to guarantee the free and full exercise of these rights to persons within [its] jurisdiction.

(...)

195. Amnesties or similar legal arrangements have been one of the obstacles alleged by some States to excuse themselves from [not] carrying out an investigation into the

responsible for serious violations of human rights and, where appropriate, to punish them. This Tribunal, the Inter-American Commission on Human Rights, United Nations bodies and other universal and regional human rights organizations have ruled on the incompatibility of amnesty laws relating to serious violations of human rights with international law and the international obligations of States.

196. As already mentioned above, this Court has ruled on the incompatibility of amnesties with the American Convention in cases of serious violations of human rights in Peru (Barrios Altos and La Cantuta cases), in Chile (Almonacid Arellano case and others) and in Brazil (Gomes Lund case and others).

197. In the Inter-American System of Human Rights, a mechanism of which Uruguay is a member by sovereign decision, pronouncements on the incompatibility of amnesty laws with respect to the treaty obligations of States when they serious human rights violations have been reiterated. In addition to the aforementioned decisions of this Tribunal, the Inter-American Commission has concluded, in this case and in others relating to Argentina, Chile, El Salvador, Haiti, Peru and Uruguay that these laws of amnesty are incompatible with international law. Likewise, the Commission recalled the following:

> "The Inter-American Commission has ruled on many key cases in which it has had the opportunity to express its point of view and crystallize its doctrine regarding the application of amnesty laws, establishing that these laws violate various provisions of both the American Declaration and the Convention. These decisions, which are consistent with the standard of other international human rights bodies regarding amnesties, have uniformly proclaimed that both amnesty laws and comparable legislative measures that prevent or terminate investigations and Judgments by agents of [a] State who could be held responsible for serious violations of the Convention or the American Declaration violate multiple provisions of these instruments. »

198. On a universal level, in its report to the Security Council on *the rule of law and the administration of justice during the transition period in conflict and post-conflict societies*, the Secretary General of the United Nations pointed out that:

> "(...) peace agreements approved by the United Nations can never promise amnesties for crimes of genocide, war or against humanity or for serious offenses against human rights (...) »

199. Along the same lines, the Office of the United Nations High Commissioner for Human Rights concluded that amnesties and other similar measures contribute to impunity and constitute an obstacle to the right to the truth by opposing an investigation. exhaustive on the facts and are therefore inconsistent with the obligations incumbent on States under various sources of international law. Furthermore, regarding the false dilemma between peace or reconciliation, on the one hand, and justice, on the other, he said the following:

> "[a]mnesties which exempt from criminal sanctions the perpetrators of heinous crimes in the hope of obtaining peace have often failed in their objective and have instead encouraged their beneficiaries to reoffend. On the other hand, peace agreements were signed without being accompanied by amnesty measures in cases where amnesty was

considered a condition *sine qua non* of peace and where many feared that the indictments would prolong the conflict. »

200. In line with the above, the United Nations Special Rapporteur on the question of impunity noted that:

"[t]he perpetrators of the violations will not be eligible for amnesty until the victims have obtained justice through an effective remedy. Legally, it will not produce its effects with regard to the actions of victims linked to the right to reparations. »

201. The United Nations General Assembly stated in Article 18 of the Declaration on the Protection of All Persons from Enforced Disappearances that "perpetrators and presumed perpetrators [of enforced disappearances] cannot benefit from "no special amnesty law or other similar measures which would have the effect of exempting them from any criminal prosecution or sanction".

202. The World Conference on Human Rights held in Vienna in 1993, in its Declaration and Program of Action, emphasized that States "should repeal laws which ensure, in effect, impunity for those responsible for serious violations of human rights [...], and they should prosecute the perpetrators of these violations", emphasizing that, in the event of enforced disappearances, States have the overriding obligation to prevent them and, if they occur , to bring their perpetrators to justice.

203. The United Nations Working Group on Enforced or Involuntary Disappearances has dealt with the theme of amnesties in cases of enforced disappearances on different occasions. In his General Comment regarding article 18 of the Declaration on the Protection of All Persons from Enforced Disappearances, he stressed that it is considered that an amnesty law is contrary to the provisions of the declaration, even when it has been approved by referendum or by means of a similar consultation procedure if, directly or indirectly, because of its application or implementation, the obligation of a State to investigate, indict and to punish those responsible for the disappearances, if they hide the name of anyone who may have committed these acts or if they exonerate them.

204. Furthermore, the same Working Group expressed its concern regarding post-conflict situations in which amnesty laws are promulgated or in which other measures are adopted which result in impunity, and reminded States that :

"to combat disappearance, the application of effective preventive measures is essential, [among which] special attention is drawn to the following measures: (...) the submission to justice of all persons accused of having committed acts of enforced disappearance, ensuring that they are judged only by competent civil courts and do not benefit from a special amnesty law or other similar measures likely to exempt them from prosecution or criminal sanctions ; providing appropriate reparations and compensation to victims and their families. »

205. Likewise, the universal domain, the bodies for the protection of human rights established by means of treaties have retained the same criterion with regard to prohibiting amnesties which hinder the investigations and the sanction of the perpetrators of serious violations of the human rights. In its General Observation n°31, the Human Rights Committee has stated that States must ensure that perpetrators of offenses amounting to crimes under international or national law, such as torture and

other cruel, inhuman or degrading treatment, summary and arbitrary executions and forced disappearances, must appear before the courts and cannot exonerate their perpetrators from legal responsibility, as has happened in the case of certain amnesties.

206. The Human Rights Committee has spoken out in this regard in its treatment of individual petitions and in its country reports. In the case of Hugo Rodríguez v. Uruguay, he declared that he could not accept the position of a State which did not consider itself obliged to investigate human rights violations that occurred during a previous regime under an amnesty law, and affirmed again that amnesties relating to serious violations of human rights are incompatible with the International Covenant on Civil and Political Rights, indicating that the latter contribute to generating an atmosphere of impunity likely to undermine order democratic and give rise to serious violations of human rights.

(...)

209. Still concerning the universal domain, in another branch of international law, international criminal law, amnesties or similar regulations have also been deemed inadmissible. The International Criminal Tribunal for the former Yugoslavia, in a case relating to torture, considered that it made no sense, on the one hand, to support the proscription of serious human rights violations and, on the other hand, to allow the taking of state measures which authorize or pardon them, or amnesty laws which absolve their perpetrators. In this same vein, the Special Court of Sierra Leone found that the amnesty laws of this country are not applicable to serious international crimes. This universal trend was reinforced by the introduction of the norm mentioned in the development of the statutes of the special tribunals most recently created under the aegis of the United Nations. This is why both the agreements concluded between the United Nations with the Republic of Lebanon and the Kingdom of Cambodia and the statutes which created the Special Court for Sierra Leone and the Extraordinary Chambers within the Cambodian courts included in their texts of the clauses which stipulate that the amnesties granted will not constitute an obstacle to the prosecution of the perpetrators of these offenses which fall within the jurisdiction of these courts.

210. Similarly, interpreting Article 6 § 5 of Additional Protocol II to the Geneva Conventions on International Humanitarian Law, the ICRC declared that amnesties could not protect perpetrators of war crimes:

> "[w]hen it adopted paragraph 5 of Article 6 of Additional Protocol II, the USSR stated in the reasoning of its opinion that this provision could not be interpreted in such a way as to permit war criminals or others guilty of crimes against humanity to escape severe sanctions. The ICRC subscribes to this interpretation. Nor would an amnesty be compatible with the rule requiring States to investigate and prosecute persons suspected of having committed war crimes in non-international armed conflicts. (...) »

211. This norm of international humanitarian law and this interpretation of Article 6 § 5 of the Protocol were adopted by the Inter-American Commission on Human Rights and by the United Nations Human Rights Committee.

212. Courts and bodies of all regional human rights systems have also affirmed that amnesties covering serious human rights violations contravene international law.

213. In the European system, the European Court of Human Rights has held that for the purposes of an effective remedy, it is imperative that criminal proceedings relating to crimes such as torture, which involve serious violations of human rights of man, are not subject to any prescription and that no amnesty or pardon is tolerated towards them. In other cases, it has emphasized that, when a public official is accused of crimes contrary to Article 2 of the European Convention on Human Rights (right to life), the criminal procedure and the judgment must not be obstructed and the granting of amnesty is not permitted.

214. The African Commission on Human and Peoples' Rights has considered that amnesty laws cannot exempt the State which adopts them from its international obligations; she further declared that prohibiting the prosecution of perpetrators of serious human rights violations through amnesties would lead States to promote not only impunity, but would remove any possibility of investigating these abuses and would deprive the victims of these crimes of an effective remedy for the purpose of obtaining reparations.

(...)

F. Amnesty laws and the jurisprudence of the Inter-American Court

225. The Inter-American Court found “inadmissible the amnesty provisions, the statute of limitations provisions and the establishment of provisions aimed at exclusion of liability intended to prevent the investigation and punishment of those responsible for serious violations of human rights of human rights such as torture, summary, extrajudicial or arbitrary executions as well as enforced disappearances, all of which are prohibited because they contravene the non-derogable rights recognized by international human rights law.

226. In this sense, in cases of serious violations of human rights, amnesty laws are expressly incompatible with the letter and spirit of the Pact of San José, given that they violate the provisions of articles 1.1 and 2, that is to say, they prohibit any investigation into serious violations of human rights and any sanction of their perpetrators and that they consequently hinder the right of victims and their families to know the truth about what happened and to obtain corresponding redress, thereby preventing justice from fully, effectively and timely doing its work in relevant cases. These laws therefore promote impunity and arbitrariness and seriously undermine the rule of law, which is why, under international law, they are deemed to be devoid of any legal effect.

227. In particular, amnesty laws undermine the State's international duty to investigate and punish serious human rights violations because they prevent victims' relatives from being heard by a magistrate, in accordance with what is stipulated in Article 8.1 of the American Convention and thus violate the right to judicial protection enshrined in Article 25 of this same instrument precisely given the absence of investigation, prosecution, capture, judgment and sanction of the perpetrators, not giving effect to Article 1.1 of the Convention.

228. In light of the general obligations enshrined in Articles 1.1 and 2 of the American Convention, States Parties are required to adopt provisions of all kinds so that no one is removed from judicial protection or prevented from exercising their right to simple and effective remedy, as stipulated in Articles 8 and 25 of the Convention. Once the Convention has been ratified, the State is required, in accordance with Article 2 thereof, to adopt all measures to ensure that

legal provisions likely to be contrary to it are devoid of effect, as is the case of norms preventing the investigation of serious human rights violations since they deprive victims of their right to defense and perpetuate the impunity, while preventing victims and their loved ones from knowing the truth about the facts.

229. The incompatibility with the Convention includes amnesties granted for serious human rights violations and is not limited only to "self-amnesties" as they are called. Thus, the Court focuses more on its *ratio legis* the adoption process and the authority issuing the amnesty law: leaving serious violations committed under international law unpunished. The incompatibility of amnesty laws with the American Convention in serious cases of human rights violations does not arise from a formal question, such as its origin, but from the material aspect since the rights are violated. rights enshrined in Articles 8 and 25, in conjunction with Articles 1.1 and 2 of the Convention.

G. The investigation into the facts and the Uruguayan law of expiration

(...)

240. (...) by applying provisions of the expiry law (which, for all intents and purposes, constitutes an amnesty law) and therefore by hindering the investigation of the facts as well as the identification, prosecution and the possible sanction of possible perpetrators of continuous and permanent damage such as that caused by enforced disappearance, the State has not complied with its obligation to adapt its domestic law enshrined in Article 2 of the Convention. »

65. In the case of Gomes Lund and others v. Brazil (exceptions preliminary proceedings, merits, reparations, costs and expenses), judgment of November 24, 2010, series C n$_{o}$219, the Inter-American Court again vigorously opposed amnesties granted to perpetrators of serious violations of fundamental human rights. After invoking the same norms of international law as in the aforementioned Gelman case, the Inter-American Court expressed itself as follows:

"170. As is clear from the content of the preceding paragraphs, all international human rights protection bodies and the various national High Courts in the region which have had the opportunity to rule on the scope of amnesty laws in cases of serious violations of human rights and their incompatibility with the international obligations of the States which promulgate them have concluded that the latter violate the obligation of the State to investigate and punish such violations.

171. This Court has already ruled previously on this question and does not find the legal basis to deviate from its constant jurisprudence, which, moreover, is consistent with what has been unanimously established by international law and by the precedents of the organs of the universal and regional systems for the protection of human rights. So that, for the purposes of the present case, the Court reiterates that "are not admissible the provisions of amnesty, the provisions on limitation and the establishment of clauses excluding all liability and which aim to prevent investigate and punish the perpetrators of serious human rights violations such as torture, summary, extralegal or arbitrary executions as well as forced disappearances, all of which are prohibited because they contravene human rights

recognized by international human rights law and from which no derogation may be made.

(...)

175. With regard to the parties' allegations as to whether it was an amnesty, a self-amnesty or a "political agreement", the Court observes, as is apparent from the criterion reiterated in present case (paragraph 171 above), that the incompatibility with the Convention includes amnesties granted for serious human rights violations and is not limited only to “self-amnesties” as they are called. Thus, as noted previously, the Court focuses more on its*ratio legis*as well as the adoption process and the authority issuing the amnesty law: leaving serious violations of international law committed by the military regime unpunished. The incompatibility of amnesty laws with the American Convention in serious cases of human rights violations does not arise from a formal question, such as its origin, but from the material aspect since the rights are violated. rights enshrined in Articles 8 and 25, in conjunction with Articles 1.1 and 2, of the Convention.

176. This Court has established, in its jurisprudence, that it is aware that domestic authorities are subject to the rule of law and, therefore, they are required to apply the provisions in force in the legal order. However, when a State is party to an international treaty such as the American Convention, all its organs, including judges, are also subject to it, hence their obligation to ensure that the effects of the provisions of the the Convention are not diminished by the application of norms contrary to its object and purpose and which, from the outset, are deprived of legal effects. This is how the judiciary is required, at the international level, to exercise “control of conventionality”*ex officio*between internal standards and the American Convention, within the framework, of course, of its competences and the related procedural regulations. In this function, the Judicial Power must not only take into account the treaty, but also the interpretation given to it by the Inter-American Court, the final interpreter of the American Convention. »

66. More recently, in Massacres of El Mozote and neighboring places vs. Salvador (merits, reparations, costs and expenses), judgment of October 25, 2012, series C n°252, the Inter-American Court of Human Rights expressed itself as follows:

“283. In the cases of Gomes Lund and others v. Brazil and Gelman v. Uruguay, on which it ruled within its area of jurisdictional competence, the Court has already described and developed in detail how it itself, the Inter-American Commission on Human Rights, the organs of the United Nations as well as other universal bodies and regional human rights protection bodies have spoken out about the incompatibility of amnesty laws with international law and the international obligations of States in relation to serious human rights violations. Amnesties or similar legal mechanisms have in fact been one of the obstacles invoked by certain States to not comply with their obligation to investigate serious violations of human rights, to prosecute and punish, where appropriate. , the responsibles. Furthermore, various member states of the Organization of American States, through their highest judicial authorities, have applied the standards in question while respecting their international obligations in good faith. The Court therefore recalls, for the purposes of this case, the inadmissible nature of "the provisions relating to amnesty, limitation and

liability waivers which aim to prevent, in the case of serious human rights violations such as torture, summary, extrajudicial or arbitrary executions or enforced disappearances, all of which are prohibited on the grounds that they contravene the non-derogable rights recognized by international human rights law, that an investigation can be carried out into the facts and that those responsible can be punished.

284. However, unlike the cases already examined by the Court, the present case concerns a general amnesty law relating to acts committed in the context of an internal armed conflict. The Court therefore considers it relevant to analyze the compatibility of the general amnesty law for the consolidation of peace with the international obligations arising from the American Convention and the application of this law to the Massacres case. of El Mozote and neighboring places in light of the provisions of Additional Protocol II to the Geneva Conventions of 1949 as well as the terms of the cessation of hostilities agreement which ended the conflict in El Salvador, in particular article 5 ("End of impunity") of Chapter I ("Armed Forces") of the Peace Agreement of January 16, 1992.

285. According to international humanitarian law applicable to these situations, the adoption of amnesty laws upon the cessation of hostilities in the event of a non-international armed conflict can sometimes be justified to facilitate the return to peace. Indeed, Article 6 § 5 of Additional Protocol II to the Geneva Conventions of 1949 provides that:

"Upon the cessation of hostilities, the authorities in power will endeavor to grant the broadest possible amnesty to persons who have taken part in the armed conflict or who have been deprived of their liberty for reasons relating to the armed conflict, whether they are interned or detained. »

286. This standard is not absolute, however, as States also have, under international humanitarian law, an obligation to investigate and prosecute war crimes. Therefore, "persons suspected or accused of having committed war crimes or convicted of this charge" cannot be covered by an amnesty. Article 6 § 5 of Additional Protocol II can therefore be understood as aiming at broad amnesties applicable to persons having taken part in a non-international armed conflict or deprived of their liberty for reasons linked to this armed conflict, provided that this does not does not involve facts, such as those at issue in the present case, likely to be classified as war crimes, or even crimes against humanity. »

A. The Extraordinary Chambers in the Cambodian Courts[9]

67. In their decision relating to the appeal filed by Ieng Sary against the closure order (case no.o002/19 09-2007-ECCC/OCIJ (PTC75)) of April 11, 2011, the Extraordinary Chambers within the Cambodian courts expressed themselves as follows regarding the effects of the amnesty on prosecutions:

"199. The crimes included in the Closure Order, namely genocide, crimes against humanity, serious violations of the Geneva Conventions, as well as

9. NDT: original French text reproduced on the website of the Extraordinary Chambers in the Cambodian Courts (footnotes omitted).

homicide, torture and religious persecution as crimes under Cambodian law, not being offenses under the 1994 Law, remain prosecutable under existing criminal law, whether domestic or international, even if they are attributed to presumed members of the Democratic Kampuchea group.

(...)

201. The interpretation of the Royal Decree put forward by Ieng Sary's co-lawyers, which amounts to saying that he was pardoned for all crimes committed during the Khmer Rouge era, including all crimes included in the Closure Order, is contrary both to the text of the Royal Decree, considered in conjunction with the 1994 Law, and to Cambodia's international obligations. In the case of genocide, torture and serious violations of the Geneva Conventions, the amnesty preventing all prosecutions and sanctions would go against the treaties which oblige Cambodia to prosecute and punish the perpetrators of these crimes, namely the Convention on genocide, the Convention against Torture and the Geneva Conventions. Cambodia, which ratified the International Covenant, also had and continues to have the obligation to ensure that victims of crimes against humanity, which by definition involve serious violations of human rights, have access to a useful remedy. This obligation generally involves the State prosecuting and punishing the perpetrators of violations. Granting amnesty for crimes against humanity, that is to say decreeing the abolition and forgetting of the offenses committed, would have been contrary to the obligation made to Cambodia by the International Covenant to prosecute and punish perpetrators of serious human rights violations or to ensure that victims have an effective remedy. As there is no basis for concluding that the King (and this applies to the other persons involved) intended, in issuing the Royal Decree, not to respect Cambodia's international obligations, the interpretation of this document put forward by the co-lawyers is deemed unfounded. . »

S. The Special Court for Sierra Leone

68. On March 13, 2004, the Appeals Chamber of the Special Tribunal for Sierra Leone, in business nboneSCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), adopted its decision on the objection of lack of jurisdiction: amnesty provided for by the Lomé Agreement, in which it made the following observations:

“82. The prosecution's argument that “a norm takes shape in international law according to which a government cannot grant amnesty to the perpetrators of serious violations constituting international crimes” is amply supported by the evidence produced before the Tribunal. The opinion of both*amici curiae*that this trend has crystallized may not be entirely correct but, when it comes to forming its own opinion, the Court sees no reason to ignore the solidity of their argument and the weight of the elements they have produced behind him. It is recognized that such a norm is developing in international law. Mr. Kallon's lawyer said that, so far, the idea that amnesties are illegal under international law is not universally accepted but, as Professor Orentlicher insists, several treaties require that such crimes be prosecuted, in particular the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the four Geneva Conventions. Furthermore, of

Numerous resolutions of the General Assembly and the United Nations Security Council reaffirm the obligation of States to pursue and bring to justice the perpetrators of such crimes. The REDRESS organization notably annexed to its written observations the relevant conclusions of the Committee against Torture, findings of the Commission on Human Rights and the relevant judgments of the Inter-American Court of Human Rights.

(...)

84. Even if it is accepted that Sierra Leone did not violate customary law in granting an amnesty, the Tribunal, in the exercise of its discretion, is entitled not to give great weight or not give any weight at all to the granting of an amnesty which goes against the current evolution of customary international law and which disregards the obligations arising from certain treaties and conventions whose aim is the protection of humanity. »

PLACE

I. ON THE ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 OF THE CONVENTION

69. The applicant complains that the same judge participated so much in the proceedings which ended in 1997 and that following which he was found guilty in 2007. He further claims to have been deprived of his right to present his final conclusions. He relies on Article 6 §§ 1 and 3 of the Convention, the relevant passages of which read as follows:

"1. Everyone has the right to have his or her case heard fairly (...) by an independent and impartial tribunal, (...) which will decide (...) the merits of any criminal charge against her. (...)

(...)

3. Every accused person has the right in particular to:

(...)

c) defend himself or have the assistance of a defender of his choice and, if he does not have the means to pay a defender, be able to be assisted free of charge by an ex officio lawyer, when the interests of justice demands it;

(...) »

A. The Chamber's conclusions

70. While noting that Judge MK had participated in both criminal proceedings in question at the stage of the first instance, the chamber considered that the first procedure had not given rise to an assessment of the facts nor to the examination of the question of the guilt of the

applicant, and that Judge MK had not expressed an opinion on any aspect of the merits of the case.

71. Therefore, for the Chamber, there was nothing to conclude that there was a defect of impartiality on the part of Judge MK

72. As for the expulsion of the applicant from the courtroom, the chamber considered that this measure had not violated the right of the person concerned to defend himself since, on the one hand, he had been invited twice not to interrupt the prosecutor while the latter presented his final conclusions, and, on the other hand, that his lawyer, who remained in the room, had been able to formulate his own.

B. The parties' observations before the Grand Chamber

1. The applicant

73. The applicant calls into question the impartiality of Judge MK, criticizing the latter to have first adopted, on the basis of the general amnesty law, a decision putting an end to the criminal proceedings against him, to then participate in the criminal proceedings at the end of which he was sentenced for some of the charges made in the first procedure.

74. The applicant explains that on March 19, 2007, after several hours of hearing, he was no longer able, due to his mental illness and diabetes, to control his reactions. No doctor being present to monitor his condition, he then uttered incomprehensible words while the prosecutor presented his final conclusions, but he neither insulted nor interrupted him. Contrary to what the Government claimed, he was not warned twice by the president of the court before being expelled from the courtroom. He would not have been allowed to re-enter the courtroom when the time came for him to present his closing arguments. The possibility that his lawyer would have had to present his final conclusions would not compensate for the impossibility of doing so himself. In the context of criminal proceedings, the accused could confess or show repentance, which could be considered as mitigating circumstances, and the defense lawyer could not take his place in this regard. The applicant therefore considers that the court of first instance should have had the opportunity to hear him present his final conclusions himself.

2. The Government

75. The Government concedes that Judge MK participated in both criminal proceedings against the applicant. As regards the question of subjective impartiality, he considers that the applicant has not produced

no evidence to rebut the presumption of impartiality in relation to Judge MK

76. With regard to objective impartiality, the Government explains that the first procedure did not give rise to an assessment of either the facts of the case or the merits of the murder charges leveled against the applicant. Thus, in the context of these proceedings, Judge MK did not express any opinion regarding the applicant's actions capable of prejudging his conduct in the second proceedings. Furthermore, the outcome of the first procedure would have been favorable to the applicant. It would only be at the end of the second procedure that a judgment on the merits would have been adopted including an assessment of the facts of the case and the guilt of the applicant. In both proceedings, Judge MK only heard the case at first instance and did not participate in the examination of the case at the appeal stage in either procedure.

77. The Government indicates that the applicant was informed of the accusations against him and evidence against him. The applicant was allegedly represented by a court-appointed lawyer throughout the proceedings and each time he disapproved of the way his lawyer approached the case, he was assigned another one. The applicant and his lawyer would have had ample opportunity to prepare their line of defense and to communicate in complete confidentiality. They would both have been present at all the hearings and they would have had complete freedom to respond to the prosecution's arguments.

78. As for the closing hearing, the Government explains that the Both the applicant and his lawyer were present at the start of the hearing, but during the hearing the applicant only ranted and shouted. The president of the court allegedly warned the person concerned twice and it was only after finding that this had no effect that he ordered his expulsion from the courtroom.

79. This expulsion would therefore have been a last-ditch measure, taken by the president of the court to maintain order in the courtroom.

80. The Government further indicates that if the applicant had wanted to confess or show repentance, he would have had ample opportunity to do so during the trial.

81. He adds that when the applicant was expelled from the room hearing, all the evidence had already been administered.

82. Finally, he recalls that the applicant's lawyer remained in the room hearing and was able to present his final conclusions.

83. Having regard to the above considerations, the Government considers that the applicant's right to defend himself or through a lawyer was not hindered in any way.

C. Assessment of the Grand Chamber

1. The question of Judge MK's impartiality

84. The Chamber's assessment, in its relevant passages, reads as follows:

> "43. The Court recalls that the impartiality of a court within the meaning of Article 6 § 1 is assessed according to a twofold approach: the first consists of trying to determine the personal conviction of a given judge on a given occasion; the second involves ensuring that it offered sufficient guarantees to exclude any legitimate doubt in this regard (see, among others, *Gautrin and others v. France*, May 20, 1998, § 58, *Collection of judgments and decisions* 1998-III).
>
> 44. In the context of the subjective approach, the Court first recalls that the personal impartiality of a magistrate is presumed until proven otherwise (*Wettstein v. Swiss*, not o 33958/96, § 43, ECHR 2000-XII). In the present case, the Court considers that the evidence is not sufficient to establish that Judge MK displayed personal prejudices when he sat in the Osijek County Court which sentenced the applicant to a sentence of fourteen years' imprisonment for war crimes against the civilian population.
>
> 45. As for the objective approach, it consists of asking whether, independently of the personal conduct of the judge, certain verifiable facts allow the impartiality of the latter to be called into question. It follows that, to rule on the existence, in a given case, of a legitimate reason to fear a judge's lack of impartiality, the point of view of the person concerned comes into play but does not does not play a decisive role. The determining factor is whether the apprehensions of the person concerned can be considered objectively justified (*Ferrantelli and Santangelo v. Italy*, August 7, 1996, § 58, *Collection* 1996-III, *Wettstein*, cited above, § 44, and *Micallef v. Malta*, not o 17056/06, § 74, January 15, 2008). In this matter, even appearances can be important; as an English adage says, "*justice must not only be done, it must also be seen to be done*» (not only must justice be done, but we must also see that it is done) (*De Cubber v. Belgium*, October 26, 1984, § 26, series A n o 86, *Mežnarić v. Croatia*, not o 71615/01, § 32, July 15, 2005, and *Micallef*, cited above, § 75).
>
> 46. In the present case, the Court notes that Judge MK did participate both in the criminal proceedings conducted before the Osijek County Court under number K-4/97 and in those brought against the applicant before the same court under number K-33/06. The charges against the applicant in these two proceedings coincide to a certain extent (paragraph 66 below).
>
> 47. The Court further notes that the two proceedings were conducted at first instance, that is to say at the merits stage. The first procedure ended in application of the general amnesty law, the trial court having considered that the facts of which the applicant was accused fell within the scope of the general amnesty. This procedure did not give rise to either an assessment of the facts or an examination of the question of the applicant's guilt. Judge MK therefore expressed no opinion on any aspect of the merits of the case. »

85. The simple fact that a trial judge has already taken decisions concerning the same offense cannot be considered to justify in itself apprehensions as to its impartiality (*Hauschildt v. Denmark*, May 24, 1989, § 50, series A n o 154, and *Romero Martin v. Spain* (dec.),

not 32045/03, June 12, 2006, concerning interlocutory decisions; *Ringeisen v. Austria*, July 16, 1971, § 97, series A n 13, *Diennet v. France*, September 26, 1995, § 38, series A n 325-A, and *Vaillant c. France*, not 30609/04, §§ 29-35, December 18, 2008, regarding the situation where a case has been remanded for reconsideration after reversal or annulment of a decision by a higher court; *Thomann v. Swiss*, June 10, 1996, §§ 35-36, *Collection* 1996-III, concerning the retrial of a defendant convicted in absentia; And *Craxi III c. Italy* (dec.), n 63226/00, June 14, 2001, and *Ferrantelli and Santangelo,* cited above, § 59, concerning the situation where judges had participated in proceedings against co-defendants of the applicants).

86. For the Court, we cannot see a legitimate reason to fear a default of impartiality in the circumstance that the same judge participated in the adoption of a decision at first instance, then took part in the procedure opened after the referral of the case for reconsideration following the annulment of this decision. It cannot be established as a general principle arising from the duty of impartiality that a court of appeal which annuls a judicial decision has the obligation to refer the case to a differently constituted body of the court of first instance (*Ringeisen*, cited above, § 97).

87. This case does not concern a situation where the first decision would have been overturned and the case sent back for retrial following a regular appeal; in this case, a new indictment was issued against the applicant in relation to partly identical charges. However, the Court considers that the principles set out in paragraph 85 above are also applicable in the present case. The simple fact that Judge MK participated both in the criminal proceedings before the Osijek County Court under number K-4/97 and in the criminal proceedings against the applicant before the same court under number K- 33/06 should not be considered incompatible in itself with the requirement of impartiality set out in Article 6 of the Convention. Furthermore, Judge MK, in the context of the first procedure, did not adopt a judgment concluding on the guilt or innocence of the applicant, and he did not at any time engage in the assessment of evidence relevant to the decision to be taken on this issue (paragraph 17 above). It limited itself to examining whether the conditions required for the application of the general amnesty law were met in the applicant's case.

88. In these conditions, the Court considers that there was no fact verifiable reason to doubt MK's impartiality and that the applicant also had no legitimate reason to cast doubt on it.

89. The foregoing considerations are sufficient for the Court to conclude that there was no violation of Article 6 § 1 of the Convention as regards the question of the impartiality of judge MK

2. Expulsion of the applicant from the courtroom

90. The chamber made the following assessment of the applicant's complaint:

"50. The Court observes first of all that it is not its task to resolve the dispute between the parties as to whether the Osijek County Court acted in accordance with the relevant provisions of the Croatian Code of Procedure criminal when he expelled the applicant from the courtroom during the closing hearing. Its role is rather to assess whether, with regard to the Convention, the applicant's rights of defense have been respected to a degree satisfactory to the guarantees of fairness enshrined in Article 6 of the Convention. In this regard, the Court recalls at the outset that the requirements of paragraph 3 of Article 6 represent particular aspects of the right to a fair trial guaranteed by paragraph 1 (see, among others,*Balliu v. Albania*, not74727/01, § 25, June 16, 2005). It is in reality for the Court to determine whether, considered as a whole, the criminal proceedings brought against the applicant were fair (see, among others,*Imbrioscia v. Swiss*, November 24, 1993, § 38, series A n275,*SN v. Sweden*, not 34209/96, § 43, ECHR 2002-V, and*Vanyan v. Russia*, not53203/99, §§ 63-68, December 15, 2005).

51. The Court accepts that the final submissions represent an important stage of the trial, since it is the only opportunity that the parties have to give orally their point of view on the entire case and on the all the evidence produced before the court, and to present their analysis of the case. However, when the accused disrupts the proper conduct of the hearing, the court cannot be expected to remain passive and allow such behavior. It is the normal duty of the court to maintain order in the courtroom, and the rules provided for this purpose apply equally to everyone present, including the accused.

52. In the present case, the applicant was twice asked not to interrupt the final submissions of the deputy prosecutor at the Osijek County Court. It was only later, because he did not comply with this invitation, that he was removed from the courtroom. However, his defense lawyer remained in the room and presented his final submissions. Therefore, the applicant was not denied the opportunity to make his final point of view known through his lawyer. In this regard, the Court also notes that the applicant, who was represented by a lawyer throughout the procedure, had ample opportunity, before the closing hearing, to develop his defense strategy and discuss with his lawyer the points to be developed in his final conclusions.

53. In these circumstances, the Court, considering the procedure as a whole, considers that the expulsion of the applicant from the courtroom during the closing hearing did not infringe the rights of the defense to a degree incompatible with the requirements of a fair trial.

54. Therefore, the Court considers that there has been no violation of Article 6 §§ 1 and 3 c) of the Convention in this regard. »

91. Subscribing to the reasoning of the chamber, the Grand Chamber concludes that there has been no violation of Article 6 §§ 1 and 3 c) of the Convention in relation to the expulsion of the applicant from the courtroom.

II. ON THE ALLEGED VIOLATION OF ARTICLE 4 OF PROTOCOL No.7 TO THE CONVENTION

92. The applicant maintains that the criminal offenses at issue in the proceedings which ended in 1997 and those of which he was found guilty in 2007 were the same. He invokes Article 4 of Protocol No.7 of the Convention, worded as follows:

> "1. No one may be prosecuted or punished criminally by the courts of the same State because of an offense for which he has already been acquitted or convicted by a final judgment in accordance with the law and criminal procedure of that State.
>
> 2. The provisions of the preceding paragraph do not prevent the reopening of the trial, in accordance with the law and criminal procedure of the State concerned, if new or newly revealed facts or a fundamental defect in the previous procedure are of a nature to affect the judgment reached.
>
> 3. No derogation is permitted from this article under article 15 of the Convention. »

A. Compatibility *ratione temporis*

1. Chamber findings

93. In its judgment of 13 November 2012, the chamber considered that the complaint based on Article 4 of Protocol No.7 to the Convention was compatible *ratione temporis* with the Convention. She expressed herself as follows:

> "58. The Court notes that the first criminal proceedings against the applicant actually ended before the entry into force of the Convention with regard to Croatia. On the other hand, the second criminal proceedings, after which the applicant was found guilty of war crimes against the civilian population, took place and concluded after 5 November 1997, the date on which Croatia ratified the Convention. . The right not to be tried or punished twice for the same facts cannot be excluded in relation to a procedure carried out before ratification since the person concerned was convicted of the same offense after ratification of the Convention. The simple fact that the first procedure ended before this date cannot therefore prevent jurisdiction. *ratione temporis* of the Court in this case. »

2. Observations of the parties before the Grand Chamber

94. The Government indicates that the decision amnestying the applicant was was adopted on June 24, 1997 and notified to the person concerned on July 2, 1997, although the Convention entered into force with regard to Croatia on November 5, 1997. He concludes that the decision in question does not fall within the scope of the temporal jurisdiction of the Court.

95. The applicant did not make any observations on this point.

3. Assessment of the Grand Chamber

96. The decision amnestying the applicant was adopted on June 24, 1997, while the Convention and Protocol No. 7 entered into force with respect to Croatia on November 5, 1997 and on November 1, February 1998 respectively. The Court must therefore consider the question of its jurisdiction *ratione temporis*.

97. The Grand Chamber agrees with the conclusions of the chamber as to compatibility *ratione temporis* with the Convention of the applicant's complaint under Article 4 of Protocol No. 7. She also refers to the opinion formulated by the Commission in the case *Gradinger v. Austria* (May 19, 1994, opinion of the Commission, §§ 67-69, series A no 328-C):

> "67. The Commission recalls that, in accordance with generally recognized principles of international law, the Convention and its Protocols bind the Contracting Parties only in relation to facts occurring after the entry into force of the Convention or the Protocol with regard to the part in question.
>
> 68. The nature of the right set out in Article 4 of Protocol No. 7 requires that two procedures have taken place: a first procedure, by which the person concerned will have been "acquitted or convicted by a final judgment", and a subsequent procedure, during which a person could have "been [again] prosecuted [e] or punish[e]" by the courts of the same State.
>
> 69. The Commission adds that, when examining the fairness of a procedure, it is entitled to consider incidents prior to the entry into force of the Convention with regard to a State when the findings relating to to these previous incidents appear in a judgment rendered after said entry into force (*X c. Portugal*, not 9453/81, Commission decision of December 13, 1982, DR 31, pp. 204-207). The essential element of Article 4 of Protocol No. 7 is the risk of being "again" prosecuted or punished. The first procedure provides only a background to the consideration of the second. In the present case, the Commission considers that if the final decision in the second procedure was rendered after the entry into force of Protocol No. 7, she is competent *ratione temporis* to hear the grievance. Since the Protocol No. 7 came into force on 1 November 1988, that Austria made on June 30, 1989 with regard to Article 7 § 2 of the said Protocol a declaration not excluding a retroactive effect (*X. c. France*, not 9587/81, Commission decision of December 13, 1982, DR 29, pp. 228-234) and that the final decision of the Administrative Court dates from March 29, 1989, the Commission considers that it is not incompetent *ratione temporis* to examine this aspect of the case[10]. »

98. Therefore, the Grand Chamber sees no reason to depart from the decision of the chamber to reject the objection of inadmissibility for lack of jurisdiction *ratione temporis* presented by the Government.

10. NDT: translation reviewed by the registry.

B. Applicability of Article 4 of Protocol No.o7

1. Chamber findings

99. The Chamber firstly concluded that the offenses for which the applicant had been tried in the first and second proceedings were the same. It left open the question of whether the amnesty decision from which the applicant had benefited could be considered as a final judgment of acquittal or conviction for the purposes of Article 4 of Protocol No.o7, then it examined the merits of the complaint from the angle of the exceptions provided for in paragraph 2 of Article 4 of Protocol No.o7. It agreed with the Supreme Court's conclusion that the general amnesty law had been wrongly applied in the applicant's case, and noted that the granting of amnesty to the applicant for acts which amounted to war crimes had constituted a "fundamental defect" in the procedure, thus opening the possibility of retrying the person concerned.

2. Observations of the parties before the Grand Chamber

a) The applicant

100. The applicant alleges that the offenses at issue in both criminal proceedings against him had the same factual basis and that the classification of the offenses as war crimes in the second proceedings does not change the fact that the charges were in substance identical.

101. He further considers that a decision amnestying an accused must pass for a final decision excluding any new trial.

b) The Government

102. In its written observations, the Government maintains that, in In the first proceedings, the Osijek County Court applied the amnesty law without establishing the facts of the case and without ruling on the guilt of the applicant. According to him, the decision thus adopted did not answer the question of whether the applicant had committed the crimes with which he was accused nor did it provide an assessment of the charges listed in the indictment. In paragraph 33 of its observations, the Government concludes that this decision does not have the authority of res judicata. However, he then states (in paragraph 37 of the same observations) that it meets all the criteria of res judicata and can therefore be considered as a final judgment of acquittal or conviction within the meaning of Article 4 of Protocol no.o7.

103. Relying largely on the findings of the chamber, the Government adds that no amnesty can be granted in relation to

to war crimes, and that the granting of amnesty in this case therefore tainted the procedure with a fundamental flaw.

104. The Government indicates that it appeared after the abandonment of the first procedure that the victims, before being killed, had been arrested and tortured. These new elements would be sufficient to qualify the acts in question as war crimes against the civilian population rather than “ordinary” murders.

105. The Government explains that the Croatian State enacted the law of general amnesty for the purposes of respecting its international commitments arising from the Agreement on the normalization of relations between the Republic of Croatia and the Federal Republic of Yugoslavia (August 23, 1996), and that this law essentially aimed to promote reconciliation within Croatian society at a time when the war was still continuing. According to the Government, this law explicitly excluded war crimes from its scope.

106. In this case, the general amnesty law would have been applied manner contrary to its very purpose and in violation of Croatia's international obligations, in particular those arising from Articles 2 and 3 of the Convention.

107. As for the procedures followed by the national authorities, the Government maintains that the applicant's trial was fair, without putting forward any argument as to whether the proceedings were conducted in accordance with the rules of the Croatian Code of Criminal Procedure.

c) The third party involved

108. The group of academic experts indicates that no treaty multilateral agreement expressly prohibits the use of amnesties for international crimes. He explains that the International Committee of the Red Cross (ICRC) interprets Article 6 § 5 of Additional Protocol II to the Geneva Conventions in a way which suggests that States may not grant amnesty to persons suspected, accused or convicted of war crimes. However, an analysis of the preparatory work for this article would show that the only States having raised the question of the perpetrators of international crimes, namely the former USSR and certain of its satellite States, would link this subject to that of foreign mercenaries. The third party intervener finds it curious that the ICRC interprets Article 6 § 5 as excluding only war criminals and not the perpetrators of other international crimes from its scope of application, to the extent that the declarations of the former USSR on which the ICRC relies specifically provided, according to him, for the initiation of proceedings against the perpetrators of crimes against humanity or against peace. The group of academic experts finds it difficult to see what arguments would justify excluding war criminals but not the perpetrators of genocide or crimes against humanity

of the potential scope of amnesties. Furthermore, the ICRC would refer to examples of non-international conflicts such as those in South Africa, Afghanistan, Sudan and Tajikistan, even though the amnesties associated with these conflicts would all include at least one international crime. .

109. The third party intervener mentions the difficulties which would be accompanied by negotiation of amnesty clauses in treaties (he refers to the Rome Conference of 1998 which resulted in the creation of the International Criminal Court (ICC), to the negotiations of the International Convention for the Protection of All Persons from Disappearance forced, and the 2012 Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels). These difficulties would reveal the lack of consensus among States on this issue.

110. The third party intervener relies on a current of doctrine regarding amnesties[11] which according to him tends to show that, since the Second World War, States have increasingly resorted to amnesty laws. While admitting that the number of new amnesty laws excluding international crimes is increasing, he assures that so is the number of amnesties granted for such crimes. Amnesties are said to be the most frequently used form of transitional justice. The use of amnesties in peace agreements concluded between 1980 and 2006 appears to have remained relatively stable.

111. For the third party involved, even if several jurisdictions international and regional authorities have expressed the view that international law prohibits amnesties in cases of international crimes, the authority of such judicial decisions is weakened by their lack of consistency regarding the scope of this prohibition and the crimes to which they apply. The group of academic experts cites the example of the Inter-American Court of Human Rights, which reportedly declared in the Barrios Altos case, cited above, that all amnesty clauses were unacceptable because they aimed to prevent investigations into violations of human rights and the punishment of their perpetrators, while in the case of the Massacres of El Mozote and neighboring places, cited above, the president of this

11. The third party intervener invokes the following sources: Louise Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (Hart Publishing, 2008); Louise Mallinder, *Amnesties' Challenge to the Global Accountability Norm? Interpreting Regional and International Trends in Amnesty Enactment*", under the direction of Francesca Lessa and Leigh A. Payne, *Amnesty in the Age of Human Rights Accountability: Comparative and International perspectives* (Cambridge University Press, 2012); Tricia D. Olsen, Leigh A. Payne and Andrew G. Reiter, *Transitional Justice in Balance, Comparing Processes, Weighing Efficacy* (United States Institute of Peace Press, 2010); Leslie Vinjamuri and Aaron P. Boesenecker, *Accountability and Peace Agreements, Mapping Trends from 1980 to 2006* (Center for Humanitarian Dialogue, Geneva, 2007).

court and four other judges would have qualified this position by recognizing that, even in cases of flagrant human rights violations, the obligation to prosecute was not absolute and had to be weighed against the imperatives of peace processes and reconciliation in post-war situations.

112. In addition, a number of national supreme courts would have endorsed the amnesty laws of their country considering that such laws contribute to the establishment of peace, democracy and reconciliation. The third party intervening cites the following examples: the conclusions of the Spanish Supreme Court in the trial of Judge Garzón in February 2012, the decision of the Ugandan Constitutional Court declaring the amnesty law of 2000 in conformity with the Constitution, the refusal of the Brazilian Supreme Court in April 2010 to annul the Amnesty Act of 1979, and the confirmation by the South African Constitutional Court, in the AZAPO case, of the constitutionality of the Promotion of Unity Act of 1995 national and reconciliation, which provided for widespread use of amnesty.

113. The third party intervener recognizes that the granting of an amnesty can, in in certain cases, lead to impunity for those responsible for violations of fundamental human rights and thus thwart attempts to guarantee such rights. However, there are strong political reasons in favor of resorting to amnesty when it constitutes the only way out of violent dictatorships and endless conflicts. The third party intervener declared himself opposed to a total ban on amnesties and in favor of a more nuanced approach in the way of approaching the question of granting amnesties.

3. Assessment of the Grand Chamber

a) On the question of the identity of the offenses for which the applicant was prosecuted

114. In the case*Sergei Zolotukhin v. Russia*, the Court concluded that Article 4 of Protocol No.o7 was to be understood as prohibiting the prosecution or trial of a person for a second “offence” provided that it originates from identical facts or facts which are in substance the same ([GC], no14939/03, § 82, ECHR 2009).

115. In the present case, the Court notes that in both procedures the applicant was accused:

– of having killed SB and VB and causing serious injuries to Sl.B. THE November 20, 1991;

– of having killed NV and Ne.V. on December 10, 1991.

116. Therefore, insofar as the two procedures relate to the above-mentioned charges, the applicant was indeed prosecuted twice for the same offenses.

b) The nature of the decisions adopted in the first procedure

117. We find ourselves in the presence of two distinct situations concerning the charges brought against the applicant in both the first and second proceedings.

118. First, on January 25, 1996, the prosecutor withdrew the charges regarding the alleged murders of NV and Ne.V. on 10 December 1991 (paragraphs 120-121 below).

119. Secondly, by a decision taken on June 24, 1997 in application of the general amnesty law, the Osijek County Court terminated the proceedings concerning the alleged murders of SB and VB and the serious injuries inflicted on Sl.B. on November 20, 1991 (paragraphs 122 et seq. below).

i. The withdrawal of charges by the prosecutor

120. The Court has already held that the abandonment of criminal proceedings by a prosecutor did not amount to either a conviction or an acquittal and that consequently Article 4 of Protocol No.o7 did not find application in this situation (*Smirnova and Smirnova v. Russia*(dec.), nbone46133/99 and 48183/99, October 3, 2002, and*Harutyunyan v. Armenia*(dec.), no34334/04, December 7, 2006).

121. Consequently, the abandonment by the prosecution of the proceedings concerning the murders of NV and Ne.V. does not fall under Article 4 of Protocol No.o7 to the Convention. It follows that this part of the complaint is incompatible*material ratio* with the provisions of the Convention.

ii. The abandonment of the procedure in application of the general amnesty law

122. As for the rest of the charges (the murders of VB and SB and serious injuries inflicted on Sl.B.), the first criminal proceedings against the applicant were terminated under the general amnesty law.

123. As part of its examination relating to the decision of June 24, 1997, the Court will first examine whether Article 4 of Protocol no.o7 is applicable to the particular circumstances of the case, having regard to the fact that the applicant was granted an unconditional amnesty for acts which amount to serious violations of fundamental human rights.

α) The situation with regard to the Convention

124. The Court notes that the criminal proceedings carried out against the applicant related in particular to accusations of murder and serious bodily injury inflicted on civilians and therefore called into question their right to life guaranteed by Article 2 of the Convention, and even their rights with regard to Article 3. On this point, she recalls that these two

These provisions are among the key articles of the Convention and enshrine some of the fundamental values of the democratic societies which form the Council of Europe (see, among many others, *Andronicou and Constantinou v. Cyprus*, October 9, 1997, § 171, *Collection* 1997-VI, and *Solomou and others v. Türkiye*, no 36832/97, § 63, June 24, 2008).

125. The obligations to protect the right to life and ensure the protection against ill-treatment imposed by Articles 2 and 3 respectively of the Convention, combined with the general duty of the State under Article 1 of the Convention to "recognize every person within the scope of [its] jurisdiction the rights and freedoms defined [in] the (...) Convention", also require, by implication, that there be some form of effective official investigation when the use of force has resulted in the death of a person (see, *mutatis mutandis*, *McCann and others v. United Kingdom*, September 27, 1995, § 161, series A no 324, and *Kaya vs. Türkiye*, February 19, 1998, § 86, *Collection* 1998-I) or ill-treatment (*El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no 39630/09, § 182, ECHR 2012). It is essentially a question, through such an investigation, of ensuring the effective application of domestic laws which protect the right to life and of guaranteeing that those responsible are held accountable for their actions.

126. The Court has already concluded that when a public official is accused of crimes involving acts of torture or ill-treatment, it is of the utmost importance that the procedure and conviction do not run into statutes of limitations and that the application of measures such as amnesty or pardon is not permitted (*Abdülsamet Yaman v. Türkiye*, no 32446/96, § 55, November 2, 2004, *Okkalı v. Türkiye*, no 52067/99, § 76, ECHR 2006-XII, and *Yeşil and Sevim v. Türkiye*, no 34738/04, § 38, June 5, 2007). She considered in particular that the national authorities should under no circumstances give the impression of being prepared to let such treatment go unpunished (*Egmez c. Cyprus*, no 30873/96, § 71, ECHR 2000-XII, and *Turan Cakir v. Belgium*, no 44256/06, § 69, March 10, 2009). In its decision on the case *Ould Dah v. France* ((dec.), no 13113/03, ECHR 2009), the Court, like the United Nations Human Rights Committee and the International Criminal Tribunal for the former Yugoslavia, considered that amnesty was generally incompatible with the obligation for States to investigate acts of torture and that we could therefore not call into question the obligation to prosecute criminals by granting impunity through an amnesty law capable of being qualified as abusive under international law.

127. The obligation of States to prosecute perpetrators of acts of torture or assassinations is therefore well established in the Court's jurisprudence. It appears from this that granting the benefit of amnesty to perpetrators of murder or ill-treatment of civilians would be contrary to the obligations arising for States from Articles 2 and 3 of the Convention, since

whereas this measure would prevent investigations into such acts and would necessarily lead to impunity being granted to their perpetrators. Such a result would compromise the very purpose of the protection provided by Articles 2 and 3 of the Convention and would render illusory the guarantees attached to the right to life and the right not to be ill-treated. However, the object and purpose of the Convention, an instrument for the protection of human beings, call for understanding and applying its provisions in a way that makes its requirements concrete and effective (*McCann and others*, cited above, § 146).

128. Admittedly, the present case concerns allegations of violation of Article 4 of Protocol No.o7, and not Articles 2 and 3 of the Convention. The Court recalls, however, that the provisions of the Convention and its Protocols must be read as a whole and interpreted in such a way as to promote internal coherence and harmony between its various provisions (*Stec and others v. United Kingdom*(dec.) [GC], nbone65731/01 and 65900/01, § 48, ECHR 2005-X, and*Austin et al v. United Kingdom*[GC], nbone39692/09, 40713/09 and 41008/09, § 54, ECHR 2012). Consequently, the guarantees enshrined in Article 4 of Protocol No.o7 and the obligations of States under Articles 2 and 3 of the Convention must be considered as parts of a whole.

β) The situation with regard to international law

129. The Court cannot ignore the evolution of international law in matter. The Convention and its Protocols must be interpreted not in isolation but in a manner consistent with the general principles of international law, of which they form an integral part. Under Article 31 § 3 (c) of the 1969 Vienna Convention on the Law of Treaties, the interpretation of a treaty must take into account "any relevant rule of international law applicable in relations between the parties", in particular those relating to the international protection of human rights (*Al-Adsani v. United Kingdom*[GC], no35763/97, § 55, ECHR 2001-XI, *Demir and Baykara v. Türkiye*[GC], no34503/97, § 67, ECHR 2008,*Saadi v. United Kingdom*[GC], no13229/03, § 62, ECHR 2008, *Rantsev v. Cyprus and Russia*, noto25965/04, §§ 273-274, ECHR 2010, and *Nada v. Swiss*[GC], no10593/08, § 169, ECHR 2012).

130. The Court takes note of the Chamber's observations that “[i]t is increasingly recognized that the granting of amnesty in relation to “international crimes” – which include crimes against humanity, war crimes and genocides – is prohibited by international law » and “[t]his conception emerges from the customary rules of international humanitarian law, human rights treaties as well as the decisions of international and regional courts and the emerging practice of States, knowing that we observe a growing trend of

international, regional and national courts to annul general amnesties decreed by governments.

131. It should be noted that at present no treaty international law expressly prohibits the use of amnesty in relation to serious violations of fundamental human rights. Certainly, Article 6 § 5 of Additional Protocol II to the Geneva Conventions relating to the protection of victims of non-international armed conflicts provides that "[t]he cessation of hostilities, the authorities in power shall endeavor to grant broadest possible amnesty for persons who have taken part in the armed conflict or who have been deprived of their liberty for reasons relating to the armed conflict (...)"; however, the interpretation given by the Inter-American Court of Human Rights to this article excludes from its scope the perpetrators of war crimes or crimes against humanity (see, in paragraph 66 above, l (Massacres of El Mozote and neighboring places v. Salvador judgment, § 286). According to the Inter-American Court, such a conclusion arises from the obligations that international law imposes on States to investigate and prosecute war crimes. Thus, the Inter-American Court ruled that "persons suspected or accused of war crimes cannot benefit from an amnesty." The same obligation to investigate and prosecute also applies to serious violations of fundamental human rights and the amnesties provided for in Article 6 § 5 of Additional Protocol II to the Geneva Conventions are therefore no more applicable to such cases. actions.

132. Furthermore, the possibility that a State has of granting amnesty to the perpetrators of serious violations of human rights can be circumscribed by the treaties to which the State is a party. Several international conventions provide for the obligation to prosecute the perpetrators of some of the crimes defined therein (see the 1949 Geneva Conventions for the Protection of War Victims and their Additional Protocols, in particular Article 3 common to the said Conventions, Articles 49 and 50 of the Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Articles 50 and 51 of the Convention (II) for the Amelioration of the Condition of the Wounded, sick and shipwrecked members of the armed forces at sea, articles 129 and 130 of the Convention (III) relating to the treatment of prisoners of war, and articles 146 and 147 of the Convention (IV) relating to the protection of civilian persons in of war; see also articles 4 and 13 of the 1977 Additional Protocol (II) to the Geneva Conventions relating to the protection of victims of non-international armed conflicts, article V of the Convention on the Prevention and Punishment of the Crime of genocide, as well as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

133. The Convention on the Imprescriptibility of War Crimes and crimes against humanity prohibits the limitation period for these two categories of crimes.

134. Various international bodies have issued statements regarding impunity and the granting of amnesties in relation to serious violations of human rights resolutions, recommendations or observations in which it is generally stated that the perpetrators of such violations of human rights and international humanitarian law should not benefit from amnesties (paragraphs 45, 47-49, 51-53, and 56-58 above).

135. Several international courts have ruled that the measures amnesties could not be accepted when they were intended to obstruct investigations into serious violations of human rights or acts constituting crimes under international law and the punishment of those responsible for this type of violation. abuses (paragraphs 54 and 59-68 above).

136. If the wording of Article 4 of Protocol No.o7 confines its application at the national level, it should be noted that the scope of certain international instruments extends to any retrial in another State or before an international tribunal. For example, Article 20 of the ICC Statute contains an explicit exception to the principle*non bis in idem* since it authorizes the ICC to prosecute a person already acquitted by another jurisdiction of the crime of genocide, crimes against humanity or war crimes if the proceedings before the other jurisdiction were intended to remove the person concerned from his criminal liability for crimes within the jurisdiction of the ICC.

137. The Court takes note of the argument of the third party intervening relating to the lack of consensus among States at the international level regarding an absolute ban on the use of amnesty for serious violations of fundamental human rights, in particular those guaranteed by Articles 2 and 3 of the Convention. The third party intervener also expressed the view that, used as a means of ending protracted conflicts, amnesty can lead to positive results (see the third party's comments summarized in paragraphs 108-113 above).

138. The Court also takes note of the Court's jurisprudence Inter-American Human Rights Commission, in particular the cases of Barrios Altos, Gomes Lund and others, Gelman and Massacres of El Mozote and neighboring places, all cited above, in which the high court, basing itself on its previous jurisprudence as well as on the conclusions of the Inter-American Commission on Human Rights, United Nations bodies and other universal and regional bodies for the protection of human rights, took a firm position on this issue, declaring that no amnesty could be admitted in relation to serious violations of fundamental human rights. She explained that in such a case, amnesty would seriously undermine the obligation of States to carry out

investigations into such abuses and to punish the perpetrators (Gelman, cited above, § 195, and Gomes Lund and others, cited above, § 171). The Inter-American Court emphasized that such amnesty measures contravened the non-derogable rights recognized by international human rights law (Gomes Lund and others, § 171).

γ) Conclusion of the Court

139. In the present case the County Court granted the applicant a amnesty for acts, namely assassinations of civilians and serious bodily harm inflicted on a child, which amount to serious violations of fundamental human rights, emphasizing in its reasoning the merits of the person concerned as than military. However, international law increasingly tends to consider these amnesties as unacceptable because they are incompatible with the universally recognized obligation of States to prosecute and punish the perpetrators of serious violations of fundamental human rights. Assuming that amnesties are possible when accompanied by specific circumstances such as a process of reconciliation and/or a form of reparation for the victims, the amnesty granted to the applicant in the present case would nonetheless remain unacceptable since there is nothing to indicate the presence of such circumstances in this case.

140. The Court considers that by issuing a new indictment against the applicant and in convicting him of war crimes against the civilian population, the Croatian authorities acted in compliance with both the obligations arising from Articles 2 and 3 of the Convention and the requirements and recommendations contained in the above-mentioned international mechanisms and instruments.

141. Having regard to the above, the Court concludes that Article 4 of the Protocol no7 of the Convention therefore does not apply to the circumstances of the present case.

FOR THESE REASONS, THE COURT

1. *Declared* inadmissible, unanimously, the complaint based on Article 4 of Protocol No.o7 of the Convention concerning the applicant's right not to be tried or punished twice in relation to the charges of murder of NV and Ne.V., dropped by the prosecutor on January 25, 1996;

2. *Said*, unanimously, that there was no violation of Article 6 of the Convention;

3.*Said*, by sixteen votes to one, that Article 4 of Protocol No.o7 of the Convention is not applicable in relation to the charges of murder of SB and VB and the serious injuries inflicted on Sl.B.

Done in French and English, then delivered in public hearing at the Human Rights Palace, in Strasbourg, on May 27, 2014.

Lawrence Early
Jurisconsult

Dean Spielmann
President

Attached to this judgment, in accordance with Articles 45 § 2 of the Convention and 74 § 2 of the Rules, is the statement of the following separate opinions:

– joint concurring opinion of judges Spielmann, Power-Forde and Nußberger;
– joint concurring opinion of judges Ziemele, Berro-Lefèvre and Karakaş;
– joint concurring opinion of judges Šikuta, Wojtyczek and Vehabović;
- opinion concordant of judge Vučinić; And
– partly dissenting opinion of Judge Dedov.

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JOINT CONCURRING OPINION OF THE JUDGES SPIELMANN, POWER-FORDE AND NUßBERGER

1. Like the majority, we consider that Article 4 of the Protocol no7 is not applicable in this case. But, contrary to the opinion expressed by the majority, we are convinced that this result is deduced directly from the text of Article 4 of Protocol No.o7. For us, this provision is not applicable because, quite simply, there was no final judgment of acquittal.

2. To the extent that the text (although clear) requires some interpretation, the Grand Chamber could have taken the opportunity to give meaning to the expression "*acquitted or convicted by a final judgment* ". We are of the opinion that the decision granting the applicant an unconditional amnesty cannot be regarded as a final judgment of acquittal within the meaning of Article 4 of Protocol No.o7. In the following lines, we intend to present the reasoning which leads us to this conclusion.

3. As far as necessary, we propose to call back in a firstly the conditions to be met for Article 4 of Protocol No.o7 applies (I) and the specificities of amnesties (II). Secondly, we apply the result of this methodological approach to the present case (III).

I. Conditions for the application of Article 4 of Protocol No.o7

4. Remember that the conditions that must be satisfied for Article 4 of Protocol No.o7 is applicable are a) the existence of definitively closed criminal proceedings, b) the existence of a second procedure and c) the existence of an acquittal or conviction by a final judgment.

a) Procedure definitively closed

5. Article 4 of Protocol No.o7 is intended to prohibit the repetition of criminal proceedings definitively closed (*Franz Fischer v. Austria*, notₒ37950/97, § 22, May 29, 2001, and*Gradinger v. Austria*, October 23, 1995, § 53, series A nₒ 328-C). According to the explanatory report on Protocol no.o7, a report which itself refers to the European Convention on the International Validity of Criminal Judgments, "a decision is final" if it has, according to the established expression, become res judicata. This is the case when it is irrevocable, that is to say when it is not subject to ordinary remedies or the parties have exhausted these remedies or allowed the deadlines to pass without exercising them. This approach is well established

in the case law of the Court (*Sergei Zolotukhin v. Russia*[GC], no 14939/03, § 107, ECHR 2009).

b) Second procedure

6. The principle*non bis in idem*refers to the second procedure, that opened after the defendant has been convicted or acquitted by a final judgment. This point of view finds support in the explanatory report of Protocol No.o7, which, regarding Article 4, states that "[t]he principle established in this provision shall apply only after the acquittal or conviction of the person concerned by a final judgment in accordance with criminal law and procedure of the State concerned".

c) Acquittal or conviction by a final judgment

7. It is this last condition which, in our view, poses a problem. In effect, so that Article 4 of Protocol no.o7 is to apply, the defendant must first have been acquitted or convicted by a final decision. For a decision to be considered res judicata for the purposes of Article 4 of Protocol No.o7, it is not enough that it is a final decision not subject to appeal; it must be a final decision of conviction or acquittal.

8. Under the rule of international law set out in article 31 of the Vienna Convention, a treaty must be interpreted in good faith according to the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The protection offered by Article 4 of Protocol No.o7 is therefore limited to the extent that this provision only prohibits the repetition of prosecutions or sanctions for persons who have already been "acquitted or convicted by a final judgment" (*finally acquitted or convicted*). The deliberate choice of words implies that there has been an assessment of the circumstances of the case and an establishment of the guilt or innocence of the accused. However, amnesty does not fit into these two scenarios.

II. Specificities of amnesties

9. An amnesty consists of an erasure of the legal memory of such or some aspect of criminal conduct. The procedures for granting an amnesty are diverse and do not always take the form of a judicial decision. Such a measure therefore does not necessarily presuppose the conduct of a trial where evidence for and against the accused is produced and the guilt of the accused is assessed. Defining the legal characteristics of amnesty, H. Donnadieu de Vabres expressed himself as follows:

> "[T]he term "amnesty" implies an idea of *oversight* (ἀμνηστία, from privative α, μνάομαι, I remember). Amnesty is an act of sovereignty whose object and result is to make certain offenses disappear into oblivion: it abolishes the prosecutions which have been carried out or which are to be carried out, as well as the convictions which have been pronounced at the occasion of these offenses.
>
> The amnesty intervenes in two series of hypotheses, either immediately after the commission of the criminal act, it then extinguishes the prosecution, or after the conviction which it erases. » (*Treatise on criminal law and comparative penal legislation* , 3e edition, Paris, Sirey, 1947, p. 550, no 977)

10. The exact scope of the institution of amnesty thus delimited allows to distinguish cases where the protection of Article 4 of Protocol No. o 7 can intervene from those who escape the empire of this protection. Certainly, it is also necessary to take into consideration the additional limits of protection defined by paragraph 2 of Article 4 of Protocol No. o 7. The philosophy of the Convention is effectively based on protection of the rights of those who have already been acquitted or convicted by a final judgment, without prejudice to the protection of the rights guaranteed by the procedural aspect of Articles 2 and 3, legal certainty must also continue to be guaranteed. It is certainly important to emphasize that the constant case law of the Court implies and requires carrying out a form of effective investigation which must be able to lead to the identification and punishment of those responsible when the use of force has resulted in the death of a person. or serious unlawful abuse (*Assenov and others v. Bulgaria*, October 28, 1998, § 102, *Collection of judgments and decisions* 1998-VIII). If this were not so, notwithstanding its fundamental importance, the general legal prohibition of torture and inhuman or degrading treatment or punishment would be ineffective in practice. But any reference to Articles 2 and 3 of the Convention appears to us to be superfluous in this case, given the manifest inapplicability that can be drawn from the very text of Article 4 of Protocol No. o 7. Added to this is the fact that the applicability of the procedural obligation arising from Articles 2 and 3 of the Convention seems to us far from being obvious in the present case in the light of the principles identified in the judgment *Janowiec and others v. Russia* ([GC], nbone 55508/07 and 29520/09, ECHR 2013).

III. Application of the principles in this case

11. In the present case, the decision of June 24, 1997 put an end to the procedure criminal offense against the applicant on the basis of the general amnesty law. As for the final nature or not of this decision, it should be remembered that the applicant did not appeal and that the prosecutor had no right of appeal. The decision therefore became final. This consideration is in no way modified by the fact that the public prosecutor's office filed an appeal in the interest of the law, such an appeal constituting an extraordinary remedy.

12. On whether the amnesty decision was a conviction, we consider that this is clearly not the case, given the absence of any decision by a national court declaring the applicant guilty of the acts with which he was accused.

13. As to whether it was an acquittal, it is necessary to refer to the nature of the amnesty decision, which did not presuppose any investigation into the accusations brought against the applicant and was not based on any factual findings relevant to the determination of the applicant's guilt or innocence. This decision did not include any assessment of whether the applicant should be held responsible for any crime, which normally constitutes a prerequisite for acquittal.

14. In view of the above, we conclude that the amnesty decision the applicant was neither a conviction nor an acquittal for the purposes of Article 4 of Protocol no. 7 to the Convention.

It is for this reason, and for this reason alone, that in our opinion this provision is inapplicable in the present case.

JOINT CONCURRING OPINION OF THE JUDGES ZIEMELE, BERRO-LEFÈVRE AND KARAKAŞ

(Translation)

1. We voted with the majority in this case since we agree in principle that the rule *non bis in idem* should not be used to justify impunity for gross human rights violations. Indeed, several important developments in international law (see the section "Relevant international law instruments", in particular chapter K of the judgment) seem to indicate that the perpetrators of flagrant violations of human rights and serious violations of the international humanitarian law should not benefit from any amnesty, pardon or prescription. It is in this context that, on the basis of the general approach adopted by the majority, we voted with them in favor of a finding of inapplicability of Article 4 of Protocol No. 7.

2. However, we would like to point out that in our eyes it would have been preferable to declare that the article in question was in principle applicable and then find on the merits that it had not been violated in the present case. Our preference for this solution is due to several reasons. We believe that the Court did not examine the facts of the case in all their details and limited its reasoning to a very general level. As for the reasoning, we find it disconcerting that the case has become an "Articles 2 and 3" case (paragraphs 124 et seq. of the judgment). If the principle established by the Court is indeed fundamental – and it is for this reason that we joined the majority – we wonder whether the Court should not have examined the case according to its usual practice.

3. For example, it is not in dispute that the two criminal proceedings carried out against the applicant at the national level related to the murders of VB and SB, as well as the serious injuries inflicted on Sl.B. (paragraph 99 of the judgment, and paragraph 122 of the judgment *Conversely*). It is in this regard that a preliminary question of double criminality could arise and the Court should have dealt in detail with the question of the applicability of paragraph 1 of Article 4 of Protocol No. 7. Furthermore, it should be noted that while the Supreme Court found that the granting of amnesty to the applicant contravened the General Amnesty Law, it examined both instances in light of the requirements of the ruler *non bis in idem*. In the first procedure, the applicant benefited *de facto* of an amnesty for war crimes committed against the civilian population and, in their reasoning, the national courts cited his merits as a military leader. The Supreme Court considered that such application of the general amnesty law was erroneous and contrary to its very purpose. Furthermore, the law provided that no amnesty could be granted in relation to war crimes. However, within the framework of the first

procedure, neither the prosecuting authorities nor the county court examined whether, in view of their factual context, the accusations against the applicant should not amount to war crimes and whether the application of the law general amnesty was therefore not excluded with regard to them.

4. These facts of the case call for an examination of what exactly happened past, the nature of the amnesty granted and its compatibility with domestic law, interpreted in the light of the relevant international obligations of the State. In this regard, we emphasize that the terms "acquitted or convicted by a final judgment" can be understood in their technical sense. In the field of criminal law, these terms relate to a final acquittal or a final conviction after assessing the circumstances of the case and establishing the guilt or innocence of the accused. In this sense, a conviction must be understood as a verdict of guilty and an acquittal as a verdict of not guilty. But we cannot exclude the possibility of giving a broader interpretation to this expression. After all, there are many legal orders and practices within states. Taking the Pinochet trial in Spain as an example, the Spanish courts interpreted the Chilean amnesty as amounting to a "standard acquittal for reasons of political convenience" and considered that they did not were not bound by the amnesty provisions of national law (the 1978 amnesty law adopted by the Pinochet regime).

Certain decisions may be considered to have the same legal effect as final decisions of acquittal, even if they do not presuppose an assessment of the guilt or innocence of the accused. Amnesty consists of erasing the legal memory of this or that aspect of criminal conduct, often before the initiation of proceedings and sometimes at a later stage. A common feature of acquittal, in the common sense of the term, and amnesty is that both involve exemption from criminal responsibility. In comparison with the abandonment of criminal proceedings by the prosecution (which does not conflict with the principle *non bis in idem*), amnesty may appear to denote a higher degree of presumption of guilt. We emphasize in this regard that, during the development of the Rome Statute of the International Criminal Court (ICC), it was proposed to expressly state that the application of the rule *non bis in idem* was excluded in cases of amnesty and pardon (report of the Preparatory Committee for the establishment of an international criminal court, vol. 1, proceedings of the Preparatory Committee in March-April and August 1996, Official Digest of the General Assembly of United Nations, 51e session, A doc. A/51/22; compare with the report of the Preparatory Committee for the establishment of an international criminal court, draft statute and draft final act, article 19, UN doc. A/CONF.183/2/Add.1

(1998) (unadopted draft article providing that the principle *non bis in idem* would not apply in cases of pardon and other measures suspending the execution of a legal decision). Admittedly, this broad approach was ultimately not retained in the statute, but it nevertheless supports our position that the legal character of amnesty depends to a large extent on the context and circumstances in which it is applied. applied, and domestic or international authorities may have to answer questions relating to an argument based on the principle *non bis in idem*. The Court decided not to raise this issue in the present case.

5. The practice adopted by the Inter-American Court in cases Almonacid Arellano and others v. Chile and La Cantuta v. Peru is also informative. In these cases, the high court concluded that the principle was inapplicable *non bis in idem* when a decision to discontinue proceedings was intended to exonerate the accused from criminal liability, when the proceedings were not conducted independently or impartially, or when there was no intention effective in bringing those responsible to justice. For the Inter-American Court, a judgment rendered in such circumstances carries “fictitious” or “fraudulent” res judicata. Article 20 of the ICC Statute contains an explicit exception to the principle *non bis in idem* since it authorizes the ICC to prosecute a person already acquitted by another jurisdiction of the crime of genocide, crimes against humanity or war crimes if the proceedings before the other jurisdiction were intended to remove the person concerned from his criminal liability for crimes within the jurisdiction of the ICC. We could summarize the question by saying that today, amnesty can still be considered legitimate under international law and that it can therefore be used as long as it is not designed to exempt the person concerned to answer for flagrant violations of human rights or serious violations of international humanitarian law. The next step could be an absolute ban on amnesty for such violations. We can already see in the Court's decision in this case an adherence to the approach proposed during the drafting of the ICC Statute, that is to say that the question of the principle *non bis in idem* does not arise per se in cases where a proceeding concerning gross human rights violations ends with an amnesty and is followed by a second instance resulting in a conviction.

6. In the instant case, the Supreme Court concluded that in the applicant's case the general amnesty law had been applied erroneously and against its purpose. Having regard to the facts of the case and the discussions in this area at international level (points 4 and 5 above), we would have preferred to say that, even assuming that the decision amnestying the applicant could be considered as a final decision of conviction or acquittal for the purposes of Article 4 of Protocol No. 7, it was not taken

"in accordance with the law" of the State concerned, which constitutes the second criterion set by paragraph 1 of Article 4. In fact, there are reasons to believe that the amnesty enjoyed by the applicant in the framework of the first procedure indeed exonerated the person concerned from all liability. Given these considerations and the importance of combating any perception that serious human rights violations or war crimes can go unpunished, we would have preferred to say that the principle *non bis in idem* enshrined in Article 4 of Protocol No. 7 should not stand in the way of bringing people to justice where they have benefited from amnesties exempting them from liability, rather than closing the door completely by concluding that the provision is inapplicable. In our opinion, the Court could have contributed to a better understanding of the scope of Article 4 of Protocol No. 7 emphasizing that the relevant domestic law should specify the circumstances in which the application of the principle *non bis in idem* was excluded, and that the expression “in accordance with the law and criminal procedure” of the State concerned contained in Article 4 of Protocol No. 7 should be interpreted consistently with the provisions of international law (see, *mutatis mutandis*, *Storck v. Germany*, not 61603/00, §§ 93, 99 and 148, ECHR 2005-V).

JOINT CONCURRING OPINION OF THE JUDGES ŠIKUTA, WOJTYCZEK AND VEHABOVIĆ

1. We are in full agreement with the majority to say that Article 4 of Protocol No.o7 is not applicable in the circumstances of this case and therefore could not be violated. On the other hand, we cannot accept the reasoning adopted by the majority to justify the judgment rendered.

2. It should be noted, first of all, that the mandate of the European Court of human rights is defined in article 19 of the Convention. This involves ensuring compliance with the commitments resulting from the Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols. In exercising this mandate, the European Court of Human Rights determines whether or not the actions or omissions attributable to the States parties, contested by the applicants, were in conformity with the Convention and its Protocols. It is therefore a question of assessing, from the point of view of the Convention and the Protocols, facts which took place in the past, either at a given moment or within a specific period of time. It is obvious that the facts must be assessed in light of the law in force at the time they occurred. A State cannot be held responsible for violations of international rules which were not in force towards it at the time of the acts attributed to it.

It must be emphasized here that the mandate of the European Court of Human Rights differs from that of a certain number of other international courts which may be called upon to decide not only interstate disputes concerning facts which occurred in the past, but also disputes linked to factual situations which continue at the time the case is examined. In the latter case, if particular rules do not limit the competence *ratione temporis* Or *material ratio*, the international court concerned may be required to assess the continuing situation from the point of view of international law applicable at the time when the judgment is rendered and to rule on the basis of all the relevant international standards in force at that time .

3. The Vienna Convention on the Law of Treaties of 1969 codified the customary rules of interpretation of treaties in its articles 31 to 33. The first rule of interpretation of international treaties was codified in article 31 § 1 of the Vienna Convention on the Law of Treaties, worded as follows: “A treaty must be interpreted in good faith according to the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose. » According to the codified rules, the starting point of interpretation is always the analysis of the text of the provision interpreted. Interpretation must begin with an attempt to establish the ordinary meaning

terms used. It must also be remembered that the interpreter must take into account all the authentic versions of the treaty.

The text of the treaty, considered in all its authentic versions, must be read taking into account the "internal" context as well as in light of the object and purpose of the treaty. The "internal" context includes not only the entire text, including the preamble and the annexes, but also the agreements concluded between all the parties relating to the treaty as well as the instruments established by one or more parties on the occasion of the conclusion of the treaty and accepted by the other parties.

The interpreter must also take into account the "external" context, which includes subsequent agreements regarding the interpretation or application of the treaty, subsequent practice as well as any relevant rules of international law applicable in the relations between the Parties. . Finally, in the alternative, the interpreter can call on additional means such as the preparatory work and the circumstances of the conclusion of the treaty.

If the Vienna Convention on the Law of Treaties is silent on the question of knowing for what point in time it is necessary to establish the "external" rules of international law to be taken into account, it is obvious that if one examines facts passed from the point of view of a treaty in the version in force at the material times, the external context is constituted by the relevant rules of international law in force at the time when these facts took place. Thus, to answer the question of whether past actions or omissions attributable to a State are in conformity with the Convention or not, it is necessary to consider the Convention in the context of the relevant rules of international law applicable at the time when these actions or omissions have taken place.

4. The interpretation of a treaty in the context of the relevant rules of International law today faces major problems resulting from the dynamic nature of international law. Not only is international law evolving very quickly but, moreover, in many areas this evolution is increasingly rapid. Actions or omissions of state authorities that were in full compliance with international law in the past may become contrary to international law today. This ontological characteristic of international law leads to a fundamental epistemological difficulty: the establishment of the rules of international law applicable, in the past, at a given moment or within a specific period of time, can pose problems that are difficult to overcome, even for the most experienced specialists. more qualified in this area.

In this situation, the interpretation and application of the Convention in the context of the relevant rules of international law is a formidable challenge for the European Court of Human Rights. Given the increasingly rapid development of international law, which constitutes the external context of the Convention, the interpretation of this instrument

international, but also and above all the way in which the Convention is applied, can also undergo rapid developments. Thus, an action by a State which took place at a given time in the past could be consistent with the Convention interpreted in the light of international law in force at that time while a similar action taken a certain number of years ago later may be judged contrary to the Convention interpreted in the light of the rules of international law in force at that second moment.

5. It should be noted that in the present case the Court must assess events which took place a number of years previously. An amnesty law was adopted in Croatia in 1996. This law was applied to the applicant on 24 June 1997. Further proceedings were initiated in 2006. The applicant was finally convicted in 2007.

The applicant challenges the compliance with the Convention and its Protocols of the actions of the Croatian authorities undertaken in 2006 and 2007. The violation of the Convention alleged by the applicant took place in 2006-2007 with the resumption of criminal proceedings and the conviction of the applicant. Given the specific nature of the complaint invoked, it must be assessed in the light of the court decision handed down by the Osijek County Court on June 24, 1997, which applied the amnesty law adopted in 1996. Thus, the Court is confronted with a series of facts which took place over more than ten years. It should also be recalled that the Convention entered into force with regard to Croatia on November 5, 1997 and Protocol No.o7 came into force with respect to this State on 1erFebruary 1998. The amnesty law was adopted and entered into force before these two dates, the alleged violation of the Convention took place later.

6. We note that, in the present case, the majority did not tried to analyze the meaning of the text of the provision of Article 4 of Protocol No.o7 nor to delimit its field of application, determined by the choice of terms used by the High Contracting Parties. On the other hand, it directly highlights the internal context, by analyzing the content of the obligations arising from Articles 2 and 3 of the Convention, and the external context, constituted by an important set of international treaties relating to human rights and humanitarian law as well as by the decisions of the bodies responsible for implementing these treaties.

Her analysis of this external context leads her to affirm that international law increasingly tends to consider amnesties for acts constituting serious violations of human rights as unacceptable. It concludes that Article 4 of Protocol No.o7 does not preclude proceedings initiated under the obligations arising from Articles 2 and 3 of the Convention and the requirements arising from other international instruments. The argument developed suggests that the court decision to apply the 1996 amnesty law would fall within the scope of Article 4 of Protocol No.o7 but that the prosecution obligations arising from other provisions of the Convention would make this

article inapplicable in this case. According to this logic, the Convention, interpreted in the light of relevant international law, imposed on Croatia the obligation to prosecute the applicant for war crimes despite the court decision rendered against him on June 24, 1997 while Article 4 of Protocol no.o7 did not preclude such proceedings. The majority's reasoning implies that, in the case examined, there is a conflict between the obligations of prosecution and the obligations arising from Article 4 of Protocol No.o7, and that the former take precedence over the latter.

7. The approach chosen by the majority raises two objections fundamental methodologies. Firstly, it completely omits the search for the meaning of the terms used. Such an interpretation methodology deviates from the applicable rules, presented below.

Secondly, the majority examines the state of international law in 2014 and assesses the facts which took place in 1996-1997 then in 2006-2007 in light of the law applicable at the time when the judgment was rendered, without examining the evolution of this right during this period. However, if we want to embark on the path of examining the relevant rules of international law concerning amnesty, it would be necessary, on the one hand, to take into account the evolution of these rules during the relevant period (1996-2007) and, on the other hand, take into consideration the principles governing the temporal scope of application of these rules.

While the answer to the question of whether international law in 2014 prohibits amnesties in cases of serious human rights violations is an important question for the protection of these rights, it remains irrelevant to the present case. On the other hand, if, as the majority suggests, the key to the problem lies in the external context of the treaty, in establishing this context two questions would have to be answered:

1) Was the amnesty law passed in 1996 contrary to the law? international law applicable to Croatia in 1996?

2) Was there a rule of international law in 2006 and 2007 applicable to Croatia which required this State to retroactively cancel the effects of the 1996 amnesty law?

In seeking the answer to these questions, it should be noted that most of the decisions cited in the judgment and rendered by international courts or other international institutions are after 1997 and often after 2007. Only three documents cited predate 1997: the report of the Inter-American Commission on Human Rights in the case of the Las Hojas massacre (case 10.287, September 24, 1992, Salvador), the report of the same Commission of February 11, 1994 on the situation of human rights man in El Salvador (doc. OEA/Ser.L/V/II.85) and General Comment no.o20 of the United Nations Human Rights Committee regarding article 7 of the International Covenant on Civil and Political Rights.

It should also be noted that the first two documents were developed in the context of the inter-American system for the protection of human rights, which is distinguished by a significant number of specific features. The solutions adopted in this system are not always transposable to other regional systems for the protection of human rights. The Human Rights Committee, for its part, refused in 1992 to take a categorical position, limiting itself to formulating the opinion according to which amnesty is *generally incompatible*with the duty of States to investigate acts of torture. Furthermore, no international document cited clearly sets out a rule of international law unconditionally imposing on States the obligation to retroactively deprive amnesty laws adopted and applied in the past of effect.

At the time of the adoption of the amnesty law in 1996, Croatia was not bound by the Convention. The question of whether the amnesty law is compatible with the Convention is therefore moot. Furthermore, while various conventions to which Croatia is a party require the prosecution of certain types of serious human rights violations, they have not been shown to completely exclude amnesty. As the majority itself recognizes, no treaty expressly prohibits the use of amnesty in relation to serious violations of fundamental human rights.

Furthermore, if international law does not exclude conventional or customary retroactive rules, these are an exception. Article 28 of the Vienna Convention on the Law of Treaties provides that unless a different intention appears from the treaty or is otherwise established, the provisions of a treaty are not binding on a party with respect to an act or fact prior to the date of entry into force of this treaty with respect to this part or a situation which had ceased to exist on that date. Likewise, a customary rule can have retroactive effect if its content is clear on this point. Nothing relevant to the interpretation of the Convention suggests that its Articles 2 and 3 impose an obligation to retroactively annul final court decisions applying amnesty laws, rendered before the ratification of this treaty by the State Party concerned. Furthermore, it has not been demonstrated that in 2006-2007 other rules of international law applicable to Croatia imposed on that State the obligation to retroactively set aside the effects of final court decisions applying Croatian law. amnesty of 1996.

In conclusion, the Croatian amnesty law of 1996 could not violate the Convention, which Croatia later ratified. The Convention interpreted in the light of the relevant rules of international law did not impose the obligation to retroactively set aside the effects of final court decisions applying the 1996 amnesty law. In this context, if, as the majority wants , the answer to the question of the applicability of Article 4 of Protocol No.o7 depends on the external and internal context of this provision, we logically arrive at the conclusion that this provision

applies in this case and that the other rules arising from the Convention or other international instruments do not justify an annulment of the court decision rendered by the Osijek court with regard to the applicant on June 24, 1997 If we followed the path adopted by the majority, we would have to conclude that there had been a violation of Article 4 of Protocol No.o7.

8. It should be recalled here that the state of international law in force in 1997 was summarized in a letter from the director of the legal division of the International Committee of the Red Cross (ICRC) as follows:

> "The preparatory work concerning Article 6 § 5 [of the 1977 Additional Protocol II] indicates that this provision aims to encourage amnesty as a "way out" of the end of hostilities. It does not aim to provide amnesty to those who have violated international humanitarian law (...) In any case, States have not accepted any rule in Protocol II which would have forced them to classify violations of this Protocol as offenses (...) Conversely, it cannot be affirmed that international humanitarian law absolutely prohibits amnesties, including when they target people who have committed violations of international humanitarian law, since the principle according to that persons guilty of serious offenses must either be prosecuted or extradited is not devoid of its substance. » (letter from the Director of the ICRC Legal Division to the University of California Law School and to the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia dated April 15, 1997, www.icrc.org/customary-ihl/eng/docs/v2_rul_rule159)

It should also be noted that doctrine in the field of international law is divided on the question of amnesties. If a significant number of authors take a position in favor of recognizing an absolute ban on amnesties for serious human rights violations, a significant number of recognized authors defend the opposite point of view.

There is no doubt that international law is evolving rapidly and is increasingly regulating the freedom of States in matters of amnesty. The extent of freedom left today (in 2014) to States in this area is much less than in 2006 and *a fortiori* than in 1996. At the same time, the assertion that international law would completely ban amnesties in cases of serious human rights violations in 2014 does not reflect the current state of this law. The analysis of the international instruments, decisions and documents invoked by the majority proves that the opinion expressed by the director of the legal division of the ICRC in his aforementioned letter has not lost its relevance in 2014.

9. We fully share the majority's concern to ensure the best possible protection of human rights and share the view that human rights violations must not go unpunished. We are also aware of the perverse effects that amnesty laws enacted to ensure impunity for the perpetrators of such violations can have. However, we note at the same time that universal history teaches the greatest prudence and humility in this area. Different nations have found very diverse solutions to overcome serious human rights violations and restore the rule of law and democracy.

The adoption of international rules prohibiting amnesties without exception in cases of serious human rights violations may, in certain circumstances, make the protection of human rights less effective. The third party presenter presented important arguments against recognizing the existence of a rule of international law completely prohibiting amnesty laws in cases of human rights violations. It must be admitted here that practical arguments can, in certain circumstances, plead in favor of an amnesty including certain serious violations of human rights. We cannot exclude that such an amnesty could be an instrument sometimes making it possible to put an end more quickly to an armed conflict or to a political regime violating human rights and thus to avoid new violations of human rights. future. The concern for effective protection of human rights argues in any case, in our opinion, in favor of a certain margin of maneuver to be left to interested States in the area in question, to thus allow the different parties to conflicts causing serious violations of human rights to seek the most appropriate solutions.

10. As was said above, the starting point of any interpretation is the analysis of the meaning of the terms used. It must be emphasized here that the scope of Article 4 of Protocol No.o7 is defined by the following formulas: "acquitted or condemned by a final judgment" in its French version, "*finally acquitted or convicted*»in its English version. The provision examined is only applicable in the event of a decision of conviction or acquittal. The scope of the interpreted provision is quite narrow, since all other court decisions which, in one way or another, close the criminal proceedings remain outside it.

When it comes to establishing the ordinary meaning to be attributed to the terms used, it is necessary to examine their meaning in everyday language even if their precise contours are not always easy to delimit for the purposes of applying the Convention. There is nothing to establish that the different terms used in the Convention and its Protocols to speak of the national law of States should be understood in the technical sense attributed to them in the legal systems of French-speaking and English-speaking States. On the contrary, such an interpretation would not only grant a privileged place to certain legal systems but also could lead to insoluble problems.

It should be noted that, according to the Petit Robert dictionary, the French word "acquitter", used in the context of criminal proceedings, means "to declare (an accused) not guilty" (Petit Robert, Paris 2012, p. 27). The New Oxford Dictionary of English explains the meaning of the English word "*acquittal*»in the following terms: "*a judgment or verdict that a person is not guilty of the crime of which they have been charged*» (New Oxford Dictionary of English, London 1998, p. 16). In both

languages, the notion of acquittal therefore means a substantive decision ruling on the question of the guilt of the accused. All final court decisions which close the proceedings without finding the accused guilty or not guilty therefore remain outside the scope of the interpreted provision.

Amnesty laws in different legal systems can have very different contents and methods of application. We cannot exclude the adoption of an amnesty law whose application presupposes the prior establishment of the guilt of the persons who are amnestied. This is not the meaning of the Croatian law of 1996. It is clear that the court decision handed down against the applicant by the Osijek County Court on June 24, 1997 did not find him not guilty. The decision rendered does not correspond to any category of court decisions covered by the provision examined. There is no doubt that Article 4 of Protocol No.o7 is not applicable in this case.

The meaning of the provision interpreted is clear and can be unequivocally established on the basis of the rule laid down in Article 31 § 1 of the Vienna Convention on the Law of Treaties without the need to resort to the external context .

11. If court decisions terminating criminal proceedings without ruling on the guilt of a person do not fall within the scope of Article 4 of Protocol No.o7, the decision to set aside or annul a decision which applies an amnesty law can nevertheless pose significant problems in terms of the protection of human rights.

A rule of law must respect a certain number of substantial standards. Among these standards, we must mention the right to a judge and legal certainty. The right to a judge includes the right to a final court decision rendered within a reasonable time and also presupposes the stability of the various decisions which close criminal proceedings, even if they do not fall within the scope of Article 4 of Protocol no.o7. Article 6 of the Convention guarantees everyone prosecuted the right to obtain within a reasonable time a final court decision ruling on their fate and protects the stability of final decisions while admitting exceptions in this area. In any case, a person who has obtained a court decision definitively closing a criminal procedure can legitimately expect that the stability of this decision will be respected unless compelling reasons justify its annulment or the reopening of the procedure.

In the present case, the applicant obtained a final court decision applying the amnesty law. He could therefore legitimately hope that this decision would remain in force and be respected. Furthermore, the resumption of prosecutions took place in 2006, almost nine years after the date of the decision to apply the amnesty law. The entire procedure was thus

prolonged to the point of giving rise to doubts from the point of view of the right to a final judgment delivered within a reasonable time.

It should be noted, however, that the applicant's legitimate expectation was not unconditional. A person who has obtained a court decision contrary to current law must expect that this decision can be corrected by extraordinary remedies. In such a situation, the standards of the rule of law require balancing the different conflicting values and in particular legal security on the one hand and respect for legality and justice on the other. Furthermore, the imperatives of respect for law and justice may require the resumption or reopening of proceedings, even if a relatively long period has elapsed after a first final decision. In the particular circumstances of the case examined, and having regard in particular to the seriousness and nature of the crimes committed, there is no doubt that all the conditions for reactivating the proceedings against the applicant were met and that the Croatian authorities did not have not violated the requirements of the Convention and its Additional Protocols.

12. The present case raises a particularly important question for the protection of human rights. The weight of the question demanded flawless methodological rigor. We regret that the majority did not want to take this path.

CONCURRING OPINION OF JUDGE VUČINIĆ

(Translation)

Like the majority, I consider that Article 4 of Protocol No. 7 of the Convention is not applicable to the particular circumstances of the case. The applicant benefited from an amnesty for acts amounting to serious violations of fundamental human rights. The granting of amnesty to the applicant went against the growing trend in contemporary international law in this area as well as the obligations of Contracting States under Articles 2 and 3 of the Convention, and was also analyzed in a fundamental defect in the first procedure within the meaning of paragraph 2 of Article 4 of Protocol No. 7.

However, the reasoning followed in the judgment does not entirely satisfy me. This case is more complicated and more legally significant than it appears at first glance. In my view, the first proceedings were tainted by several consecutive fundamental defects which should be considered interconnected and interdependent. Ultimately, these defects, for me, inevitably lead to the conclusion that Article 4 of Protocol No. 7 cannot be considered applicable.

The first and most fundamental flaw in this case, the one at the root of all others, was the decision of the Osijek military prosecutor to consider obvious war crimes committed by a member of the Croatian army against the population civilian during the armed conflict in Croatia in 1991 as “ordinary homicides”. Such a legal characterization of the offenses in question was regrettably accepted by the Osijek County Court in 1993. This characterization and its acceptance were wrong in law. At the material time, there was a general and commonly accepted political belief in Croatia that considerations of legitimate state self-defense in the face of foreign aggression could not justify the commission of crimes by members of the armed forces. of war or crimes against humanity. This political attitude was then concretized by a judicial practice whereby blatant war crimes committed by members of the Croatian armed forces were wrongly classified in law as “ordinary homicides”.

The General Amnesty Law was subsequently applied in relation to such "legal qualifications" of overt war crimes against the civilian population despite the very clear provision it contained that it was not to be applied to any acts s. amounting to a serious violation of humanitarian law or a war crime.

Finally, as a result of the two previous defects, the first criminal proceedings against the applicant (no K-4/97) ended with an “abandonment of the criminal proceedings”, and not with a final judgment of acquittal or

of conviction within the meaning of paragraph 2 of Article 4 of Protocol No. 7. The Croatian authorities were very clearly responsible for several fundamental flaws in the previous proceedings, in violation of national law, international law and Convention law, which, in my view, resulted in the absolute inapplicability of the Article 4 of Protocol No. 7 in this case.

In view of the above, the reopening of the proceedings and the final conviction of the applicant must be understood as a legal and legitimate effort on the part of the Croatian authorities aimed at correcting the above-mentioned defects in the domestic procedure. In my opinion, this is fully consistent with the letter and spirit of Article 4 of Protocol No. 7. This provision may in no case be interpreted and applied with a view to blocking or obstructing the punishment of war crimes and crimes against humanity, as well as the obligations incumbent upon a Contracting State under Articles 2 and 3 of the Convention.

PARTLY DISSENTING OPINION OF JUDGE DEDOV

(Translation)

1. In this case, the Court meticulously applied the principles of law international humanitarian organization to an amnesty granted for acts which amount to war crimes, and considered "these amnesties as unacceptable because they are incompatible with the universally recognized obligation for States to pursue and punish the perpetrators of serious violations of human rights fundamental aspects of man" (paragraph 139 of the judgment). Therefore, such an amnesty cannot be invoked to avoid the aforementioned obligation. I fully agree with the above position adopted by the majority of judges, this assessment being based on the Convention (paragraphs 124-128 of the judgment) and on international law (paragraphs 129-138 of the judgment).

However, I cannot subscribe to the conclusion reached by the majority in paragraph 141 of the judgment, according to which "Article 4 of Protocol no.o7 of the Convention does not (...) apply to the circumstances of the present case." This conclusion is not self-evident, the Court having not examined whether Article 4 of the Protocolo7 applied to the circumstances of this case. However, from the point of view of legal certainty and the quality of judgments, the assessment of the circumstances of the case is a precondition for any conclusion on the applicability of Article 4 of Protocol No.o7.

The Court cannot ignore the following circumstances of the case. The Osijek County Court established all the facts (paragraph 17 of the judgment) before applying the national amnesty law, and its judgment became final; the applicant's case subsequently gave rise to a reopening of the proceedings, the applicant was tried twice for the same offenses (paragraph 116 of the judgment) and punished. Under the terms of paragraph 1 of Article 4 of Protocol No.o7, "[n]o person may be prosecuted or punished criminally by the courts of the same State due to an offense for which he has already been acquitted or convicted by a final judgment in accordance with the law and criminal procedure of that state. State ". The wording of this provision demonstrates beyond doubt that Article 4 of Protocol No.o7 should apply in the circumstances described above. I would even say more: the Court should have applied Article 4 of Protocol no.o7 although there are some doubts about its applicability. I will explain myself on this point.

It should be noted that in paragraph 128 of the judgment, the Court concludes that "the guarantees enshrined in Article 4 of Protocol no.o7 and the obligations incumbent on States under Articles 2 and 3 of the Convention must be considered as parts of a whole" and "interpreted in a manner that promotes internal coherence and harmony among its various provisions". If these items are an integral part of the protection system

put in place by the Convention, none of them can be removed from the entire system. In its main conclusion, the Court refers to "the obligation (...) for States to prosecute and punish the perpetrators of serious violations of fundamental human rights" (paragraph 139 of the judgment), which is part also obligations under Articles 2 and 3 mentioned in paragraphs 124 to 140 of the judgment.

While Articles 2 and 3 establish what types of substantive rights should be protected under the Convention, Article 4 of Protocol no.o7 contains procedural guarantees (*non bis in idem*) against arbitrariness, including the guarantees provided for in Article 6 of the Convention, and therefore has its own dimension, which is independent of Articles 2 and 3 and which is governed by the rule of law and legal certainty. This is why the applicant sought the protection of Article 4 of Protocol No.o7.

As for possible doubts, they are not decisive. Firstly, if this provision provides guarantees against being tried and punished a second time, its scope cannot be limited to a judgment of acquittal or conviction, therefore excluding amnesties granted by a court whose decision is final. . This is why both acquittal and amnesty amount to exemption from criminal responsibility. Secondly, when deciding an appeal in the interest of law under Article 422 of the Code of Criminal Procedure, the Supreme Court of Croatia can simply establish that there has been a violation of a law (paragraph 27 of the judgment). However, the absence of national criminal proceedings which would allow the re-examination of the case prevents any remedying of the fundamental defect in accordance with paragraph 2 of Article 4 of Protocol No.o7.

Therefore, Article 4 of Protocol no.o7 is applicable in this case.

2. Was there a violation of Article 4 of Protocol No.o7 by state defendant? Despite the existence of solid guarantees against being tried and convicted a second time, an exception to the benefit of these guarantees (in the event of a fundamental defect) is provided for by paragraph 2 of this provision. In my view, the Chamber was rightly influenced by this exception (paragraph 76 of the Chamber judgment), although it did not clarify the general principle applicable under Article 4 of Protocol No.o7.

Application of the principle*non bis in idem*was assessed by the “old” Court from the point of view of an alleged violation of the right to a fair trial under Article 6 § 1 of the Convention (*X. c. The Netherlands*, noto 9433/81, Commission decision of 11 December 1981, Decisions and reports (DR) 27, p. 238, and*S. v. Germany*, noto8945/80, Commission decision of December 13, 1983, DR 39, p. 43). Furthermore, according to the established case law of the “new” Court under Article 6 § 1, only exceptional circumstances (i.e. a “fundamental defect”) can result in the annulment of a judicial decision

definitive by means of judicial review (see, among many others, *Riabykh v. Russia*, no. 52854/99, ECHR 2003-IX, *Brumărescu v. Romania* [GC], no. 28342/95, ECHR 1999-VII, and *Kot v. Russia*, no. 20887/03, January 18, 2007).

Given that the notion of "fundamental defect" applies under Article 6 § 1 for the same purposes (the reopening of the case), it can easily be concluded that Article 4 of Protocol no. 7 regulates a specific aspect of the following fundamental principle enshrined in Article 6 § 1, thus clarified, for example, in the judgment *Kot*, cited above, §§ 23 and 24:

> "As regards the merits of the complaint, the Court recalls that the right to be fairly heard by a court, guaranteed by Article 6 § 1 of the Convention, must be interpreted in the light of the preamble to the Convention, which cites in particular the rule of law as an element of the common heritage of the contracting States. One of the fundamental elements of the rule of law is the principle of security of legal relations, which requires, among other things, that the definitive solution given to any dispute by the courts is no longer called into question (*Brumărescu v. Romania*, October 28, 1999, § 61, *Collection of judgments and decisions* 1999-VII).
>
> Under this principle, no party is entitled to request the reopening of the procedure for the sole purpose of obtaining a review of the case and a new decision on it. Higher courts should only use their supervisory power to correct errors of fact or law and miscarriages of justice and not to re-examine. The mere fact that there may be two points of view on the subject is not sufficient grounds to retry a case. This principle may only be deviated from when substantial and compelling reasons so require (see, *mutatis mutandis*, *Riabykh*, cited above, § 52, and *Pravednaya v. Russia*, no. 69529/01, § 25, November 18, 2004). »

The proceedings in this case were reopened as a result of the application of the general amnesty law, in violation of the principles of international law and the obligations of the respondent State under the Convention. Clearly, these are "substantial and compelling reasons", and the reopening of the procedure was therefore justified to remedy a fundamental defect.

Having regard to the foregoing considerations, I consider that Article 4 of Protocol No. 7 was applicable and there was no violation of this provision in the circumstances of this case.