



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

FIRST SECTION

CASE OF LUCÀ v. ITALY

(Application no. 33354/96)

JUDGMENT

STRASBOURG

27 February 2001

FINAL

27/05/2001

In the case of Lucà v. Italy,

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

Mrs E. PALM, *President*,

Mrs W. THOMASSEN,

Mr B. CONFORTI,

Mr GAUKUR JÖRUNDSSON,

Mr C. BÎRSAN,

Mr J. CASADEVALL,

Mr B. ZUPANČIČ, *judges*,

and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 6 February 2001,

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

PROCEDURE

1. The case originated in an application (no. 33354/96) against the Italian Republic lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Italian national, Mr Nicola Lucà ("the applicant"), on 17 January 1994.

2. The applicant was represented by Mr F. Macrí, a lawyer practising in Reggio di Calabria. The Italian Government ("the Government") were represented by their Agent, Mr U. Leanza, head of the Diplomatic Disputes Department at the Ministry of Foreign Affairs, assisted by Mr V. Esposito, co-Agent of the Government at the European Court of Human Rights.

3. Relying on Article 6 §§ 1 and 3 (d) of the Convention, the applicant alleged that he had been convicted on the basis of statements made by a witness whom he had never been given an opportunity to examine or to have examined.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. By a decision of 9 March 1999, the Chamber declared the application admissible [*Note by the Registry*. The Court's decision is obtainable from the Registry].

7. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant, who was born in 1955, is currently detained in Cosenza Prison.

9. On 25 October 1992 N. and C. were arrested by *carabinieri* from Roccella Jonica (Reggio di Calabria) and found to be in possession of cocaine.

10. On 25 and 26 October 1992 N. was questioned, initially by the *carabinieri*, and subsequently by the Locri public prosecutor (Reggio di Calabria). He said that he had obtained part of the drugs from C. for his own use; the remainder belonged solely to C. He added that on the day of their arrest, C. had accompanied him to certain people's homes to try to buy drugs. After the evening meal they had gone to the applicant's home. The applicant had said that he was prepared to supply them with five hundred grams of cocaine to be delivered a few days later, as he was not willing to accept deferred payment and could not go out after 8 p.m. to get the drugs.

11. N. was questioned by the *carabinieri* as someone who was helping them with their inquiries ("*persona che può riferire circostanze utili ai fini delle indagini*"), not as an accused. For that reason, he was not assisted by a lawyer. However, the Locri public prosecutor subsequently decided that N. should be regarded as a "suspect" ("*indagato*"), and therefore questioned him in that capacity.

12. By an order of 12 February 1993 the Locri investigating judge committed the applicant, C. and two other suspects, Mr A. and Mr T., for trial before Locri Criminal Court for drug trafficking. A. was also accused of unlawful possession of an offensive weapon. Separate proceedings were instituted against N. for possession of drugs.

13. At the hearing on 17 July 1993, N. was called to give evidence as a person accused in connected proceedings ("*imputato in procedimento connesso*"). However, he chose to remain silent as he was entitled to do by virtue of Article 210 of the Code of Criminal Procedure (hereafter, "the CCP").

14. The lawyers acting for the accused argued that Article 513 of the CCP was unconstitutional since it was incompatible with Articles 3 and 24 of the Italian Constitution – which guaranteed the equality of citizens before the law

and the right to defend oneself at all stages of the proceedings – and Article 6 of the Convention. They observed in particular that, as construed by the Constitutional Court, Article 513 of the CCP laid down that if a person accused in connected proceedings exercised his right to remain silent, the court could read and use any statements made by him to the public prosecutor or to the investigating judge during the investigation. As a result, the accused was deprived of any opportunity of examining that person or of having him examined.

15. On the same day the Criminal Court dismissed as manifestly unfounded the objection that the provision was unconstitutional and ordered that the record of the statements made by N. to the public prosecutor should be read out. It noted that the statutory right to remain silent was intended to protect an accused, who could not be required to make statements that could be used in evidence against him. Further, the rule that statements made during preliminary investigations could be read and used had been established by the Constitutional Court itself in its judgment no. 254 of 3 June 1992.

16. In a judgment of 7 March 1994, which was lodged with the registry on 1 June 1994, Locri Criminal Court sentenced the applicant to eight years and four months' imprisonment and a fine of 54,000,000 Italian lire (approximately 183,000 French francs). C., A. and T. were also given prison sentences ranging between six and nine years.

17. The Criminal Court noted at the outset that the main evidence against the accused was the statements which N. had made to the public prosecutor, since the statements made to the *carabinieri* were inadmissible under Article 513 of the CCP. It also observed that having regard to N.'s personality and the spontaneity and precision with which his statements had been made, his depositions should be regarded as credible. The Criminal Court noted that N. had recognised a photograph of the applicant and had given an accurate description of his home and the route followed to get there. In addition, the applicant already had previous convictions under the drug-trafficking legislation and was under judicial supervision (*sorveglianza speciale*). He was prohibited from leaving his home after dusk, and that was a possible explanation for his unwillingness to go out after 8 p.m. Furthermore, the amount of cocaine found in C.'s possession showed that C. had contacts with drug dealers and meant that N.'s account of his visit to the applicant's home was probably true. It also confirmed that the negotiations that had started were genuine.

18. On 13 July 1994 the applicant appealed to Reggio di Calabria Court of Appeal. He contested, *inter alia*, the reliability of N.'s statements and complained that they had been made in breach of the adversarial principle and in the absence of a judge or of the defendants' lawyers.

19. In a judgment of 7 November 1994, Reggio di Calabria Court of Appeal followed in substance the arguments set out in the order of 17 July

1993. It upheld the decision of the court below concerning the applicant, while reducing A.'s sentence.

20. On 18 February 1995 the applicant and his co-accused appealed to the Court of Cassation. T. relied, *inter alia*, on Article 6 § 3 (d) of the Convention contending that N's statements should have been declared inadmissible in evidence.

21. In a judgment of 19 October 1995, which was lodged with the registry on 3 November 1995, the Court of Cassation dismissed the appeals of the applicant and his co-accused, holding that the grounds given by the Court of Appeal for its decision on all the disputed issues relating to the drug-trafficking count had been reasonable and correct. It overruled the impugned decision with regard to A.'s conviction for being unlawfully in possession of an offensive weapon and remitted the case to Catanzaro Court of Appeal.

22. The Court of Cassation observed among other things that Article 6 § 3 (d) of the Convention concerned "the examination of witnesses, who ... are required to tell the truth, not the examination of the accused, who are entitled to defend themselves by remaining silent or even by lying". Further, since all States that were party to the Convention had an obligation by relevant domestic legislation to regulate the examination of witnesses, it was "obvious that ... when a witness refused to give evidence, statements made to the public prosecutor ... had to be produced for the court's file".

II. RELEVANT DOMESTIC LAW

A. Rules in force at the material time

23. The circumstances in which statements made by an accused or co-accused before trial may be admitted in evidence are set out in Article 513 of the CCP.

24. As initially worded, the first paragraph Article 513 of the CCP provided that statements made by an accused before trial could be admitted in evidence by the trial court if the accused failed to appear or refused to repeat the statement.

25. On the other hand, the second paragraph of Article 513 concerned statements made before trial by persons accused in connected proceedings. Unlike the position under the first paragraph, the second paragraph did not permit the trial court to admit such statements in evidence if the accused exercised his right to remain silent.

26. In its judgment no. 254 of 1992, the Constitutional Court declared the second paragraph of Article 513 unconstitutional on the ground that, as the statements referred to therein could not be admitted in evidence at trial if the accused in connected proceedings remained silent, there was an unjustified difference in treatment between those statements and statements

of the type referred to in the first paragraph. The Constitutional Court thereby enabled trial courts to admit statements made by a co-accused in connected proceedings, irrespective of whether the person against whom they were being used had been given the opportunity of examining the maker of the statement or of having him examined at any stage in the proceedings. Furthermore, the Constitutional Court made no reference to the procedural safeguards embodied in Article 6 of the Convention or to the criteria established by the Court's case-law.

B. Developments subsequent to the applicant's final conviction

27. By Law no. 267 of 7 August 1997 Parliament amended Article 513 with a view to making it consistent with the adversarial principle. In substance, statements made by a co-accused or by an accused in connected proceedings could no longer be used against another person without his consent if the maker of the statement exercised his right to remain silent.

28. However, in its judgment no. 361 of 2 November 1998 the Constitutional Court again declared Article 513 unconstitutional, this time in its entirety. It held that precluding the trial court from admitting such statements in evidence if the maker remained silent entailed a risk that the court would be deprived of evidence that could assist it in reaching its decision, a risk that was dependent solely on the decision of the maker of the statements.

29. Following that decision Parliament adopted the Constitutional Amendment Act no. 2 of 23 November 1999 whereby the principle of a fair trial was embodied in the Constitution itself. Article 111 of the Constitution, as now worded, reads:

“1. Jurisdiction shall be exercised through fair proceedings, conducted in accordance with rules of procedure.

2. All proceedings shall be conducted in compliance with the principles of adversarial process and equality of arms before a neutral and impartial court. The right to be tried within a reasonable time shall be guaranteed by law.

3. In criminal proceedings, the law shall guarantee that the person accused of an offence shall be informed promptly and in confidence of the nature and grounds of the charge against him; that he shall have adequate time and facilities for the preparation of his defence; that he shall be given an opportunity before the court to examine or to have examined anyone giving evidence against him, to obtain the attendance and examination of any defence witnesses on the same conditions as witnesses called by the prosecution and to obtain the production of any other evidence in his favour; and that he will have the assistance of an interpreter if he cannot understand or speak the language used at the trial.

4. The principle of adversarial process shall be observed during criminal proceedings with regard to the examination of evidence. An accused's guilt cannot be

established on the basis of statements made by a person who has freely and wilfully eluded examination by the accused or his lawyer.

5. Rules shall be made governing the circumstances in which adversarial examination of the evidence shall be dispensed with either because the accused has consented, or because there is due evidence that such examination is objectively impossible or that there has been unlawful conduct.”

30. In Law no. 35 of 25 February 2000, the Italian parliament clarified how the amended Article 111 of the Constitution would apply to trials under way. In particular, the former rules continue to apply in certain circumstances.

Further, a consolidating bill implementing that constitutional amendment was adopted by Parliament on 14 February 2001. Among other things, this implementing legislation amends Article 513 CCP by providing that if the maker of statements made before the trial exercises his right not to answer questions, his statements will, as a general rule, be admissible in evidence if the parties agree. However, the former rules will continue to apply in at least some circumstances to trials that are under way.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (d) OF THE CONVENTION

31. The applicant complained that the criminal proceedings against him had been unfair and alleged that he had been convicted on the basis of statements made to the public prosecutor, without being given an opportunity to examine the maker of the statements, N., or to have him examined. He relied on Article 6 §§ 1 and 3 (d) of the Convention, the relevant parts of which read as follows:

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

...

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

...

(d) to examine or have examined witnesses against him ...

...”

32. The Government submitted that, in principle, the Italian legal system afforded the accused the right to examine prosecution witnesses. However, in order to establish the facts of the case, the trial court was permitted in certain circumstances and subject to complying with the statutory conditions to rely in reaching its decision on evidence obtained during the preliminary investigation.

33. In the instant case, under the relevant Italian legislation, N. was not a “witness” but a “person accused in connected proceedings”, and was entitled to remain silent. As the Court itself had recognised in *Saunders* (see *Saunders v. the United Kingdom*, judgment of 17 December 1996, *Reports of Judgments and Decisions* 1996-VI, p. 2064, § 68), “although not specifically mentioned in Article 6 of the Convention the right to silence and the right not to incriminate oneself are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6”. Accordingly, the domestic authorities had had no alternative but to accept N.’s decision not to give evidence, since requiring him to repeat his statements at the trial would have entailed a violation of his fundamental rights.

34. The Government emphasised that three interests had been at stake: the right of the co-accused to remain silent, the right of the accused to examine a co-accused witness and the right of the judicial authority not to be deprived of evidence obtained during the investigation. The issue was so complex that the provisions governing the admissibility of the statements of a prosecution witness who was also a co-accused had been examined on several occasions by the Italian Constitutional Court and been the subject of amendments. In particular, the Constitutional Court had restated in its case-law the principle that a court should not be deprived of evidence obtained during the investigation (“*non dispersione*”).

35. The Government observed lastly that on 10 September 1997, the Committee of Ministers of the Council of Europe had adopted Recommendation No. R (97) 13, concerning intimidation of witnesses and the rights of the defence, in which it was suggested that States should use “pre-trial statements given before a judicial authority as evidence in court when it is not possible for witnesses to appear before the court or when appearing in court might result in great and actual danger to the life and security of witnesses, their relatives or other persons close to them”.

36. The applicant disagreed with the Government’s arguments. He said that his contention was not that the domestic courts had failed to apply the provisions in force at the material time, but that those provisions were incompatible with the principles set out in the Convention. Furthermore, the fact that the Italian parliament had decided on 7 August 1997 to amend Article 513 of the CCP only confirmed the view that the provision in question infringed every accused person’s “right to put the prosecution to proof”. He stressed, lastly, that N.’s statements had been the only evidence against him.

37. As the requirements of Article 6 § 3 are to be seen as particular aspects of the right to a fair trial guaranteed by Article 6 § 1, the Court will examine the complaints under those two provisions taken together (see, among many other authorities, *Van Mechelen and Others v. the Netherlands*, judgment of 23 April 1997, *Reports* 1997-III, p. 711, § 49).

38. The Court reiterates that the admissibility of evidence is primarily a matter for regulation by national law and as a general rule it is for the national courts to assess the evidence before them. The Court's task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see, among other authorities, *Doorson v. the Netherlands*, judgment of 26 March 1996, *Reports* 1996-II, p. 470, § 67, and *Van Mechelen and Others*, cited above, p. 711, § 50).

39. The evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence. As a general rule, paragraphs 1 and 3 (d) of Article 6 require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statement or at a later stage (see *Lüdi v. Switzerland*, judgment of 15 June 1992, Series A no. 238, p. 21, § 49, and *Van Mechelen and Others*, cited above, p. 711, § 51).

40. As the Court has stated on a number of occasions (see, among other authorities, *Isgrò v. Italy*, judgment of 19 February 1991, Series A no. 194-A, p. 12, § 34, and *Lüdi*, cited above, p. 21, § 47), it may prove necessary in certain circumstances to refer to depositions made during the investigative stage (in particular, where a witness refuses to repeat his deposition in public owing to fears for his safety, a not infrequent occurrence in trials concerning Mafia-type organisations). If the defendant has been given an adequate and proper opportunity to challenge the depositions, either when made or at a later stage, their admission in evidence will not in itself contravene Article 6 §§ 1 and 3 (d). The corollary of that, however, is that where a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6 (see *Unterpertinger v. Austria*, judgment of 24 November 1986, Series A no. 110, pp. 14-15, §§ 31-33; *Saïdi v. France*, judgment of 20 September 1993, Series A no. 261-C, pp. 56-57, §§ 43-44; and *Van Mechelen and Others*, cited above, p. 712, § 55; see also *Dorigo v. Italy*, application no. 33286/96, Commission's report of 9 September 1998, § 43, unpublished, and, on the same case, Committee of Ministers Resolution DH (99) 258 of 15 April 1999).

41. In that regard, the fact that the depositions were, as here, made by a co-accused rather than by a witness is of no relevance. In that connection, the Court reiterates that the term “witness” has an “autonomous” meaning in the Convention system (see *Vidal v. Belgium*, judgment of 22 April 1992, Series A no. 235-B, pp. 32-33, § 33). Thus, where a deposition may serve to a material degree as the basis for a conviction, then, irrespective of whether it was made by a witness in the strict sense or by a co-accused, it constitutes evidence for the prosecution to which the guarantees provided by Article 6 §§ 1 and 3 (d) of the Convention apply (see, *mutatis mutandis*, *Ferrantelli and Santangelo v. Italy*, judgment of 7 August 1996, *Reports* 1996-III, pp. 950-51, §§ 51-52).

42. In the light of the foregoing, the reasons given by the Court of Cassation in its judgment of 19 October 1995 for dismissing the appeal brought under Article 6 § 3 (d) of the Convention – reasons on which the Government also relied in part – do not appear pertinent. In particular, the fact that under the domestic law in force at the material time (see paragraph 26 above) the court could rule statements made before the trial admissible if a co-accused refused to give evidence could not deprive the accused of the right which Article 6 § 3 (d) afforded him to examine or have examined in adversarial proceedings any material evidence against him.

43. In the instant case, the Court notes that the domestic courts convicted the applicant solely on the basis of statements made by N. before the trial and that neither the applicant nor his lawyer was given an opportunity at any stage of the proceedings to question him.

44. In those circumstances, the Court is not satisfied that the applicant was given an adequate and proper opportunity to contest the statements on which his conviction was based.

45. The applicant was, therefore, denied a fair trial. Accordingly, there has been a violation of Article 6 §§ 1 and 3 (d).

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

46. Article 41 of the Convention provides:

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

A. Damage

47. The applicant said that his conviction and imprisonment had been unjust. He had thereby been prevented from working and his private and family life had suffered. He alleged that as a result of the violation of the

Convention he had sustained substantial pecuniary and non-pecuniary damage, which he put at 500,000,000 Italian lire (ITL).

48. The Court finds no causal link between the violation of Article 6 of the Convention and the pecuniary damage alleged by the applicant. The Court cannot speculate on what the outcome of the proceedings would have been if they had complied with Article 6 §§ 1 and 3 (d). Consequently, it dismisses the applicant's claims under this head (see *Cöeme and Others v. Belgium* [GC], nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 155, ECHR 2000-VII).

On the other hand, it finds that the applicant sustained some non-pecuniary damage, which cannot be compensated for simply by a finding of a violation. Ruling on an equitable basis, in accordance with Article 41 of the Convention, the Court decides to award the sum of ITL 15,000,000.

B. Costs and expenses

49. The applicant also sought the reimbursement of various costs that he had incurred before the domestic courts and the Convention institutions.

50. Under its settled case-law, the Court can only make an award in respect of costs and expenses incurred by the applicant if it is established that such costs and expenses were actually and necessarily incurred and were reasonable as to quantum (see, among other authorities, *Zimmermann and Steiner v. Switzerland*, judgment of 13 July 1983, Series A no. 66, p. 14, § 36). The Court notes, however, that the applicant has not provided any details of the costs of which he seeks reimbursement. It accordingly dismisses his claim for reimbursement of the costs incurred before the domestic courts.

51. As regards the costs incurred before the Convention institutions, the Court considers that aspects of the case were complex. However, the applicant has not produced any evidence in support of his claim for costs. Nevertheless, in the light of the written work which his lawyer has incontestably performed, the Court considers it appropriate to award the applicant a lump sum of ITL 3,000,000, to cover his costs.

C. Default interest

52. According to the information available to the Court, the statutory rate of interest applicable in Italy at the date of adoption of the present judgment is 3.5% per annum.

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention;
2. *Holds* by six votes to one
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, ITL 15,000,000 (fifteen million Italian lire) in respect of non-pecuniary damage and ITL 3,000,000 (three million Italian lire) for costs and expenses;
 - (b) that simple interest at an annual rate of 3.5% shall be payable from the expiry of the above-mentioned three months until settlement;
3. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in French, and notified in writing on 27 February 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Elisabeth PALM
President

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

E.P.
M.O'B.

PARTLY CONCURRING OPINION OF JUDGE ZUPANČIČ

I.

In cases where procedural errors contaminate the legal credibility of conviction, there persists the problem of “just compensation”. In a separate opinion in the judgments of *Cable and Others v. the United Kingdom* and *Hood v. the United Kingdom* ([GC], nos. 24436/94 et seq., 18 February 1999, unreported, and [GC], no. 27267/95, ECHR 1999-I), I outlined the absurdity of the artificial separation of procedural injustice from its *substantive* result. According to Convention, these are not “mere” procedural errors relevant only in so far as they affect the truth-finding function of a particular criminal process and the veracity of the resulting conviction. These are among the gravest substantive human-rights violations in their own right. Originally, the framers of the Convention anticipated that these procedural errors would be among the few situations in which the judgment of the European Court of Human Rights would be directly enforceable so as to overrule the decision of the national judiciary. We are speaking here of substantive due process.

In internal law there exist two main possible remedies to correct procedural human-rights violations, depending on who commits the violations and at what stage of the criminal procedure. These two remedies are (1) the exclusionary rule and (2) the retrial of the whole case. The exclusionary rule remedy, an *alter ego* of the privilege against self-incrimination, applies mostly in the focused pre-trial phase situations where the violation has been committed by police. The remedy of trial *de novo* applies in situations where the first-instance court, rather than police, has committed what in continental law is sometimes called “an absolutely essential procedural error”. These errors often overlap with the procedural human-rights violations.

In the context of Article 41, the question arises whether our pecuniary “just satisfaction” is not an entirely inadequate remedy for procedural human-rights violations if, as a consequence of these violations, the person who has not been afforded a fair criminal trial continues to sit in prison.

Pecuniary just satisfaction is logical only if we set out from the premise that gravely tainted criminal procedures may nevertheless yield substantively just convictions. If this were the premise, however, I doubt the framers of the Convention would have considered the procedural violations *per se* as grave human-rights violations to which they dedicated a substantial portion of the Convention. Since a large proportion of our own case-law deals with essential procedural requirements of fair trial established in Articles 5, 6, etc., I doubt this would make sense if we started from the premise that the procedure, fair or not, is merely a means to a substantively correct conviction and that in the last analysis what matters is

only whether the conviction is a “true positive”. Epistemologically speaking, the credibility of conviction and acquittal, in any event, cannot be tested except through a flawless procedure. It follows ineluctably that the only adequate remedy is the retrial of the case.

The majority maintains it is not willing to speculate, should the procedure be renewed and corrected, about the alternative outcome of the case. But the majority is then implicitly speculating to the effect that the corrected procedure *would* have yielded the same result (conviction). In *Cable and Others* and *Hood*, cited above, we considered the mere finding of a violation to be a sufficient remedy, which at least is consistent with the agnostic position taken *vis-à-vis* the (in)justice of the ultimate conviction.

I maintain, however, that a criminal procedure tainted with grave human-rights violations *a priori cannot* yield a substantively acceptable conviction. To maintain otherwise is to subscribe to the classical inquisitorial standpoint that the end justifies the means.

If proof of this be needed in international law, we may refer to the United Nations Convention against Torture (“the CAT”). The CAT maintains categorically that all evidence directly and indirectly obtained by torture must be prevented from reaching the eyes or ears of those who decide the criminal case (judge or jury). The CAT requires the exclusion of such evidence despite the fact that confessions and other evidence extracted by torture may reinforce the truth-finding function of criminal procedure: *confessio regina probationum*. If exclusion is violated the procedure must be reopened *ab initio* and subsequently the exclusion of tainted evidence strictly maintained. *A fortiori*, where the procedural error, such as the refusal to examine witnesses, fatally detracts from the truth-finding function of criminal procedure, there should be a trial *de novo*.

In *Scozzari and Giunta v. Italy* ([GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII), we have taken a step forward in resolving this problem. We made a strong recommendation in the direction of *restitutio in integrum pro futuro*¹. Admittedly, *Scozzari and Giunta* was a non-final family law situation, whereas here we are faced with the finality of a criminal conviction. Nevertheless, I advocated a similar recommendation in this case. Many High Contracting Parties to the Convention have already adopted a provision in their domestic procedural law according to which an otherwise final criminal or private-law judgment becomes subject to a new trial should the Court find a violation of the Convention.

Thus, I find it unacceptable – in a situation where the defendant was not permitted to have the witnesses examined and cross-examined – then to award 15,000,000 Italian lire as “just compensation” for non-pecuniary damage, purportedly on account of his “loss of real [namely, procedural] opportunities”².

II.

A careful examination of the *travaux préparatoires* for what is today Article 41 (former Article 50) reveals the original intentions of the founding fathers of the Convention. The original version of the Article presented on 5 September 1949 by P.-H. Teitgen read as follows:

“The verdict of the [European] Court [of Human Rights] shall order the State concerned: (1) *to annul, suspend or amend the incriminating decision*; (2) to make reparation for damage caused; (3) to require the appropriate penal, administrative or civil sanctions to be applied to the person or persons responsible.”³ (emphasis added)

This wording was later modified by the Committee of Experts for Human Rights composed of government representatives. The Italian delegate T. Perassi, a member of the Permanent Court of Arbitration, proposed an amendment resulting in the present version of Article 41⁴.

The provision was inspired by the 1921 German-Swiss *Treaty on Arbitration and Conciliation* (Article 10) and the Geneva *General Act for the Pacific Settlement of International Disputes* of 1928 (Article 32). Of course, these provisions were meant to deal with specific inter-State situations in which the State party to an arbitration agreement was unable to change its internal law but was willing to pay an equitable satisfaction of another kind. The basis for the arbitrage was extra-judicial compensation for the damage suffered by an individual caused to him by an alien State.

The reference to “*the internal law of the ... Party [which] allows only partial reparation to be made*” makes sense in inter-State disputes in which the State was politically willing to compensate for the restitution to the aggrieved individual, but was unable to do so due to specific provisions of its internal, usually constitutional, law. The intent of the provision, therefore, was to by-pass the internal legal impediments and to transpose the compensation question to the inter-State diplomatic protection level. This is also why, as we shall see, the language is difficult to interpret in the context of the Convention. To the best of my knowledge, the sentence “*the internal law of the ... Party [which] allows only partial reparation to be made*” has never been fully interpreted by the Court.

In the context of the Convention this phrase, imported from an inter-State arbitration agreement, has two possible meanings. It either has to be put on a Procrustean bed in order to derive any sense from it, in so far as it simply reiterates that the internal law must be proven to be incapable of dealing with the human-rights violation in question. Since the domestic remedies have to be exhausted before the case reaches the Court, the provision, as a formal precondition for awarding just satisfaction, would seem redundant.

The question may also be reversed. The Convention is not an arbitration agreement. Many procedural violations of human rights cannot be compensated for by pecuniary “just satisfaction”. The fears concerning the infringement of national sovereignty which hung over the Committee of Experts for Human Rights in 1949 are clearly out of date today. That the

underlying situation has radically changed can easily be proven by the fact that so many States have *sua sponte* relinquished this aspect of national sovereignty and have, by adopting specific legislation, subjected the final judgments of their criminal and private law courts to a trial *de novo*⁵. In such retrials the Court's finding of a violation is taken to be a legal *novum factum*. The implication is, of course, that the findings of this Court should exert their direct binding force upon the first-instance national courts retrying the cases. Clearly, nothing less will do if justice in a case such as this one is to be done.

Consequently, the second, more reasonable, interpretation of the phrase "*if the internal law of the High Contracting Party concerned allows only partial reparation to be made*" should in my opinion be as follows. Before the Court awards pecuniary just satisfaction, this critical phrase logically (*argumento a contrario*) presupposes that the High Contracting Party's legal system will have done everything in its power to correct the violation in question. Since the domestic remedies have been exhausted through the hierarchy of legal appeals *before* the case has reached the Court, this in most cases implies that the "*the internal law of the High Contracting Party concerned*" did not "*allow ... [for any] ... reparation to be made*".

This, however, does not logically imply that the internal legal system cannot react and correct the violation *after* it has been established by the Court. In this particular case, for example, under Article 632 § 1 b) of the Italian Code of Criminal Procedure the "*procuratore generale presso la corte di appello*" is empowered to request the retrial of the case and the court of appeal is empowered to grant the retrial. Logically then, the "reparation to be made" need not be "partial" only, it can be full.

Of course, there is the problem of timing. *Before* the case reached the Court the internal legal system did not register the violation of the Convention. The domestic legal system, however, is often capable of repairing the damage *later*, once the violation is notified to it by the Court. The Court, therefore, when handing down its judgment, should not *a priori* assume that the domestic legal system is incapable of full *restitutio in integrum*⁶.

At a minimum, the Court ought to explore the (im)possibility for the internal legal system to allow for full *restitutio in integrum* – because this impossibility of full *restitutio in integrum* is a strict legal precondition for the Court's awarding of pecuniary just satisfaction. The pecuniary just satisfaction, that is clear, is an *ultimum remedium*.

On the other hand, Article 1 of the Convention obliges the State party to the Convention "*to secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention*". It would not be logical to assume that this obligation simply ceases to exist, perhaps because the pecuniary just satisfaction will have been paid, after the Court

has found that the State had failed in its obligation to secure to the applicant an essential procedural right defined in Article 6 § 3 (b).

To maintain so would be to imply that there is a *quid pro quo* relationship between an essential procedural human right (and perhaps the freedom) of the applicant on the one hand and the payment of monies on the other hand. Despite the judgment in *Delta*, cited above, I find it difficult to accept such a reductive relationship between a human right and its remedy.

III.

Given the provisions of Article 1 of the Convention, there can be no doubt that the State party to the Convention is under a *moral* obligation to correct the violation of the human right found by this Court. Given the reference to the impossibility of full reparation in Article 41 (as a negative legal precondition for just satisfaction) the State party to the Convention is also under a *legal* obligation to explore fully the possibilities in its internal law in order to arrive at full *restitutio in integrum*.

To suggest that this legal obligation of *restitutio in integrum* no longer exists subsequent to the finding of a violation by this Court, whether or not just satisfaction had been awarded, would go against both Article 1 and Article 41. It would go against Article 1 which clearly implies that the States are bound to do everything possible to correct the violation. Since this is the whole purpose of the Convention, this holds true *a fortiori* after it went undetected by the internal legal system but has, consequently, been identified by the so-called Strasbourg machinery. It would go against Article 41 because it presupposes that full restitution would be made unless the internal law proves constitutionally incapable of granting it⁷.

To put this into perspective, let me emphasise that in some cases, such as those concerning violations of Article 1 of Protocol No. 1, the pecuniary compensation is the remedy *par excellence*. In some cases, the consequences of the violation of a particular human right, for example in cases concerning Articles 2 and 3, is truly irreversible and can only be, although always insufficiently, mitigated by pecuniary just satisfaction. In situations such as this one, however, deriving from an unfair trial of the applicant, full *restitutio in integrum* is eminently possible. It implies the full retrial of the whole case.

1. “The Court points out that by Article 46 of the Convention the High Contracting Parties undertook to abide by the final judgments of the Court in any case to which they were parties, execution being supervised by the Committee of Ministers. It follows, *inter alia*, that a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order *to put an end to the violation found by the Court and to redress so far as possible the effects* (see, *mutatis mutandis*, the Papamichalopoulos and Others v. Greece (Article 50) judgment of 31 October 1995, Series A no. 330-B, pp. 58-59, § 34). Furthermore, subject to monitoring by the Committee of Ministers, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that *such means are compatible with the conclusions set out in the Court’s judgment*.” (emphasis added)

2. For an analogous case, see *Delta v. France*, judgment of 19 December 1990, Series A no. 191-A, pp. 17-18, § 43: “The Court notes that in the present case an award of just satisfaction can only be based on the fact that the applicant did not have the benefit of all the guarantees of Article 6. Whilst the Court cannot speculate as to the outcome of the trial had the position been otherwise, it does not find it unreasonable to regard Mr Delta as having suffered a loss of real opportunities (see, among other authorities and *mutatis mutandis*, the Goddi [v. Italy] judgment of 9 April 1984, Series A no. 76, pp. 13-14, §§ 35-36, and the Colozza [v. Italy] judgment of 12 February 1985, Series A no. 89, p. 17, § 38).” In *Cable and Others v. the United Kingdom* [GC], nos. 24436/94 et seq., 18 February 1999, unreported, however, we considered the mere finding of a violation a sufficient moral satisfaction. The case-law, therefore, is inconsistent. In both cases the applicants continued to serve their sentences.

3. See the “Report of the Committee on Legal and Administrative Questions of the Consultative [now Parliamentary] Assembly”, report prepared by P.-H. Teitgen; see the Council of Europe *Collected Edition of the “Travaux Préparatoires” of the European Convention on Human Rights*, volume I, The Hague, Martinus Nijhoff, 1975, p. 212.

4. The original version of this text read as follows: “If the Court finds that a decision or a measure taken by a legal authority or of any authority of one of the High Contracting Parties, is completely or partially opposed to the obligations arising from the present Convention, and *if the internal law of the said Party only allows for a partial reparation to be made for the consequences of this decision or measure*, the decisions of the Court shall, if necessary accord just satisfaction to the injured party.” (emphasis added)

5. See Pradal and Corstens, *Droit penal européen*, Dalloz, 1999, p. 277, and notes 5, 6, 7 and 8.

6. The inadequate word “reparation”, coming as it does from an arbitration agreement, would *stricto sensu* mean *pecuniary compensation* for the damage incurred by the applicant. The Court, however, has implied that as a precondition to just satisfaction this word means *restitutio in integrum*. See *Scozzari and Giunta*, cited above.

7. In order to comply with this logic, the Court ought to split its procedure into two phases. In the first phase the Court would ascertain whether there has been a violation. In the second phase the burden should be on the State concerned to show that the internal law is incapable of full restitution. Only in this second phase could the Court award just satisfaction. But since such bifurcation of procedure is clearly not going to happen, it falls to the Committee of Ministers to abide by the above logic. Consequently, it would be very helpful if our judgments contained specific recommendations concerning possible ways and means of restitution, such as, for example, those the Court has handed down in *Scozzari and Giunta*, cited above.