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

FIRST SECTION

CASE OF LO TUFO v. ITALY

(Application no. 64663/01)

JUDGMENT

STRASBOURG

21 April 2005

DÉFINITIF

21/07/2005

In the case of Lo Tufo v. Italy,

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

Mr C.L. ROZAKIS, *President*,
Mr L. LOUCAIDES,
Mrs F. TULKENS,
Mr P. LORENZEN,
Mrs N. VAJIĆ,
Mr V. ZAGREBELSKY,
Mr D. SPIELMANN, *judges*,
and Mr S. NIELSEN, *Section Registrar*,

Having deliberated in private on 24 March 2005,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 64663/01) against the Italian Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Italian nationals, Mrs Alessandra Lo Tufo and Mrs Ilaria Lo Tufo ("the applicants"), on 14 August 2000.

2. The applicants were represented by Mrs L. Aglietti, a lawyer practising in Florence. The Italian Government ("the Government") were represented, successively, by their Agents, Mr U. Leanza and Mr I.M. Braguglia, and by their co-Agents, Mr V. Esposito and Mr F. Crisafulli.

3. By a decision of 30 May 2002, the Court declared the application admissible.

4. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed First Section.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1968 and 1964 and reside in London and Florence, respectively.

6. C.S. was the owner of a flat in Florence, which she had let to M.P.

7. On 21 December 1989 the applicants became the owners of the flat.

8. The applicants served formal notice on the tenant on 21 February 1990, informing him that they intended to terminate the lease when it expired on 30 June 1991, requiring him to vacate the premises by that date and giving him notice to appear before the Florence Magistrate's Court.

9. In a decision of 18 June 1990, that court formally fixed the termination of the lease for 15 November 1993 and ruled that the premises would have to be vacated by 15 September 1994. The decision became enforceable on 17 July 1990.

10. On 17 November 1994 one of the applicants, Mrs Ilaria Lo Tufo, signed a statutory declaration to the effect that she urgently needed to recover the use of the flat for her own accommodation.

11. On 25 May 1995 the applicants served notice on the tenant requiring him to vacate the premises.

12. On 3 August 1995 they served notice on the tenant indicating that he would be evicted on 5 October 1995 by a bailiff.

13. Between 5 October 1995 and 1 October 1998 a bailiff made sixteen attempts to evict the tenant but each attempt proved unsuccessful. The applicants never obtained police assistance for the enforcement of the eviction.

14. On 21 July 1999, relying on section 6 of Law no. 431/98, the tenant applied to the District Court for a stay of execution of the eviction. The court stayed the execution until 23 September 1999.

15. In October 2000 the tenant spontaneously vacated the premises and the applicants were able to recover the use of their flat.

II. RELEVANT DOMESTIC LAW

16. Since 1947 the public authorities in Italy have frequently intervened in residential tenancy legislation with the aim of controlling rents. This has been achieved by rent freezes (occasionally relaxed when the government decreed statutory increases), by the statutory extension of all current leases and by the suspension or staggering of the enforcement of orders for possession. With respect to the extension of leases and the suspension or staggering of the enforcement of orders for possession, the relevant domestic law is set out in the Court's judgment in the case of *Immobiliare Saffi v. Italy* ([GC], no. 22774/93, §§ 18-35, ECHR 1999-V).

17. Lastly, Legislative Decree no. 147 of 24 June 2003, which later became Law no. 200/03, suspended the enforcement of certain orders for possession until 30 June 2004.

18. By Legislative Decree no. 240 of 13 September 2004, the suspension was extended until 31 October 2004.

A. Rent control legislation

19. The history of legislative developments in the area of rent control may be summarised as follows.

20. The first relevant measure was Law no. 392 of 27 July 1978, which provided for a system of "fair rents" (*equo canone*) on the basis of a number of criteria such as the surface area of the flat and the cost of its construction.

21. The second was adopted by the Italian authorities in August 1992, with a view to the progressive liberalisation of the rental property market. Legislation relaxing rent level restrictions (*patti in deroga*) then came into force. Owners and tenants were in principle given the opportunity to derogate from the rent fixed by law and to agree on a different amount.

22. Lastly, Law no. 431 of 9 December 1998 reformed the tenancy regulations and liberalised rents.

B. Obligations of the tenant in the case of late restitution

23. The tenant is under a general obligation to compensate the landlord for any loss caused by the belated return of the accommodation. In this connection, Article 1591 of the Civil Code provides:

> "Tenants who fail to vacate premises are under an obligation to pay the landlord the agreed amount until the date of their departure, together with compensation for any other loss."

24. However, Law no. 61 of 21 February 1989 provided, *inter alia*, that the compensation claimable by the landlord would be limited to the amount of the rent paid by the tenant at the time of the expiry of the lease, index-linked to the cost of living (section 24 of Law no. 392 of 27 July 1978) and increased by 20%, in respect of the whole period in which the landlord had been unable to recover possession of his property.

C. Principles laid down by the Constitutional Court

25. On a number of occasions the Constitutional Court has been called upon to consider whether the statutory system for the extension of leases and for the suspension or staggering of the enforcement of orders for possession was compatible with the Constitution in terms of the right to peaceful enjoyment of property and the reasonable-time requirement. It has also been requested to rule on the issue of the limitation to the compensation that a landlord is entitled to claim.

26. In response to the first question, the Constitutional Court gave a number of judgments between 1984 and 2004 (in particular, judgments nos. 89 of 1984, 108 of 1986 and 155 of 2004) in which it found that the legislative measures were compliant, being justified by their transitional and

limited nature. In the last of the above-mentioned judgments, in particular, the Constitutional Court asserted that, even though the legislature had a duty to make provision for individuals who were particularly destitute, the burden could no longer simply be transferred exclusively to the landlord, who might himself be in a situation of hardship. Moreover, the future continuation of the same legislative logic could no longer be perceived as legitimate.

27. As to the second question, in judgment no. 482 of 2000 the Constitutional Court confirmed that compensation could be limited during the periods determined by law for the suspension of evictions. It explained that the introduction of such limits was intended to govern tenancies concerned by the emergency legislation currently in force, and that the housing shortage made such suspension of enforcement necessary. Whilst evictions were suspended *ex lege*, the law also determined the quantum of the compensation that could be claimed from the tenant, both measures being temporary and exceptional. Besides, to compensate landlords to some extent, they had been exempted from having to prove that they had suffered a loss.

28. The Constitutional Court declared the limitation to the compensation claimable by the landlord unconstitutional in cases where the inability of the landlord to recover possession stemmed from the conduct of the tenant rather than from any legislative intervention.

29. The court thus opened the way for landlords to bring civil proceedings in order to obtain full compensation for the loss caused by the tenant.

D. Article 1591 of the Civil Code and the case-law of the Court of Cassation

30. In its judgment no. 1463 of 5 February 1993, the Court of Cassation held that Article 1591 of the Civil Code did not prevent the parties concerned from agreeing in advance on the amount of the compensation, so that the landlord would not be obliged to adduce evidence of the sum lost.

31. In its subsequent judgment no. 7670 of 12 July 1993, the Court of Cassation explained that a delay in the return of the property could only, by itself, justify a general finding that the tenant should pay compensation for the loss sustained by the landlord, who would be required to provide specific evidence of that loss in relation to the condition and location of the property and its potential use. In that particular case, the Court of Cassation upheld the decision of the court below, which had dismissed the landlord's claim for compensation on the ground that he had not submitted evidence of the loss actually sustained by producing specific documents concerning precise offers to rent the property or agreements with prospective tenants on rent rates.

32. In judgment no. 10270 of 1 December 1994, the Court of Cassation considered that the loss sustained by a landlord could also be evaluated on an equitable basis.

33. In judgment no. 5927 of 27 May 1995, the Court of Cassation established that the limiting of the compensation to which a landlord was entitled only applied in respect of periods during which the suspension of evictions had been provided for by law.

34. In judgment no. 6359 of 6 June 1995, the Court of Cassation confirmed that the landlord was obliged to provide evidence of precise offers to rent or purchase the property, in order to substantiate the loss claimed on the basis of a shortfall in rent or an inability to sell the flat. The same principle was subsequently confirmed by judgments nos. 4864 of 14 April 2000 and 9545 of 1 July 2002.

35. In judgment no. 1032 of 10 February 1996, the Court of Cassation held that the loss sustained by the landlord could be proved simply by a request for a higher rent, determined on the basis of the amount that he could have charged on the free market.

36. Lastly, in judgment no. 10560 of 19 July 2002, the Court of Cassation laid down the principle that the tenant is considered to have been given notice to quit as soon as the lease agreement expires, regardless of the eviction date set by the judge.

E. The issue of police assistance and the case-law of the Court of Cassation

37. In judgment no. 3873 of 26 February 2004 the Court of Cassation ruled on the issue of police assistance.

38. That judgment was given in a case arising from a claim for compensation lodged by a number of landlords against the Ministry of the Interior in 1990.

39. In particular, they were claiming reimbursement for losses sustained as a result of a delay in recovering their property that was attributable, in their view, to the fact that they had not been provided with police assistance.

40. A bailiff had made twenty-one attempts to gain access and nineteen of them were unsuccessful. According to the landlords, only six of those attempts were made during periods when evictions were subject to legislative suspension.

41. In the other thirteen cases, the claimants asserted that the authorities had not provided evidence of any *force majeure* that made it absolutely impossible for them to grant the necessary police assistance.

42. At first instance the Rome District Court found in favour of the claimants and awarded them the sum of 177,886,610 lire (91,870.77 euros) in compensation. The Ministry appealed and the judgment was set aside by the Rome Court of Appeal on the ground that, in view of the public policy

imperatives cited by the authorities, the claimants had not provided evidence to show that the refusal to grant police assistance was unjustified. The claimants appealed on points of law.

43. The Court of Cassation observed that, in judgment no. 2478 of 18 March 1988, sitting in plenary, it had laid down the principle that a landlord who has obtained an enforceable judgment in his favour is entitled to apply to the authorities for any acts required for the purpose of enforcement, including police assistance. It was thus an obligation rather than a discretionary power of the authorities.

44. The Court of Cassation further observed that, in judgment no. 5233 of 26 May 1998, sitting in plenary, it had held that as a consequence of that principle any inability of the authorities to comply with their obligation should be subjected to a stringent test. In particular, the question whether the police authority had legitimately refused to provide assistance on the date and at the time indicated by the bailiff was to be assessed by taking into account whether any alternative time, or even date, had been proposed, and if any reasons had been given, in each specific case, to justify the refusal.

45. The Court of Cassation moreover stated that the police authority enjoyed a margin of discretion as to the actual time when its assistance was to be allocated.

46. Except where the inability to comply is caused by *force majeure*, if the competent authority refuses to grant such resources in spite of a request from a bailiff, the landlord should be entitled to lodge a claim with the ordinary courts seeking compensation from the authorities for the loss sustained as a result of the refusal.

47. The Court of Cassation reiterated the principle set out in judgments nos. 8827 and 8828 of 31 May 2003 that reparation in the form of compensation was the minimum guarantee necessary to uphold an impaired right in cases where the resulting damage interfered with an interest protected by the Constitution. It held that the right to execution of the order contained in an enforceable judgment had to be regarded as such a right, because the possibility for a person to bring legal proceedings seeking the protection of his or her rights extended to the enforcement of final and binding judicial decisions.

48. The Court of Cassation quashed the judgment of the Rome Court of Appeal and referred it back to the lower courts for reconsideration. It stated as a matter of principle that, when compensation claims were brought against public authorities by landlords complaining of damage because an eviction order had not been executed or its execution had been delayed, it was for the authorities to prove that they had been prevented from allocating police assistance. Such a defence would only release the authorities from responsibility, in particular, if it arose from extraordinary and unforeseeable imperatives. In this connection, the Court of Cassation emphasised that any permanent crisis situations, such as those affecting the judicial system or

public authorities, did not preclude responsibility for damage caused to individuals, but, on the contrary, might constitute the origin of such responsibility. In particular, the "crisis" in the Italian court system had not helped the State to avoid a number of unfavourable judgments by the European Court for the excessive length of judicial proceedings, and currently did not preclude such findings by domestic courts pursuant to Law no. 89 of 24 March 2001 (the "Pinto Act").

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

49. In the Ministry of the Interior's observations dated 1 December 2003, received at the Registry on 3 December 2003, the Government contended that, under Article 1591 of the Civil Code, the legislative suspension of evictions did not waive the liability of tenants for any loss sustained by a landlord as a result of delays in the recovery of his property. However, it did not appear from the case file that the applicants had lodged any such compensation claim. Accordingly, any loss sustained could be explained exclusively by the negligence of the applicants and was not imputable to the State.

50. Since the Government's observations on this point could be regarded as a preliminary plea of non-exhaustion of domestic remedies, the Court notes that, in their written observations on the admissibility of the application, the Government had cited neither the existence of such remedies nor any failure to exhaust them.

The Government are accordingly estopped from raising that objection (see, among other authorities, *Ceteroni v. Italy*, judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V, pp. 1755-56, § 19, and *Pantea v. Romania*, no. 33343/96, ECHR 2003-VI).

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 AND ARTICLE 6 OF THE CONVENTION

51. The applicants complained of their prolonged inability to recover possession of their flat because they had not been granted police assistance. They alleged that this amounted to a violation of their right to the peaceful enjoyment of their property, as embodied in Article 1 of Protocol No. 1, which provides:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

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

52. The applicants also alleged that there had been a breach of Article 6 § 1 of the Convention, the relevant part of which provides:

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

53. In the many previous cases heard by the Court concerning similar issues to those in the instant case, it has found violations of Article 1 of Protocol No. 1 and of Article 6 § 1 of the Convention (see *Immobiliare Saffi*, cited above, §§ 46-75; *Lunari v. Italy*, no. 21463/93, §§ 34-46, 11 January 2001; and *Edoardo Palumbo v. Italy*, no. 15919/89, §§ 33-48, 30 November 2000).

54. After examining the case file, the Court considers that the Government have failed to provide any facts or arguments capable of justifying a different conclusion on this occasion. It observes that the applicants were obliged to wait some five years from the first attempt at eviction by the bailiff before they were able to recover possession of their flat.

55. Consequently, in the present case, there has been a violation of Article 1 of Protocol No. 1 and of Article 6 § 1 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

56. Article 41 of the Convention provides:

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

A. Pecuniary damage

57. The applicants claimed 27,845 euros (EUR) for pecuniary damage, representing the difference between the potential rent at the going market rate and the rent actually paid by their tenant over a period of seventy-two months (from 15 September 1994 to October 2000).

58. They asserted that they had received from their former tenant the total sum of EUR 11,899 whereas they could have let their flat for EUR 552

per month, in accordance with the Regional Agreement on Residential Tenancies of 16 July 1999 between Florence City Council, other municipalities in Tuscany, landlords' associations and tenants' associations. The applicants provided the Court with a copy of that agreement.

59. The applicants considered that such an award would be equitable, since they were no longer able to provide evidence of the expenses incurred by Mrs Ilaria Lo Tufo in finding alternative accommodation. Either those costs were incurred a long time ago and the documentary evidence was therefore difficult to trace or there had never been any such evidence because of the temporary nature of the accommodation in question.

60. The applicants further referred to the expenses incurred for the refurbishment of the flat after they had recovered possession, because of the damage caused by the tenant, and to their installation-related expenses.

61. The Government claimed that it was for the person concerned by the judicial decision, namely the tenant, to execute that decision, and not the State. For its part, the State had only an incidental obligation to assist the private individual in exercising his or her right. Any failure, delay or deficiency in the fulfilment of that obligation might entail a procedural violation of the Convention, as in cases concerning the procedural obligation to conduct an inquiry into a death, but direct liability for interference with the landlord's right to peaceful enjoyment of his property lay with the uncooperative tenant.

62. In this connection, the Government considered that the applicants could have sought compensation through the Italian courts for the damage sustained, within the meaning of Article 1591 of the Civil Code, that is to say for the loss of rent resulting from their inability to let their flat, or for the costs and expenses incurred in finding alternative accommodation for the periods 5 October 1995 to 30 December 1998 and 23 September 1999 to 25 February 2000. This was the same damage that the applicants had claimed before the Court and had imputed to the State, whereas their loss had clearly been caused directly by the tenant.

63. The Government contended that, since the applicants had failed to seek redress for the damage under Article 1591 of the Civil Code, their request for just satisfaction in that connection should be dismissed.

64. The Government observed that the applicants had subsequently signed a solemn declaration that they urgently needed to recover possession of the flat so that one of them could make use of it for personal accommodation. Accordingly, if they had succeeded in recovering the flat earlier, they would not have been able to let it. In so far as the applicants were claiming the difference between rent at the statutory rate and rent at market value, their claims should be dismissed. Similarly, regarding their claim for the reimbursement of expenses incurred in their search for alternative accommodation, the Government considered that they had not

adduced any evidence. In their opinion, the claims submitted under that head also had to be dismissed.

65. Lastly, the Government considered that the Court should take account of the fact that the applicants had purchased an occupied flat and had thus benefited from a more advantageous price on the market than if it had been vacant.

66. The Court first observes that the Government have not raised any arguments concerning the possibility, which appears to have been referred to in the case-law of the Court of Cassation, of bringing proceedings for damages against the State in the event of an unjustified failure to provide police assistance.

67. The Court further notes that the applicants are entitled to bring an action against their former tenant in the civil courts, under Article 1591 of the Civil Code, to seek compensation for the damage attributable to him as a result of the delay in recovering possession of the property.

68. The damage, in the present case, actually stems from the unlawful conduct of the tenant, who, whether or not the State cooperated in the enforcement of the judicial eviction order, was bound to return the flat to its owners. The violation of the applicants' right to the peaceful enjoyment of their property is mainly the consequence of the tenant's unlawful conduct. The Court thus concludes that the breach of Article 6 of the Convention by the State was procedural in nature and was subsequent to the tenant's own conduct.

69. The Court accordingly finds that Italian domestic law allows reparation to be made for the pecuniary consequences of the breach and considers that the claim of just satisfaction should be dismissed in respect of pecuniary damage (see *Mascolo v. Italy*, no. 68792/01, 16 December 2004).

B. Non-pecuniary damage

70. The applicants claimed EUR 14,400 for non-pecuniary damage.

71. The Government contested this claim.

72. The Court considers that the applicants indisputably suffered non-pecuniary damage. Making an assessment on an equitable basis, it awards EUR 5,000 to each applicant under this head.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Dismisses* the Government's preliminary objection;

2. *Holds* that there has been a violation of Article 1 of Protocol No. 1;

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

4. *Holds*
   (a) that the respondent State is to pay each applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 5,000 (five thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicants' claims for just satisfaction.

Done in French, and notified in writing on 21 April 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN	Christos ROZAKIS
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the concurring opinion of Mr Spielmann joined by Mr Loucaides is annexed to this judgment.

C.L.R.
S.N.

CONCURRING OPINION OF JUDGE SPIELMANN JOINED BY JUDGE LOUCAIDES

(Translation)

1. In point 5 of the operative provisions of the judgment the Court quite rightly dismissed the claim for just satisfaction in respect of the alleged pecuniary damage.

2. It should be noted at the outset that, if the State had been able to enforce the eviction order, the applicants would normally have been able to recover possession of their flat and would not have incurred any additional expenses in finding alternative accommodation (contrast *Bertuccelli v. Italy*, no. 37110/97, § 30, 4 December 2003). On 17 November 1994 one of the applicants made a statutory declaration to the effect that she urgently needed to recover the flat for her own accommodation.

3. The applicants were not therefore entitled to claim the reimbursement of lost rent. They could only seek the reimbursement of the expenses incurred for the rental of alternative accommodation in so far as those expenses exceeded the amount of the rent paid by the tenant (see, among other authorities, *Scamaccia v. Italy*, no. 61282/00, § 31, 4 December 2003).

4. Whilst the applicants did make such a claim, they were unable to submit itemised particulars or the necessary supporting documents, as required by Rule 60 of the Rules of Court. That claim therefore had to be dismissed (see, among other authorities, *Fabbri v. Italy*, no. 58413/00, § 29, 4 December 2003).

5. The applicants likewise failed to submit any figures, supporting documents or itemised particulars in respect of the expenses allegedly incurred for the refurbishment of their flat.

6. Those claims also had to be dismissed, as the State's obligation under the Convention was to ensure that the eviction order was executed and not to supervise the tenant's private conduct. The Court has always dismissed claims by applicants seeking to obtain the reimbursement of any expenses that may have been incurred in repairing damage caused to the flat by a tenant or in respect of unpaid service charges or rent. In such cases the liability lies with the tenant and applicants have to bring proceedings in domestic courts under the appropriate internal law (see, among other authorities, *Auditore v. Italy*, no. 35550/97, § 24, 19 December 2002).

7. The applicants' failure to submit figures, supporting documents or itemised particulars of their claims also concerns the expenses they

allegedly incurred in moving into their flat. Those claims were therefore rightly dismissed.

8. For all these reasons, though they are not the ones given by the Court in this judgment, I agree with the dismissal of the claim for just satisfaction in respect of pecuniary damage.

9. However, I do not agree with the *reasons* given in the judgment for the dismissal of that claim in respect of such damage (see paragraphs 67-69 of the judgment).

10. The Court's reasoning, which on this precise point follows that of the *Mascolo v. Italy* judgment (no. 68792/01, § 55, 16 December 2004), raises a serious question affecting the interpretation of Article 41 of the Convention, which would have been sufficient in itself to justify the relinquishment of jurisdiction in favour of the Grand Chamber. It would have been necessary to do so, in any event, if the Chamber had adopted an approach that differed from that of the Third Section in *Mascolo*.

11. Saving an objection by one of the parties to the case, relinquishment in favour of the Grand Chamber would thus have been necessary and, moreover, it would have been preferable if the Court had departed from its approach in *Mascolo*.

12. It should be borne in mind that, in all cases before the Court, it is the international responsibility of the State that counts. Governments are accountable under the Convention for the acts of their authorities or of any other public body to which a breach of the Convention may be imputed in the domestic system (see, *mutatis mutandis*, *Foti and Others v. Italy*, judgment of 10 December 1982, Series A no. 56, p. 21, § 63).

13. Accordingly, a State only becomes responsible under the Convention when an alleged violation can be imputed to it (see, *mutatis mutandis*, *Assanidze v. Georgia* [GC], no. 71503/01, § 137, ECHR 2004-II).

14. The principle underlying just satisfaction awards is well-established: the applicant should, as far as possible, be put in the position he would have enjoyed had the proceedings complied with the Convention's requirements. The Court will award financial compensation under Article 41 only where it is satisfied that the loss or damage complained of was actually caused by the violation it has found, as a State cannot be required to pay damages in respect of losses for which it is not responsible (see, *mutatis mutandis*, *Kingsley v. the United Kingdom* [GC], no. 35605/97, § 40, ECHR 2002-IV).

15. In its reasoning in the present case, the Court stated in substance that the applicants were entitled to bring proceedings in the civil courts by lodging a claim for compensation against their former tenant (Article 1591 of the Civil Code), as the breach of the applicants' right to the peaceful enjoyment of their property was mainly the consequence of the tenant's unlawful conduct (see paragraphs 67-68 of the judgment).

16. I do not agree with that approach.

17. In asserting that the violation of the applicants' right to peaceful enjoyment of their property was *mainly* the consequence of the tenant's unlawful conduct, the Court itself acknowledged that the violation in question was not *exclusively* the consequence of that conduct.

18. In the instant case, as the violations (see paragraphs 51-55 of the judgment) were constituted by the protracted failure to execute the eviction order, it should be accepted that the responsibility of the State was incurred (see, among other authorities, *Scollo v. Italy*, judgment of 28 September 1995, Series A no. 315-C, p. 55, § 44).

19. If the breach of the applicants' right to the peaceful enjoyment of their property is not *exclusively* the consequence of the tenant's conduct, but also stems from the protracted failure to execute the eviction order – something for which the State is responsible – there is nothing *in principle* to preclude an award of just satisfaction, provided, among other requirements, that the claim under Article 41 of the Convention also satisfies the conditions of Rule 60.

20. In paragraph 68 of the judgment, the Court states that the violation by the State of Article 6 of the Convention was *procedural in nature* and *subsequent* to the tenant's own conduct.

21. I do not share that view.

22. To be precise, I am of the opinion that it was the protracted failure to execute the eviction order that enabled the tenant to remain in the flat. The tenant's conduct was thus subsequent to, or at least concurrent with, the State's inactivity, and such inactivity conveyed a suggestion of impunity, verging on encouragement not to comply with a judicial decision. Far from simply being subsequent to the tenant's conduct, the violation of Article 6 of the Convention can be regarded, at least in part, as having occurred *prior* to or *concurrently* with that conduct. Far from simply being procedural, the violation was one of the causes of the damage. There is clearly a well-established causal link between the violation and at least part of the damage sustained by the applicants.

23. Consequently, the State and the tenant are jointly and severally liable for the damage caused.

24. This joint liability necessarily implies that the applicants had a choice between claiming compensation from the State, under Article 41 of the Convention, and bringing an action against their former tenant under Article 1591 of the Civil Code.

25. Moreover, since execution of a judgment given by any court must be regarded as an integral part of the "trial" for the purposes of Article 6 of the Convention (see, among other authorities, *Hornsby v. Greece*, judgment of 19 March 1997, *Reports of Judgments and Decisions* 1997-II, pp. 510-11, § 40), the implementation of a judicial decision cannot be regarded as a secondary obligation, but, on the contrary, as a principal obligation of the State, regardless of its nature[1].

26. Under these circumstances, I consider that Article 1591 of the Civil Code is not a legal instrument liable to prevent the Court from examining or ruling on the merits of the applicants' claims. To maintain the contrary would imply, firstly, that the State's inactivity can have absolutely no repercussions, and, secondly, that the applicants have no guarantee of obtaining redress for their loss, bearing in mind that the tenant may, in the meantime, have disappeared or become insolvent. It should also be noted that Article 1591 of the Civil Code provides for ordinary proceedings which can extend over three levels of jurisdiction. The Court has, on many occasions, identified a practice incompatible with the Convention in Italy because of an accumulation of failures to comply with the "reasonable time" requirement (see, for example, *Bottazzi v. Italy* [GC], no. 34884/97, § 22, ECHR 1999-V). Accordingly, there is also a significant risk that the applicants would have to wait a long time for the outcome of any proceedings under Article 1591 of the Italian Civil Code.

27. This principle concerning the interpretation of Article 41 (formerly Article 50) of the Convention has been established by the Court in a number of precedents, and in particular in *De Wilde, Ooms and Versyp v. Belgium* ((Article 50), Series A no. 14, judgment of 10 March 1972, pp. 8-9, § 16), in which it ruled as follows:

> "16. In support of its plea of inadmissibility, the Government put forward a second argument based on Article 50: as they had not exhausted domestic remedies, the applicants had not established, according to the Government, that Belgian internal law 'allows only partial reparation to be made for the consequences' of the violation found by the judgment of 18 June 1971; it followed that their claims for damages were inadmissible.
>
> In the Court's opinion, the part of the sentence just quoted states merely a rule going to the merits. If the draftsmen of the Convention had meant to make the admissibility of claims for 'just satisfaction' subordinate to the prior exercise of domestic remedies they would have taken care to specify this in Article 50 as they did in Article 26, combined with Article 27 (3), in respect of petitions addressed to the Commission. In the absence of such an explicit indication of their intention, the Court cannot take the view that Article 50 enunciates in substance the same rule as Article 26.
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> Moreover, Article 50 has its origin in certain clauses which appear in treaties of a classical type – such as, Article 10 of the German Swiss Treaty on Arbitration and Conciliation, 1921, and Article 32 of the Geneva General Act for the Pacific

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1. It is appropriate in this connection to point out that on 9 September 2003 the Committee of Ministers adopted a recommendation (Rec(2003)17) concerning the enforcement of judicial decisions. It acknowledges that the rule of law is a principle that can only be a reality if citizens can, in practice, assert their legal rights and challenge unlawful acts. It calls for greater efficiency and fairness in the enforcement of judgments in civil cases, to strike a positive balance between the rights and interests of the parties to the enforcement process. Failing that, "other forms of 'private justice' may flourish and have adverse consequences on the public's confidence in the legal system and its credibility".

Settlement of International Disputes, 1928 – and have no connection with the rule of exhaustion of domestic remedies.

In addition, if the victim, after exhausting in vain the domestic remedies before complaining at Strasbourg of a violation of his rights, were obliged to do so a second time before being able to obtain from the Court just satisfaction, the total length of the procedure instituted by the Convention would scarcely be in keeping with the idea of the effective protection of Human Rights. Such a requirement would lead to a situation incompatible with the aim and object of the Convention."[1]

28. In the above-cited judgment of 10 March 1972 in the *De Wilde, Ooms and Versyp* case, the Court also stated as follows in paragraph 20:

"...

The mere fact that the applicants could have brought and could still bring their claims for damages before a Belgian court does not therefore require the Court to dismiss those claims as being ill-founded any more than it raises an obstacle to their admissibility ..."[2]

29. Moreover, concerning the failure to use the remedy provided for under Article 1591 of the Civil Code, the Third Section of the Court, in its admissibility decision in *Coggiola and Alba v. Italy* ((dec.), no. 28513/02, 24 February 2005), dismissed the objection of non-exhaustion of domestic remedies in the following terms:

"**B. Failure to use the remedy under Article 1591 of the Civil Code**

The Government further submitted that domestic remedies had not been exhausted, as the applicants had failed to use the remedy provided for under Article 1591 of the Civil Code.

The applicants observed that they were unable, under Article 1591 of the Civil Code, to obtain compensation for the non-pecuniary damage they had suffered. In any event, they argued that in view of the limit on the compensation that could be claimed for pecuniary damage, they would have been awarded an insignificant sum in relation to the loss actually sustained.

With regard to the second objection, the Court considers that an action under Article 1591 of the Civil Code – a provision requiring an individual to fulfil an obligation

1. See, to the same effect, *Ringeisen v. Austria* (Article 50), judgment of 22 June 1972, Series A no. 15, p. 9, § 22; *König v. Germany* (Article 50), judgment of 10 March 1980, Series A no. 36, pp. 14-15, § 15; *Artico v. Italy*, judgment of 13 May 1980, Series A no. 37, pp. 20-21, § 44; *Guzzardi v. Italy*, judgment of 6 November 1980, Series A no. 39, pp. 41-42, § 113; *Eckle v. Germany* (Article 50), judgment of 21 June 1983, Series A no. 65, p. 7, § 13; *Bozano v. France*, judgment of 18 December 1986, Series A no. 111, pp. 28-29, § 66; *Barberà, Messegué and Jabardo v. Spain* (Article 50), judgment of 13 June 1994, Series A no. 285-C, p. 57, § 17; and *Oğur v. Turkey* [GC], no. 21594/93, § 98, ECHR 1999-III.

2. See, to the same effect, *König v. Germany* (Article 50), judgment of 10 March 1980, Series A no. 36, pp. 14-15, § 15; *Artico v. Italy*, judgment of 13 May 1980, Series A no. 37, pp. 20-21, § 44; and *Eckle v. Germany* (Article 50), judgment of 21 June 1983, Series A no. 65, p. 7, § 13.

towards another individual – is not an effective way of ensuring that the State acknowledges the alleged breach and awards compensation. In this connection, the Court reiterates that it is only where the national authorities acknowledge a violation of the Convention on the part of the State, and grant reparation, that an applicant will lose his or her standing as a 'victim' (see, *mutatis mutandis*, *Huart v. France*, no. 55829/00, 25 November 2003). Consequently, the Government's objection must be dismissed."[1]

30. I find it inconsistent to dismiss the objection of non-exhaustion of domestic remedies whilst accepting, as in the present case, that Article 1591 of the Civil Code provides an adequate remedy in terms of just satisfaction.

31. It may be added that, in the present case, proceedings under Article 1591 of the Civil Code would normally result in no more than a token award of compensation, being limited, during the periods of statutory suspension of enforcement, to 20% of the rent, which in turn is already limited in most cases as it is fixed by law (see paragraphs 20 and 24 of the judgment). Any possible action under domestic law must therefore be assessed in the light of those conditions. I would point out that, in accordance with the Court's case-law, the effectiveness of an action may also depend on the level of compensation (see, among other authorities, *Paulino Tomás v. Portugal* (dec.), no. 58698/00, ECHR 2003-VIII, and *Gouveia Da Silva Torrado v. Portugal* (dec.), no. 65305/01, 27 March 2003).

32. In addition, in the present case, the Government failed to produce any precedents to show that landlords have been successful in such proceedings.

33. Concerning the risk of double compensation, it should be noted that, in principle, the existence of Article 1591 of the Civil Code would not lead to two awards, one by domestic courts and another potentially by this Court, in respect of the same damage. Even though the damage may be the same, liability is borne on two distinct levels, that of the State and that of the tenant.

34. In practice, too, double compensation can be avoided.

35. If the applicants had already received compensation prior to this Court's judgment, the Court would have been informed of the reimbursement that they had succeeded in obtaining through the domestic courts.

36. Similarly, the domestic courts, in examining a hypothetical case referred to them after an award of just satisfaction by this Court in respect of pecuniary damage, could take account of any sum that the Court might have awarded to the applicants (see, *mutatis mutandis*, *Terazzi S.r.l. v. Italy* (friendly settlement), no. 27265/95, 26 October 2004).

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1. See also, to the same effect, *Scorzolini v. Italy* (dec.), no. 15483/02, 24 February 2005; *Comellini v. Italy* (dec.), no. 15491/02, 24 February 2005; and *Cuccaro Granatelli v. Italy* (dec.), no. 19830/03, 24 February 2005.

37. That is why I disagree with the *reasons* given in the judgment for the dismissal of the claim for just satisfaction in respect of pecuniary damage. That reasoning, even though it is consistent with that of the *Mascolo* judgment, is nevertheless at odds with the Court's traditional approach, which is well illustrated in the *De Wilde, Ooms and Versyp* judgment cited above and has since been confirmed in many other judgments.

38. It would thus have been preferable for the Chamber to have relinquished jurisdiction in favour of the Grand Chamber, provided there was no objection by one of the parties.