



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

GRAND CHAMBER

CASE OF MARKOVIC AND OTHERS v. ITALY

(Application no. 1398/03)

JUDGMENT

STRASBOURG

14 December 2006

In the case of Markovic and Others v. Italy,

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

Luzius Wildhaber, *President*,
Christos Rozakis,
Jean-Paul Costa,
Nicolas Bratza,
Boštjan M. Zupančič,
Lucius Caflisch,
Ireneu Cabral Barreto,
Karel Jungwiert,
John Hedigan,
Margarita Tsatsa-Nikolovska,
Mindia Ugrekhelidze,
Anatoly Kovler,
Vladimiro Zagrebelsky,
Egbert Myjer,
Davíd Thór Björgvinsson,
Danutė Jočienė,
Ján Šikuta, *judges*,

and Lawrence Early, *Section Registrar*,

Having deliberated in private on 14 December 2005, 9 January and 25 October 2006,

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

PROCEDURE

1. The case originated in an application (no. 1398/03) against the Italian Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by ten nationals of Serbia and Montenegro, Mr Dusan Markovic and Mr Zoran Markovic, Ms Dusika Jontic and Mr Vladimir Jontic, Ms Draga Jankovic, Ms Mirjana Stevanovic and Ms Slavica Stevanovic, and Ms Milena Dragojevic, Mr Obrad Dragojevic and Mr Dejan Dragojevic (“the applicants”), on 6 December 2002.

2. The applicants applied to the Court through Ms A. Rampelli and are represented by Mr G. Bozzi, a barrister practising in Rome, and Mr A. Bozzi and Ms C. Gatti, barristers practising in Milan. The Italian Government (“the respondent Government”) were represented by their Agent, Mr I.M. Braguglia, and by their co-Agent, Mr F. Crisafulli.

3. The applicants complained in particular of a violation of Article 6 of the Convention, taken together with Article 1, as a result of a ruling by the Italian Court of Cassation that the domestic courts had no jurisdiction to examine their claim for compensation for damage sustained as a result of an air strike by NATO forces.

4. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). In a decision of 12 June 2003, the Section declared the application partly inadmissible with regard to the complaints under Articles 2, 10, 13 (inasmuch as it is considered to have been absorbed by Article 6) and 17 of the Convention and decided to communicate the remainder of the application to the respondent Government for their written observations. On 28 April 2005 a Chamber of that Section composed of Boštjan M. Zupančič, President, John Hedigan, Lucius Caflisch, Margarita Tsatsa-Nikolovska, Vladimiro Zagrebelsky, Egbert Myjer and Davíð Thór Björgvinsson, judges, and Vincent Berger, Section Registrar, relinquished jurisdiction in favour of the Grand Chamber, none of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

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

6. Pursuant to Article 29 § 3 of the Convention and Rule 54A § 3, the Grand Chamber notified the parties that it might decide to examine the merits of the case at the same time as the issue of admissibility.

7. The applicants and the respondent Government each filed submissions. Observations were also received from the United Kingdom Government, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2). The Government of Serbia and Montenegro exercised their right to intervene (Article 36 § 1 of the Convention and Rule 44 § 1 (b)). The applicants replied to the intervening parties' comments at the hearing (Rule 44 § 5).

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 14 December 2005 (Rule 59 § 3).

There appeared before the Court:

(a) *for the respondent Government*

Mr F. CRISAFULLI,
Ms A. CIAMPI,

*Co-Agent,
Adviser;*

(b) *for the applicants*

Mr G. BOZZI, of the Rome Bar,
Mr A. BOZZI, of the Milan Bar,
Mr D. GALLO,

*Counsel,
Adviser;*

(c) *for the Government of Serbia and Montenegro*

Mr S. CARIĆ,

Agent,

Ms K. JOSIFOR,

Ms I. BANOVCANIN-HEUBERGER,

Advisers.

The Court heard addresses by Mr Crisafulli, Ms Ciampi, Mr G. Bozzi, Mr A. Bozzi and Mr Carić, and their answers to the questions put by the judges.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The ten applicants are all citizens of Serbia and Montenegro, which was known at the time of the events in question as the Federal Republic of Yugoslavia (“the FRY”).

The first two applicants, Dusan and Zoran Markovic, were born in 1924 and 1952 respectively, and applied to the Court on behalf of Dejan Markovic, deceased son of Dusan Markovic and brother of Zoran Markovic.

The third and fourth applicants, Dusika and Vladimir Jontic, were born in 1948 and 1978 respectively, and applied to the Court on behalf of Slobodan Jontic, deceased husband of Dusika Jontic and father of Vladimir Jontic.

The fifth applicant, Draga Jankovic, was born in 1947 and applied to the Court on behalf of her deceased husband, Milovan Jankovic.

The sixth and seventh applicants, Mirjana and Slavica Stevanovic, were born in 1945 and 1974 respectively, and applied to the Court on behalf of Slavisa Stevanovic, deceased son of Mirjana Stevanovic and brother of Slavica Stevanovic.

The eighth, ninth and tenth applicants, Milena, Obrad and Dejan Dragojevic, were born in 1953, 1946 and 1975 respectively, and applied to the Court on behalf of Dragorad Dragojevic, deceased son of Milena and Obrad Dragojevic and brother of Dejan Dragojevic.

10. The applicants lodged the present application to complain of the outcome of an action in damages which they had brought in the Italian courts in respect of an air strike against the FRY.

A. Background and the bombing of Radio-televizija Srbija (RTS)

11. The facts of the case relate to the same events as those considered by the Court in its decision in the case of *Banković and Others v. Belgium and Others* ((dec.) [GC], no. 52207/99, ECHR 2001-XII). The facts in that case were summarised as follows:

“6. The conflict in Kosovo between Serbian and Kosovar Albanian forces during 1998 and 1999 is well documented. Against the background of the escalating conflict, together with the growing concerns and unsuccessful diplomatic initiatives of the international community, the six-nation Contact Group (established in 1992 by the London Conference) met and agreed to convene negotiations between the parties to the conflict.

7. On 30 January 1999, and following a decision of its North Atlantic Council (NAC), the North Atlantic Treaty Organisation (NATO) announced air strikes on the territory of the FRY in the case of non-compliance with the demands of the international community. Negotiations consequently took place between the parties to the conflict from 6 to 23 February 1999 in Rambouillet and from 15 to 18 March 1999 in Paris. The resulting proposed peace agreement was signed by the Kosovar Albanian delegation but not by the Serbian delegation.

8. Considering that all efforts to achieve a negotiated political solution to the Kosovo crisis had failed, the NAC decided on, and on 23 March 1999 the Secretary General of NATO announced, the beginning of air strikes (Operation Allied Force) against the FRY. The air strikes lasted from 24 March to 8 June 1999.

...

9. Three television channels and four radio stations operated from the RTS facilities in Belgrade. The main production facilities were housed in three buildings at Takovska Street. The master control room was housed on the first floor of one of the buildings and was staffed mainly by technical staff.

10. On 23 April 1999, just after 2 a.m. approximately, one of the RTS buildings at Takovska Street was hit by a missile launched from a NATO forces' aircraft. Two of the four floors of the building collapsed and the master control room was destroyed.

11. ... Twenty-four targets were hit in the FRY that night, including three in Belgrade.”

12. The partial collapse of the RTS building caused the deaths of sixteen people, including the five relatives of the applicants.

B. Civil proceedings in the Rome District Court

13. On 31 May 2000 the first four applicants brought an action in damages in the Rome District Court under Article 2043 of the Italian Civil Code. The other six applicants applied to be joined to the proceedings on 3 November 2000.

14. The applicants believed that civil liability for the deaths of their relatives lay with the Italian Prime Minister's Office and Ministry of Defence and with the Command of NATO's Allied Forces in Southern Europe (AFSOUTH).

They argued that the Italian courts had jurisdiction to hear the case. In particular, on the basis of the wording of Article 6 of the Italian Criminal Code, they submitted that the unlawful act that had caused the alleged damage should be regarded as having been committed in Italy inasmuch as the military action had been organised on Italian territory and part of it had taken place there. They based this argument on the extent of Italy's commitment – involving substantial political and logistical support – to the military mission in question. Specifically, Italy, unlike other NATO members, had provided the air bases from which the aircraft that had bombed Belgrade and the RTS had taken off. They also relied in support of their claim on Article 174 of the Wartime Military Criminal Code and on the London Convention of 1951 and the Protocol Additional to the Geneva Conventions.

15. The defendants argued that the Italian courts had no jurisdiction to hear the case. The proceedings against AFSOUTH were discontinued by the applicants.

16. The Prime Minister's Office and the Ministry of Defence subsequently sought a preliminary ruling from the Court of Cassation on the question of jurisdiction (*regolamento preventivo di giurisdizione*) under Article 41 of the Italian Code of Civil Procedure.

17. In written submissions dated 16 November 2001, Assistant Principal State Counsel at the Court of Cassation argued that the application for a preliminary ruling should be declared inadmissible as it concerned the merits of the claim, not the issue of jurisdiction. He stated as follows:

“The governmental bodies defending this claim have requested a preliminary ruling on the issue of jurisdiction, arguing that:

(a) since the action is brought against the Italian State as a specific (unitary) subject of international law for acts performed in the exercise of its *imperium* (*iure imperii*), it cannot be brought in the Italian courts;

(b) paragraph 5 of Article VIII of the London Convention of 19 June 1951, which Italy ratified by Law no. 1335 of 1955, does not provide any basis for the action either, as it applies to damage caused in the receiving State.

The government seek to show through this jurisdictional issue that the Italian legal system does not contain any provision or principle capable of providing a basis for the alleged personal right [*diritto soggettivo perfetto*] or of guaranteeing it in the abstract.

Accordingly, the position is that:

(a) the government argue that the Italian State cannot be held liable for acts carried out in the exercise of its *imperium*;

(b) in addition, they deny that the said London Convention can be used to determine the place where the acts which caused the alleged damage took place (it is not by accident that the applicant has cited the provisions of the Criminal Code referring to the place where the offence was committed).

It follows that the questions thus raised go to the merits, not to the issue of jurisdiction (see judgment no. 903 of 17 December 1999 of the Court of Cassation, sitting as a full court).

For these reasons, the Court of Cassation, sitting as a full court, is asked to declare the application inadmissible, with all the consequences which that entails in law.”

18. In a ruling (no. 8157) of 8 February 2002, which was deposited with the registry on 5 June 2002 and conveyed to the applicants on 11 June 2002, the Court of Cassation, sitting as a full court (*Sezioni Unite*), found that the Italian courts had no jurisdiction. It reasoned as follows:

“...

2. The claim seeks to impute liability to the Italian State on the basis of an act of war, in particular the conduct of hostilities through aerial warfare. The choice of the means that will be used to conduct hostilities is an act of government. These are acts through which political functions are performed and the Constitution provides for them to be assigned to a constitutional body. The nature of such functions precludes any claim to a protected interest in relation thereto, so that the acts by which they are carried out may or may not have a specific content – see the judgments of the full court of 12 July 1968 (no. 2452), 17 October 1980 (no. 5583) and 8 January 1993 (no. 124). With respect to acts of this type, no court has the power to review the manner in which the function was performed.

3. While the purpose of the provisions of international agreements governing the conduct of hostilities – the Protocol Additional to the Geneva Conventions (Articles 35.2, 48, 49, 51, 52 and 57) and the European Convention on Human Rights (Articles 2 and 15 § 2) – is to protect civilians in the event of attack, they are rules of international law, and so also regulate relations between States.

These same treaties lay down the procedure for finding a violation and the sanctions in the event of liability (Article 91 of the Protocol and Article 41 of the Convention); they also designate the international courts and tribunals with jurisdiction to make such a finding.

However, the legislation implementing these rules in the Italian State does not contain any express provision enabling injured parties to seek reparation from the State for damage sustained as a result of a violation of the rules of international law.

The notion that provisions to that effect may implicitly have been introduced into the system through the implementation of rules of international law is at odds with the converse principle that has been mentioned which holds that protected individual interests are no bar to carrying out functions of a political nature.

Indeed, in order to enable reparation to be provided in the domestic system for loss sustained as a result of a violation of the ‘reasonable time’ requirement under Article 6

of the Convention on Human Rights, [the State] introduced appropriate legislation (Law no. 89 of 24 March 2001).

4. No entitlement to a review of the government's decision concerning the conduct of hostilities with respect to the NATO aerial operations against the Federal Republic of Yugoslavia can be found in the London Convention of 1951.

The fact that the aircraft used to bomb the Belgrade radio and television station were able to use bases situated on Italian territory constitutes but one element of the highly complex operation whose lawfulness it is sought to review and is not therefore relevant to the application of the rule laid down in paragraph 5 of Article VIII of the Convention, which on the contrary presupposes the commission of an act that is amenable to review."

19. The Court of Cassation's ruling brought to an end, *ipso jure*, the proceedings in the Rome District Court.

II. RELEVANT DOMESTIC LAW AND PRACTICE

20. The relevant provisions of the Italian Constitution are as follows:

Article 10 § 1

"The Italian legal system shall comply with the generally recognised rules of international law.

..."

Article 24 § 1

"Everyone may bring legal proceedings to protect his or her rights and legitimate interests.

..."

Article 28

"Civil servants, other agents of the State and public entities shall be directly responsible, in accordance with the criminal, civil and administrative law, for acts committed in breach of rights. In connection with such acts, civil liability shall extend to the State and public entities.

..."

Article 113

"Judicial protection of rights and legitimate interests in the ordinary and administrative courts shall always lie against acts of the public administrative authorities.

It may not be excluded or limited to extraordinary remedies or specific categories of act.

The law shall specify which judicial bodies are empowered to set aside acts of the public authorities, in what cases and with what effects.”

21. Article 31 of Royal Decree no. 1024 of 26 June 1924 provides:

“No appeal to the *Consiglio di Stato*, sitting in its judicial capacity, shall lie against acts or decisions of the government which involve the exercise of political power.”

22. Article 2043 of the Civil Code provides:

“Any unlawful act which causes damage to another will render the perpetrator liable in damages under the civil law.”

23. Article 41 of the Code of Civil Procedure, which deals with the issue of jurisdiction, provides:

“For so long as there has been no determination of the merits of the proceedings at first instance, any party may seek a ruling on a question of jurisdiction under Article 37 from the Court of Cassation, sitting as a full court. ...”

Article 37 of the Code of Civil Procedure provides:

“A ruling that an ordinary court has no jurisdiction because the case concerns a public authority or is within the province of a special court may be made at any time and at any level of jurisdiction, including by the court of its own motion.”

24. The relevant provisions of the Criminal Code provide:

Article 6

“Anyone who commits an offence on the territory of the State shall be punished in accordance with Italian law.

The offence will be regarded as having been committed on the territory of the State if all or part of the act or omission at the origin of the offence or all or some of the consequences of such act or omission occurred there.”

Article 185

“Restitution and compensation for damage.

The commission of an offence shall give rise to an obligation of restitution under the civil law [Articles 2043 et seq. of the Civil Code].

Any offence that causes pecuniary damage [Article 2056 of the Civil Code] or non-pecuniary damage [Article 2059 of the Civil Code] shall impose an obligation on the perpetrator and those accountable for his or her actions under the civil law [Article 2047 of the Civil Code] to make reparation.”

25. Article 174 of the Wartime Military Criminal Code reads as follows:

“A commanding officer of a military force who, in order to inflict damage on the enemy, orders or authorises the use of a means or method of warfare that is prohibited

by law or by international treaty or which is in any event contrary to the military code of honour shall be liable on conviction to a minimum of five years' imprisonment unless the act concerned is a criminal offence under a specific statutory provision.

If the act results in a massacre, the minimum term of imprisonment shall be ten years."

26. In a judgment of 10 July 1992 (no. 124/1993), the Court of Cassation, sitting as a full court, established the rule that the courts had no jurisdiction to hear cases against the authorities relating to political acts.

A trade union had brought an action against the Prime Minister, the Civil Service Ministry and the Ministry of State Education on the ground that the government had failed to comply with their undertakings. The Court of Cassation noted, *inter alia*, that such a failure could only engage the government's political responsibility, but could not create a right. It ruled that the courts had no jurisdiction to hear the case after formulating the following principle:

"Legislative action is a political act since it is the standard means of performing political and governmental functions. The governmental authority's conduct in the present case was not, therefore, capable in law of causing individuals damage (whether to their personal rights or to their legitimate interests); it consequently escapes all judicial scrutiny."

27. The Italian courts had in fact already examined this question in a number of earlier cases and had ruled that, as they were political in nature, the following acts escaped the scrutiny of the domestic courts:

(i) a waiver of the right to exercise jurisdiction under Article VII of the Agreement of 1951 between the Parties to the North Atlantic Treaty regarding the Status of their Forces (Court of Cassation, Third Criminal Division, 21 March 1962, no. 1645, *Kinardi and Others*, *Giust. Pen.* [Criminal Justice], 1963, III, p. 80);

(ii) the assignment of property belonging to Italian nationals under the London Convention of 1951 (Court of Cassation, sitting as a full court, 12 July 1968, no. 2452, *De Langlade v. the Treasury*, *Rivista diritto internazionale* [*International Law Review*], 1969, p. 583);

(iii) a Transport Ministry decree suspending permission to transport goods to Austria (Rome District Court, 18 May 1993, *Soc. S. and C. Transp. GmbH v. Ministry of Transport*, *Rivista diritto internazionale privato e processuale* [*Review of Private International Law and Procedure*], 1995, p. 755);

(iv) a decision by the Ministry of Employment appointing employees' representatives as delegates to the International Labour Organisation (Lazio Regional Administrative Court, 20 August 1976, no. 492, *CISNAL v. Ministry of Employment and Ministry of Foreign Affairs*, *Italian Yearbook of International Law*, 1978-79, p. 184);

(v) a declaration of war and treaty provisions relating to compensation for war damage (Lazio Regional Administrative Court (I), 28 January 1985,

no. 106, *Pestalozza v. the Treasury*, Trib. Amm. Reg. [Regional Administrative Court Review], 1985, p. 381).

28. The full court of the Court of Cassation delivered a further judgment (no. 5044) on 11 March 2004. It concerned the jurisdiction of the Italian civil courts to hear claims for compensation for damage sustained by a person who had been captured by the German military in 1944 and deported to work for German industry. Germany had pleaded State immunity and the courts of first instance and appeal had held that they had no jurisdiction to make an order against it. The Court of Cassation carried out a very extensive examination of the international treaties on international crime, imprescriptibility, the international responsibility of States, immunity from jurisdiction and of the case-law of various international tribunals. In holding that the immunity plea failed and the Italian courts had to decide the claim, it stated *inter alia*:

“... In a decision no. 8157 of 5 June 2002, this full court did indeed rule that acts performed by the State in the conduct of hostilities escape all scrutiny by the courts, as they are acts through which ‘political’ functions are carried out. The nature of these functions ‘precludes any claim to a protected interest in respect thereto, so that there may or may not be a specific content to the acts through which they are performed’. Pursuant to this principle, the Italian courts were held to have no jurisdiction to hear a claim against the Italian Prime Minister’s Office and the Italian Ministry of Defence for compensation for the destruction of a non-military objective during NATO air strikes against the Federal Republic of Yugoslavia or for the resultant civilian deaths. It is readily apparent, however, firstly, that the fact that the court cannot contest the manner in which the actions of the supreme head of the *res publica* are conducted does not prevent it from finding that a criminal offence has been committed or that there is related liability under the criminal or civil law (Articles 90 and 96 of the Constitution; section 15 of Constitutional Law no. 1 of 1953; and section 30 of Law no. 20 of 1962); secondly, by virtue of the principle of adaptation established by Article 10 § 1 of the Constitution, the ‘generally recognised’ principles of international law which govern the fundamental values constituted by the freedom and dignity of the human being and characterise the most serious assaults upon the integrity of those values as ‘international crimes’ have ‘automatically’ been integrated into our system and are entirely apt for use as a standard whereby the injustice of damage caused to others by intentional or negligent ‘acts’ may be gauged. It is evident, therefore, that the principles referred to in this decision cannot be taken into consideration in the instant case. ...

9.1 Granting immunity from jurisdiction to States who have been guilty of such wrongdoing is in manifest contradiction with the aforementioned normative rules because it constitutes an obstacle to the defence of values whose protection, like these norms and principles, must on the contrary be considered essential for the entire international community, even to the point of justifying forms of mandatory response in the most serious cases. Nor is there any doubt that the antinomy must be resolved by giving priority to the highest ranking norms, as the judges in the minority (eight to nine) stated in their dissenting opinion appended to the judgment in *Al-Adsani* [v. the United Kingdom [GC], no. 35763/97, ECHR 2001-XI], by precluding in such cases any claim by the State to immunity from suit in the foreign courts.”

29. In 1993 the Italian government decided to send a military expeditionary force to Somalia to perform peacekeeping operations. After the expeditionary force had returned to Italy, it was discovered that some of its members had engaged in the torture of Somali prisoners. Two members of the expedition were charged and given prison sentences. They were also ordered to pay compensation to the civil party. In judgment no. 28154 of 7 March 2002, the text of which was deposited with the registry on 10 July 2002, the Rome Civil Court ordered another Italian serviceman and the Ministry of Defence to make reparation for the damage sustained by the relatives of a civilian whom the serviceman had killed unlawfully.

III. OTHER RELEVANT PROVISIONS

30. The applicants relied in the domestic courts on the Protocol Additional of 8 June 1977 to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts (Protocol I). The Protocol, which Italy ratified through Law no. 672 of 11 December 1985, contains, *inter alia*, the following provisions:

Article 35 – Basic rules

“1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.

2. It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.

3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.

...”

Article 48 – Basic rule

“In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”

Article 49 – Definition of attacks and scope of application

“1. ‘Attacks’ means acts of violence against the adversary, whether in offence or in defence.

2. The provisions of this Protocol with respect to attacks apply to all attacks in whatever territory conducted, including the national territory belonging to a Party to the conflict but under the control of an adverse Party.

3. The provisions of this section apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air.

4. The provisions of this section are additional to the rules concerning humanitarian protection contained in the Fourth Convention, particularly in Part II thereof, and in other international agreements binding upon the High Contracting Parties, as well as to other rules of international law relating to the protection of civilians and civilian objects on land, at sea or in the air against the effects of hostilities.”

Article 51 – Protection of the civilian population

“1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

3. Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.

4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:

- (a) those which are not directed at a specific military objective;
- (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
- (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;

and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

5. Among others, the following types of attacks are to be considered as indiscriminate:

- (a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects;

and

- (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

6. Attacks against the civilian population or civilians by way of reprisals are prohibited.

7. The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.

8. Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57.

...”

Article 52 – General Protection of civilian objects

“1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.

2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.

...”

Article 57 – Precautions in attack

“1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.

2. With respect to attacks, the following precautions shall be taken:

(a) those who plan or decide upon an attack shall:

(i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;

(ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;

(iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

(b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

(c) effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.

3. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.

4. In the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.

5. No provision of this Article may be construed as authorizing any attacks against the civilian population, civilians or civilian objects.

...”

Article 91 – Responsibility

“A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.”

31. The applicants also relied in the domestic courts on paragraph 5 of Article VIII of the London Convention of 19 June 1951 between the Parties to the North Atlantic Treaty regarding the Status of their Forces¹, which Italy ratified through Law no. 1335 of 1955.

Article I defines certain terms as follows:

“...

(d) 'sending State' means the Contracting Party to which the force belongs;

(e) 'receiving State' means the Contracting Party in the territory of which the force or civilian component is located, whether it be stationed there or passing in transit;

...”

1. Serbia is not a party to this Treaty.

Article VIII provides, *inter alia*:

“ ...

5. Claims (other than contractual claims and those to which paragraphs 6 or 7 of this Article apply) arising out of acts or omissions of members of a force or civilian component done in the performance of official duty, or out of any other act, omission or occurrence for which a force or civilian component is legally responsible, and causing damage in the territory of the receiving State to third parties, other than any of the Contracting Parties, shall be dealt with by the receiving State in accordance with the following provisions:

(a) Claims shall be filed, considered and settled or adjudicated in accordance with the laws and regulations of the receiving State with respect to claims arising from the activities of its own armed forces.

(b) The receiving State may settle any such claims, and payment of the amount agreed upon or determined by adjudication shall be made by the receiving State in its currency.

(c) Such payment, whether made pursuant to a settlement or to adjudication of the case by a competent tribunal of the receiving State, or the final adjudication by such a tribunal denying payment, shall be binding and conclusive upon the Contracting Parties.

(d) Every claim paid by the receiving State shall be communicated to the sending States concerned together with full particulars and a proposed distribution in conformity with sub-paragraphs (e) (i), (ii) and (iii) below. In default of a reply within two months, the proposed distribution shall be regarded as accepted.

(e) The cost incurred in satisfying claims pursuant to the preceding sub-paragraphs and paragraph 2 of this Article shall be distributed between the Contracting Parties, as follows:

(i) Where one sending State alone is responsible, the amount awarded or adjudged shall be distributed in the proportion of 25 per cent chargeable to the receiving State and 75 per cent chargeable to the sending State.

(ii) Where more than one State is responsible for the damage, the amount awarded or adjudged shall be distributed equally among them: however, if the receiving State is not one of the States responsible, its contribution shall be half that of each of the sending States.

(iii) Where the damage was caused by the armed services of the Contracting Parties and it is not possible to attribute it specifically to one or more of those armed services, the amount awarded or adjudged shall be distributed equally among the Contracting Parties concerned: however, if the receiving State is not one of the States by whose armed services the damage was caused, its contribution shall be half that of each of the sending States concerned.

(iv) Every half-year, a statement of the sums paid by the receiving State in the course of the half-yearly period in respect of every case regarding which the proposed distribution on a percentage basis has been accepted, shall be sent to the

sending States concerned, together with a request for reimbursement. Such reimbursement shall be made within the shortest possible time, in the currency of the receiving State.

(f) In cases where the application of the provisions of sub-paragraphs (b) and (e) of this paragraph would cause a Contracting Party serious hardship, it may request the North Atlantic Council to arrange a settlement of a different nature.

(g) A member of a force or civilian component shall not be subject to any proceedings for the enforcement of any judgment given against him in the receiving State in a matter arising from the performance of his official duties.

(h) Except in so far as sub-paragraph (e) of this paragraph applies to claims covered by paragraph 2 of this Article, the provisions of this paragraph shall not apply to any claim arising out of or in connexion with the navigation or operation of a ship or the loading, carriage, or discharge of a cargo, other than claims for death or personal injury to which paragraph 4 of this Article does not apply.

6. Claims against members of a force or civilian component arising out of tortious acts or omissions in the receiving State not done in the performance of official duty shall be dealt with in the following manner:

(a) The authorities of the receiving State shall consider the claim and assess compensation to the claimant in a fair and just manner, taking into account all the circumstances of the case, including the conduct of the injured person, and shall prepare a report on the matter.

(b) The report shall be delivered to the authorities of the sending State, who shall then decide without delay whether they will offer an *ex gratia* payment, and if so, of what amount.

(c) If an offer of *ex gratia* payment is made, and accepted by the claimant in full satisfaction of his claim, the authorities of the sending State shall make the payment themselves and inform the authorities of the receiving State of their decision and of the sum paid.

(d) Nothing in this paragraph shall affect the jurisdiction of the courts of the receiving State to entertain an action against a member of a force or of a civilian component unless and until there has been payment in full satisfaction of the claim.

7. Claims arising out of the unauthorized use of any vehicle of the armed services of a sending State shall be dealt with in accordance with paragraph 6 of this Article, except in so far as the force or civilian component is legally responsible.

8. If a dispute arises as to whether a tortious act or omission of a member of a force or civilian component was done in the performance of official duty or as to whether the use of any vehicle of the armed services of a sending State was unauthorized, the question shall be submitted to an arbitrator appointed in accordance with paragraph 2 (b) of this Article, whose decision on this point shall be final and conclusive.

9. The sending State shall not claim immunity from the jurisdiction of the courts of the receiving State for members of a force or civilian component in respect of the civil jurisdiction of the courts of the receiving State except to the extent provided in paragraph 5 (g) of this Article.

10. The authorities of the sending State and of the receiving State shall co-operate in the procurement of evidence for a fair hearing and disposal of claims in regard to which the Contracting Parties are concerned.

...”

THE LAW

I. ADMISSIBILITY OF THE APPLICATION

A. Objection of failure to exhaust domestic remedies

32. The respondent Government pointed out that in the six months following the Court of Cassation’s judgment, which dealt with the question of jurisdiction only in respect of the Italian State, not in respect of NATO or AFSOUTH, the applicants had not resumed the proceedings against NATO. In their submission, this reflected a lack of interest on the applicants’ part and constituted, albeit indirectly, a failure to exhaust the domestic remedies available to them under Italian law. The respondent Government added at the hearing that the applicants’ claim was based on provisions which, while of relevance to instituting criminal proceedings, could not validly be relied upon in the civil courts and they noted that the applicants had been unable to produce any example of a case in which a claim such as theirs had been successfully pleaded.

33. The applicants said that they had made a joint and several claim for reparation from the Italian State and NATO. However, after NATO claimed immunity in respect of its headquarters, they had withdrawn their claim against it with its consent. The action against NATO had therefore been finally extinguished. This had not, however, affected the action against the Italian State. The applicants pointed out that the respondent Government’s argument was illogical in that it required the applicants to pursue proceedings in the national courts when, according to the respondent Government’s own case, they had no right they could validly assert there.

34. The Court notes that in *Banković and Others*, cited above, which was based on the same facts as the present application save that the applicants in that case did not bring an action in the Italian courts, the Italian

Government pleaded a failure to exhaust domestic remedies and actually cited the *Markovic* case as proof of the existence of a remedy. The applicants in the instant case made use of the remedy and pursued the proceedings which, in their view, had the greatest prospect of success as far as they could after NATO claimed immunity from the jurisdiction of the national courts.

35. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success (see *Sejdovic v. Italy* [GC], no. 56581/00, § 46, ECHR 2006-II).

The respondent Government have not provided any concrete example of a civil action being successfully brought against NATO. The Court does not, therefore, find convincing their argument that resuming the proceedings against NATO would have offered better prospects of success than the proceedings against the Italian State.

36. In these circumstances, the application cannot be dismissed for failure to exhaust domestic remedies within the meaning of Article 35 § 1 of the Convention.

B. Whether the applicants came within the “jurisdiction” of the respondent State within the meaning of Article 1 of the Convention

1. The respondent Government's submissions

37. The respondent Government submitted that the application was inadmissible as it was incompatible with the provisions of the Convention. With reference to the Article 6 complaint, they invited the Court to adopt the reasoning it had applied in *Banković and Others* when declaring the complaints concerning the essential rights guaranteed by the Convention inadmissible *ratione loci*.

38. The reference to Article 1 in the questions that had been put to the parties by the Court and the connection that undoubtedly existed with the Article 6 issue indicated that the Court considered the relevant question to be whether a right of access to the courts to assert a Convention right as opposed to an ordinary civil right existed in the present case. A person who was not within the national jurisdiction had no right of access to a remedy that would enable him or her to claim reparation for loss from the authorities of the State concerned. If a State had no liability for acts committed outside its territory, it could hardly be criticised for declining to accept an application complaining of the consequences of such acts. The respondent Government therefore submitted that, even though – in contrast

to the applicants in *Banković and Others* – the applicants in the present case had brought themselves within the ambit of the State’s jurisdiction by lodging a claim with the authorities for reparation for their losses, their application, like that in *Banković and Others*, had to be considered as a whole and all the complaints, including those under Article 6, declared inadmissible.

39. The respondent Government further noted that an analysis of NATO’s decision-making system did not reveal any participation by Italy in the choice of the various targets and that all the military operations had been carried out in compliance with the rules of international humanitarian law. In those circumstances, it was very hard to establish any joint liability on the part of Italy. Accordingly, there was no jurisdictional link between the applicants and the Italian State.

40. In the respondent Government’s submission, it would be absurd in a case in which no obligation to protect a substantive right arose to hold that there was an obligation to protect the corresponding procedural right, that is to say, to afford a means of asserting that same substantive right in the national courts.

41. The respondent Government also raised the same objections as in *Banković and Others* with regard to the individual responsibility of States for acts committed by an international organisation of which they were members, observing that it would be illogical to hold the State – which was not responsible for the acts of international organisations of which it was a member – accountable under the Convention for not taking domestic measures to remedy the consequences of those acts. They submitted that the application should therefore be declared inadmissible as being incompatible *ratione materiae* with the provisions of the Convention.

2. *The applicants’ submissions*

42. The applicants referred to the respondent Government’s objection in *Banković and Others* of a failure to exhaust domestic remedies. They submitted that it amounted to an acknowledgement, at least as regards the domestic legal order, that they were within the jurisdiction of the national courts. They added that Assistant Principal State Counsel at the Court of Cassation shared that view as, in his written submissions, he had argued that the lack of jurisdiction defence raised by the Prime Minister’s Office should be dismissed.

43. The applicants went on to say that in *Banković and Others* there had been no prior referral to the national courts. They argued that that difference sufficed to show that they were indisputably within the jurisdiction of the respondent State within the meaning of Article 1 of the Convention and consequently enjoyed the protection of the Convention.

In their submission, the Court of Cassation's decision was irreconcilable with Article 1 of the Convention in that it precluded any practical application of the provisions of the Convention in domestic law.

3. *The intervening parties' submissions*

(a) **The Government of Serbia and Montenegro**

44. The Government of Serbia and Montenegro submitted that the complaint under Article 6 of the Convention was not incompatible *ratione loci* with the provisions of the Convention. They noted that the acts had been committed either on the territory of Serbia and Montenegro or on the territory of Italy, while the consequences had been suffered solely in Serbia and Montenegro. In their submission, the first point the Court had to take into consideration was that the aircraft which had bombed the RTS building had taken off in Italy, where the decision to carry out the raid had been taken in coordination with NATO headquarters in Brussels. The acts concerned also included all the physical and logistical preparation of the operation, which had resulted in the deaths of sixteen people. At the time, Italy and the other NATO member States had total control over the use of weapons in Serbian and Montenegrin airspace, but ultimately it was Italy which had had the aerial capacity to bomb the RTS building. These factors clearly showed the link between the events in issue and Italy, even though the consequences were suffered only in Serbia. In the Government of Serbia and Montenegro's submission, the present case was, therefore, sufficiently distinguishable from *Banković and Others* (cited above) as to warrant a different conclusion and one that would avoid a denial of justice. They concluded from the above that the act complained of in the present case was not exclusively extraterritorial.

(b) **The Government of the United Kingdom**

45. The British Government noted that in *Banković and Others* the Court had decided unanimously that all of the provisions of the Convention had to be read in the light of Article 1 of the Convention, which defined the scope of their application. The effect of Article 1, as the Court had decided in *Banković and Others* and in its earlier decision in the present case (see paragraph 4 above), was that the rights and freedoms guaranteed by the Convention were not applicable to an incident such as an attack – carried out in the course of an armed conflict – on a building outside the territory of the Contracting States concerned, because the persons affected by that attack were not within the jurisdiction of the Contracting States in question.

46. Once it had been established that the Convention was not applicable, it followed that those claiming in respect of that incident possessed no rights under the Convention. Accordingly, no question of a duty on the States

Parties to the Convention to provide a remedy in the national courts for the violation of such rights could arise.

47. It was, therefore, entirely logical that the Grand Chamber in *Banković and Others* should have found the claim to be inadmissible with regard to Article 13 once it had found that the application did not fall within the scope of Articles 2 and 10. Referring to the case of *Z and Others v. the United Kingdom* ([GC], no. 29392/95, § 103, ECHR 2001-V), the British Government submitted that to the extent that Article 6, as opposed to Article 13, had a distinct role regarding the enforcement of rights under the other provisions of the Convention, the answer had to be the same under that Article.

48. It could make no difference that the individual applicant had subsequently entered the territory of the Contracting State and sought to bring proceedings there. While such a person could come within the jurisdiction of that Contracting State when he or she entered its territory, that fact could not retrospectively render the Convention applicable to a past event to which the Convention was not applicable at the time. Nor did it alter the fact that, at the time of the incident, that person was not within the jurisdiction of the State and accordingly it had no duty under Article 1 to guarantee to them the rights and freedoms set out in the Convention. Neither Article 13 nor Article 6 required a Contracting State to provide a remedy for violation of other provisions of the Convention if those other provisions were not applicable to the event in question because of their scope of application under Article 1.

4. *The Court's assessment*

49. It will be recalled that in *Banković and Others*, the Court stated: “As to the ‘ordinary meaning’ of the relevant term in Article 1 of the Convention, the Court is satisfied that, from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial. While international law does not exclude a State’s exercise of jurisdiction extraterritorially, the suggested bases of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality) are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States.”

50. It did not find any “jurisdictional link” for the purposes of Article 1 of the Convention between the victims of the act complained of and the respondent States and held that the action concerned did not engage the latter’s responsibility under the Convention. In the light of that finding, it considered it unnecessary to examine the remaining issues of admissibility that had been raised by the parties.

51. As for the other complaints which the applicants in the present case have made in their application (see paragraph 4 above), the Court has

declared them inadmissible on the grounds that the specific circumstances of the case, notably the fact that the applicants had sought a remedy in the Italian courts, did not warrant a departure from the *Banković and Others* case-law.

52. However, as regards the complaint under Article 6 taken in conjunction with Article 1 of the Convention, the Court notes that in *Banković and Others* the respondent Government stressed that it was possible for proceedings to be brought in the Italian domestic courts, thus implying that the existence of a jurisdictional link could not be excluded for future complaints made on a different basis. The applicants had in fact already begun proceedings in the domestic courts.

53. The Court does not share the view of the Italian and British Governments that the subsequent institution of proceedings at the national level does not give rise to any obligation on the part of the State towards the person bringing the proceedings. Everything depends on the rights which may be claimed under the law of the State concerned. If the domestic law recognises a right to bring an action and if the right claimed is one which *prima facie* possesses the characteristics required by Article 6 of the Convention, the Court sees no reason why such domestic proceedings should not be subjected to the same level of scrutiny as any other proceedings brought at the national level.

54. Even though the extraterritorial nature of the events alleged to have been at the origin of an action may have an effect on the applicability of Article 6 and the final outcome of the proceedings, it cannot under any circumstances affect the jurisdiction *ratione loci* and *ratione personae* of the State concerned. If civil proceedings are brought in the domestic courts, the State is required by Article 1 of the Convention to secure in those proceedings respect for the rights protected by Article 6.

The Court considers that, once a person brings a civil action in the courts or tribunals of a State, there indisputably exists, without prejudice to the outcome of the proceedings, a “jurisdictional link” for the purposes of Article 1.

55. The Court notes that the applicants in the instant case brought an action in the Italian civil courts. Consequently, it finds that a “jurisdictional link” existed between them and the Italian State.

56. In these circumstances, the Government’s preliminary objections based on the lack of a jurisdictional link must be dismissed.

C. Whether Article 6 was applicable to the proceedings

1. *The respondent Government's submissions*

57. The respondent Government submitted that Articles 6 and 13 did not apply to political acts. Relying on the judgment in *Z and Others v. the United Kingdom* (cited above), they submitted that the concept of political act could not be considered a “procedural bar” to the domestic courts’ power to determine a substantive right, but a limitation on that right.

58. They submitted that there was no civil right in the present case that could be said, at least on arguable grounds, to be recognised under domestic law.

59. There were three reasons for this: firstly, no right to reparation for damage caused by an allegedly illegal act of war existed either under the rules of international law applicable in the instant case or under Italian domestic law; secondly, the impugned act was attributable to NATO, not the Italian State; thirdly and lastly, the right the applicants sought to assert was not recognised under domestic law because the political-acts doctrine precluded *in limine* any action against the State.

2. *The applicants' submissions*

60. The applicants pointed out that the question whether their claim was well-founded or ill-founded under the domestic legal system should have been determined by a court. However, the Court of Cassation’s decision had prevented them from asserting in the Italian courts a right recognised by Article 2043 of the Civil Code. Moreover, it was at variance with that court’s existing case-law and subsequent decisions. In the applicants’ submission, the Court of Cassation’s judgment no. 5044 of 11 March 2004 (see paragraph 28 above) showed, firstly, that immunity from jurisdiction could never extend to the criminal law so that civil liability for criminal acts could not, therefore, ever be excluded and, secondly, that rules of international origin protecting fundamental human rights were an integral part of the Italian system and could therefore be relied on in support of a claim in respect of damage caused by criminal acts or by negligence. It followed that anyone alleging a violation of a right guaranteed by such rules was always entitled to the protection of the courts.

61. The applicants added that the respondent Government’s conduct was ambiguous to say the least: in *Banković and Others* they had pleaded a failure to exhaust domestic remedies and referred to the applicants’ own domestic-court proceedings then pending before the Court of Cassation. However, the respondent Government now sought to argue that the applicants had no right which they could assert in the national courts, although they seemed to have taken the opposite view when the proceedings were still pending. The applicants contended that it had therefore been

reasonable for them to consider that they possessed an at least arguable right when they commenced the proceedings in the domestic courts, since even the respondent Government had been sufficiently convinced that they had as to rely on that argument in the international proceedings.

3. *The intervening parties' submissions*

(a) **The Government of Serbia and Montenegro**

62. The Government of Serbia and Montenegro pointed out that since the events in question Serbia and Montenegro had acceded to the Convention and that its citizens had to be permitted to assert their rights not only in the courts of their State of origin but also in the courts of other States Parties to the Convention in all cases in which there was a basis in law for so doing.

(b) **The Government of the United Kingdom**

63. The British Government argued that Article 6 § 1 did not convert the Convention enforcement bodies into an appellate tribunal determining appeals from national courts as to the content of the law applicable in those courts, irrespective of whether that law was wholly national in origin or was derived from public international law. In their submission, the general rules of liability that released the State from liability for reasons of public policy did not fall within the scope of Article 6 § 1 at all.

4. *The Court's assessment*

64. The Court considers that the objection that the application is incompatible *ratione materiae* with the provisions of the Convention is very closely linked to the substance of the applicants' complaint under Article 6 of the Convention. It therefore considers it appropriate to join this objection to the merits (see, among other authorities, *Airey v. Ireland*, 9 October 1979, § 19, Series A no. 32; and *Ferrazzini v. Italy* [GC], no. 44759/98, § 18, ECHR 2001-VII).

65. The Court notes, further, that the application raises issues of fact and law which require an examination of the merits. It accordingly concludes that the application is not manifestly ill-founded. Having also established that no other obstacle to its admissibility exists, it declares the remainder of the application admissible (see *Vo v. France* [GC], no. 53924/00, § 45, ECHR 2004-VIII). In accordance with its decision to apply Article 29 § 3 of the Convention (see paragraph 6 above), the Court will immediately consider the merits of the applicants' complaint (see *Kleyn and Others v. the Netherlands* [GC], nos. 39343/98, 39651/98, 43147/98 and 46664/99, § 162, ECHR 2003-VI).

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 1

66. Relying on Article 6 of the Convention taken in conjunction with Article 1, the applicants complained of the Court of Cassation's ruling that the Italian courts had no jurisdiction.

The relevant parts of Article 6 read as follows:

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

Article 1 provides:

"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention."

A. The parties' submissions

1. The applicants' submissions

67. The applicants pointed out that, in his written submissions, Assistant Principal State Counsel at the Court of Cassation had stated that the issues that had been raised concerned the merits of the case, not the question of jurisdiction. Further, under domestic law a civil action for compensation for damage caused by a criminal offence lay irrespective of whether the offence had been made out at a criminal trial or the offender convicted by a criminal court. Consequently, they argued that they had been fully entitled to seek reparation for the damage they had sustained without being required first to bring criminal proceedings to establish individual criminal liability, which was an entirely independent form of action.

68. In their submission, their action in the Rome District Court satisfied all the conditions required by Article 6 of the Convention for it to qualify as a claim for the determination of a civil right. Since they had brought an ordinary action for the reparation of non-pecuniary damage caused by an illegal act, there could be no doubt that they had asserted a right protected under domestic law which the courts had full jurisdiction to determine if the defendant resided in Italy. Moreover, even if the question was examined from the territorial perspective, that is to say, by reference to the *locus commissi delicti*, Article 6 of the Italian Criminal Code allowed proceedings to be brought even if only part of the impugned act was committed on Italian territory. The bombing could not have taken place without the agreement of the Italian political authorities and the military facilities placed at NATO's disposal by Italy, as the raids had been carried out from Italian territory. Furthermore, Article 185 of the Italian Criminal Code required reparation for criminal offences to be made in accordance with the civil law. It followed that the nature of the right the applicants had sought to

assert was indeed civil and that it was only because that conclusion was inescapable that the Court of Cassation had been forced to rule that the Italian courts had no jurisdiction, thereby circumventing Assistant Principal State Counsel's conclusions.

69. The applicants maintained that the Court of Cassation's case-law both before and after its judgment in the present case showed that a national court could only be deemed to have no jurisdiction under Italian law if there were no rules or principles in the domestic legal order theoretically capable of protecting the personal right it was sought to assert (see the full Court of Cassation's judgments nos. 3316 of 31 May 1985 and 5740 of 24 October 1988). In the applicants' case, however, the Court of Cassation had only been able to find in favour of the respondent Government and so deny the applicants access to a court by disregarding the provisions of domestic and international law on which the applicants had based their claim for compensation for damage caused by the acts of an Italian public authority that had involved not only the bombing of the RTS building, but also all the preparatory acts performed in Italy with the permission and assistance of the Italian authorities (see Article 2043 of the Civil Code, Article 6 of the Criminal Code and Article 174 of the Wartime Criminal Military Code). Its decision had deprived the European Convention on Human Rights of all effect in domestic law and was at variance with the Court's case-law requiring the States Parties to the Convention to secure effective respect for the rights protected by the Convention. Further, the Court of Cassation had characterised the State's conduct at the origin of the claim as an "act of government". It had deduced from this that the act in question was not subject to scrutiny by the courts and had gone on to assert that this principle took precedence over the European Convention on Human Rights, so that the applicants were unable to rely upon it to secure a right of access to the courts.

70. In the applicants' submission, that proposition denied the primacy of the Convention, a primacy that was also recognised in domestic law through Article 117 of the Constitution, which provided: "Legislative power is exercised by the State and the regions in compliance with the Constitution and the links arising out of the organisation of the Community and other international obligations." Furthermore, the bombing of the RTS headquarters could not be classified in domestic law as an act of government capable of precluding judicial review. Under Italian law, an act of government excluded the jurisdiction of the administrative courts, and only of the administrative courts, as they alone took acts of government directly into consideration in their decisions or had power to quash them. Although Article 31 of Royal Decree no. 1054 of 26 June 1924 had introduced into the system a limitation on judicial review, it did not affect personal rights, such as the right to compensation for damage, which could be asserted in the ordinary courts. In any event, even if the jurisdictional

limitation could still be said to exist in the Italian system after the entry into force of the Constitution, it could only cover the act of government by which Italian participation in the military operations in the former FRY had been decided on, not each isolated act or military operation such as the operation at the origin of the instant case. In reality, a bombing mission of that kind could not be characterised as an act of government that escaped the scrutiny of the courts. In a similar case, the jurisdiction of the Italian courts to try a case concerning criminal acts committed by Italian soldiers during the international military mission to Somalia was held not to have been ousted. Thus, in the applicants' submission, neither the domestic law nor the Convention justified the exclusion of a right of access to the courts to assert a right to compensation for damage caused by the acts of a public authority, even when those acts stemmed from a political decision. It was necessary to distinguish between the merits of the claim before the courts and the issue of jurisdiction. As to the general issue of the effects of the Convention in domestic law, the applicants were at pains to point out the gravity of some of the statements which the Court of Cassation had made in its judgment denying the Italian courts all jurisdiction. They noted that the judgment was contrary to the Court of Cassation's own decisions in earlier cases (see, *inter alia*, the judgments of *Polo Castro* (1988), *Mediano* (1993), and *Galeotti* (1998)) and could, if confirmed, have serious implications extending beyond their own case, in view of the full Court of Cassation's role as the highest judicial authority. They added, however, that the Court of Cassation had later abandoned the line it had taken in their case, thus further highlighting the injustice they had suffered.

2. *The respondent Government's submissions*

71. The respondent Government said that Article 6 was not applicable. The first reason for this was that the right claimed by the applicants was not one that could validly be said to be recognised in domestic law.

72. They noted that the applicants had relied on Article 2043 of the Civil Code, Articles 6 and 185 of the Criminal Code and Article 174 of the Wartime Military Criminal Code. As regards Article 2043, the State's liability in tort could only be engaged by intentional or negligent acts for which the State was accountable under various provisions of domestic law. However, the provisions that had been relied upon did not afford any right to reparation for losses caused by an allegedly illegal act of war.

73. The effect of Article 6 of the Criminal Code was to establish and determine the scope of the State's territorial jurisdiction in criminal cases. In the respondent Government's submission, Italy could not be accused of violating the right of access to a court merely because its domestic law provided greater access to a court than the laws of other States in that Article 6 § 2 of the Criminal Code afforded a remedy that enabled claims for compensation to be made for damage resulting from acts committed

overseas. As to the combined application of Article 174 of the Wartime Military Criminal Code and Article 185 of the Criminal Code, it enabled the State's responsibility to be engaged for acts perpetrated by members of its armed forces.

74. All of the provisions on which the applicants had relied concerned the commission of an individual offence whereas their complaint in the proceedings referred to damage caused by NATO air forces which could not be said to have engaged the individual criminal liability of members of the Italian armed forces. The respondent Government noted in passing that the case-law cited by the applicants was totally irrelevant as it concerned either cases relating to the individual liability of a member of the armed forces or cases in which the State's civil liability had not been established.

75. Nor was any legal basis for the right to reparation claimed by the applicants to be found in the rules applicable to international customary law. In the domestic courts, the applicants had referred to Articles 35, 48, 51 and 91 of the Protocol Additional to the Geneva Conventions (Protocol I). These provisions restricted the right of parties to a conflict to choose the methods or means by which they would carry on the war by making it illegal for operations to be directed against non-military objectives. The intention was to create rights and obligations solely at the inter-State level and not to confer rights on individuals, even in cases involving an obligation to make reparation. The provisions did not afford any personal right to obtain reparation for damage sustained in war in the courts of the State responsible, or impose on the States Parties an obligation to change their domestic law to provide such a right.

76. Although perhaps desirable, no right to reparation for damage resulting from an allegedly illegal act of war currently existed under Italian law and Italy was not bound by any international obligation to introduce such a right into its domestic legal system. Reaching the opposite conclusion would entail interpreting Article 6 in such a way as to create a substantive right for which there was no basis in the law of the country concerned. Article 6 did not, however, create rights. Further, finding that Article 6 of the Convention afforded a right of access to a court to bring an action against the State for unlawful acts even in cases where the breach of the civil right resulted from acts of international policy, including peacemaking and peacekeeping operations, would undermine the efforts being made to encourage governments to cooperate in international operations of that kind.

77. Since the impugned act was extraterritorial and had been committed by an international organisation of which Italy was a member, it would be extremely difficult to establish any joint liability on the part of Italy. The prospects of successfully instituting proceedings in Italy to challenge the lawfulness of the actions of the NATO forces in Kosovo were remote and poor. Indeed, the applicants had not furnished a single example of a case in

which such a claim had succeeded. Referring to the judgment in *Prince Hans-Adam II of Liechtenstein v. Germany* ([GC], no. 42527/98, ECHR 2001-VIII), the respondent Government submitted, therefore, that it was not possible to assert that a sufficient link existed between the outcome of the proceedings and the recognition of the rights claimed by the applicants.

78. Lastly, the dispute was not of a type that could be brought before the courts. The Court of Cassation had found that the fundamental issue underlying the applicants' complaint was whether the impugned act was illegal and engaged the responsibility of the Italian State. In deciding that it was a "political act" that escaped the scrutiny of the courts, the Court of Cassation had not set a limit on the right of access to a court but had defined the scope of the substantive right claimed by the applicants. In the respondent Government's submission, the political-act doctrine did not create a procedural bar that removed or restricted the right to refer complaints to the courts, it precluded an action against the State *in limine*.

79. As to the merits of the complaint, and in the event of the Court finding Article 6 of the Convention applicable despite the above arguments, the respondent Government submitted that there had been no violation of that provision and that the restriction on the applicants' right of access to a court was both consistent with the rule of law and the principle of the separation of powers, and proportionate to the legitimate aim pursued.

80. In their view, the national courts' lack of jurisdiction had not resulted in an infringement of the right of access to a court guaranteed by Article 6 of the Convention. The right was not unlimited: it could be regulated by the State and the State enjoyed a margin of appreciation in respect thereof. In Italy, neither the State, nor the government, nor the public authorities enjoyed any general form of immunity from jurisdiction. The Court of Cassation's ruling in the present case that the Italian courts had no jurisdiction did not constitute a restriction applicable to claims for compensation for loss from the State *per se*. It referred only to a very narrow category of act asserting "State authority" at the highest level. These were "political" acts which concerned the State as a unit in relation to which the judiciary could not be regarded as a "third party". Legislation was a typical example of an "act of government" that could cause damage to individuals. Yet the Court had already stated that the Convention did not go so far as to require the States to provide machinery for challenging legislation.

81. Other acts asserted "State authority" at the highest level: these were acts of international policy and, through them, acts of war. The rule that acts implementing a State's fundamental political decisions were legitimately excluded from the realm of judicial competence stemmed from the principle of the separation of powers and the need to avoid involving the judiciary – which by definition had no democratic legitimacy – in the task of identifying the objectives that served the general interest or of choosing the

means used to achieve such objectives. In sum, the judiciary could not be involved, even after the event, in the task of deciding national policy.

82. In the respondent Government's submission, there was thus a legitimate purpose to the limitation imposed on access to the courts when the impugned act had a political objective. As to the rule requiring proportionality between the means used and the aim pursued, the respondent Government pointed out that the exemption from jurisdiction did not violate the very essence of the individual's right of access to a court because it did not prevent access to a whole range of civil actions or confer immunity on large groups of people, but applied only to a limited and very strictly defined category of civil actions against the State. Nor was there any doubt that the aim pursued by the political-act doctrine could be achieved only by ousting the jurisdiction of the courts. For all these reasons, there had been no violation of Article 6 of the Convention.

B. The intervening parties' submissions

1. The Government of Serbia and Montenegro

83. The Government of Serbia and Montenegro observed that the principle requiring the reparation of damage was a fundamental notion dating back to the Roman-law principle of *neminem laedere* that had been recognised as a general principle by the international treaties of civilised nations. They said that the principle had been applied by the Court in *Osman v. the United Kingdom* (28 October 1998, *Reports of Judgments and Decisions* 1998-VIII) when it ruled that a State – which had granted itself immunity on public-policy grounds in an action in tort – had to provide other means to enable victims of damage sustained as a result of an act or omission of the State to obtain reparation.

84. The Government of Serbia and Montenegro added that the underlying explanation for Article 6 of the Convention was to be found in the principle of the rule of law enunciated in Article 3 of the Statute of the Council of Europe. They said that it would be difficult to envisage that principle being applied without access to a court and referred to the judgment in *Fayed v. the United Kingdom* (21 September 1994, § 65, Series A no. 294-B), in which the Court stated: “[I]t would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6 § 1 – namely that civil claims must be capable of being submitted to a judge for adjudication – if, for example, a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons.”

85. Lastly, they explained that in Serbia and Montenegro, neither the civil nor the constitutional courts could decline to decide an issue on the

pretext that it concerned an act of government. The sole problem that could arise was whether rules existed under the domestic law which would enable the acts concerned to be reviewed. Adopting the act of government doctrine would considerably limit the aim pursued in applying the law, as regards both access and the effectiveness of remedies such as those guaranteed by the Convention. By its very nature, such a doctrine would justify acts relating to the implementation of foreign policy being removed from scrutiny on the grounds of “reasons of State”, with the result that human-rights protection would become impossible. In the Government of Serbia and Montenegro’s submission, the doctrine of the rule of law should prevail over that of reasons of State.

2. The Government of the United Kingdom

86. The British Government submitted that a rule of national law that an individual was not entitled to compensation, or its corollary that the State did not incur liability, for acts performed by the State in the conduct of foreign relations did not violate Article 6 § 1.

87. They noted that such a rule was common in the laws both of member States of the Council of Europe and elsewhere even though different legal systems formulated it in different ways (for example, as a rule that decisions in the conduct of foreign relations were not justiciable or that a general rule relating to liability did not extend to damage caused by acts of war or other actions taken by the State in the course of its international relations).

88. Whichever way it was formulated, such a rule was a limit on the scope of the substantive law of the State concerned, not a limit on the right of access to courts to enforce that law. In the British Government’s submission, the substantive position was very similar to that in *Z and Others v. the United Kingdom* (cited above). Like the limiting rule of English law which was in issue in *Z and Others*, the rule of national law that the State was not liable to compensate individuals for losses which they had suffered on account of the State’s decisions in the conduct of foreign relations limited the scope of the general rules of liability in their application to the State for reasons of public policy. The British Government submitted that to treat such a rule as contrary to Article 6 § 1 would be to do precisely what the Court had repeatedly said it could not do, namely to create, by way of interpretation of Article 6 § 1, a substantive right which had no basis in the law of the Contracting State concerned.

89. While the British Government were of the view that rules of the kind considered above did not fall within the scope of Article 6 § 1 at all, and if (contrary to that view) it were held that they did, they submitted that they should be regarded as reasonable and proportionate limitations on the scope of the rights conferred by Article 6 § 1 which were necessary in a democratic society.

90. The British Government had already noted that many systems of national law had a rule similar to that applied by the Italian courts in the present case. They added that such a rule served a clear public purpose in a democratic State in defining the nature of the separation of powers between courts and executive with regard to the conduct of foreign relations and military activity.

91. In the British Government's view, such a rule could not be said to violate Article 6 § 1 of the Convention.

C. The Court's assessment

1. General principles

92. The right of access to a court in issue in the present case is derived from Article 6 and was established in *Golder v. the United Kingdom* (21 February 1975, §§ 28-36, Series A no. 18), in which the Court established, by reference to the principles of the rule of law and the avoidance of arbitrary power underlying much of the Convention, that the right of access to a court was an inherent aspect of the safeguards enshrined in Article 6. Thus, Article 6 § 1 secures to everyone the right to have a claim relating to his civil rights and obligations brought before a court.

93. The Court refers to its constant case-law to the effect that "Article 6 § 1 extends only to 'contestations' (disputes) over (civil) 'rights and obligations' which can be said, at least on arguable grounds, to be recognised under domestic law; it does not itself guarantee any particular content for (civil) 'rights and obligations' in the substantive law of the Contracting States" (see *James and Others v. the United Kingdom*, 21 February 1986, § 81, Series A no. 98; *Lithgow and Others v. the United Kingdom*, 8 July 1986, § 192, Series A no. 102; and *The Holy Monasteries v. Greece*, 9 December 1994, § 80, Series A no. 301-A). The Court may not create by way of interpretation of Article 6 § 1 a substantive right which has no legal basis in the State concerned (see *Roche v. the United Kingdom* [GC], no. 32555/96, §§ 116-17, ECHR 2005-X). It will however apply to disputes of a "genuine and serious nature" concerning the actual existence of the right as well as to the scope or manner in which it is exercised (see *Bentham v. the Netherlands*, 23 October 1985, § 32, Series A no. 97, and *Z and Others v. the United Kingdom*, cited above, § 87).

94. The distinction between substantive limitations and procedural bars determines the applicability and, as the case may be, the scope of the guarantees under Article 6. The fact that the particular circumstances of, and complaints made in, a case may render it unnecessary to draw the distinction between substantive limitations and procedural bars (see, among other authorities, *A. v. the United Kingdom*, no. 35373/97, § 65, ECHR 2002-X) does not affect the scope of Article 6 of the Convention which can,

in principle, have no application to substantive limitations on the right existing under domestic law.

95. In assessing therefore whether there is a civil “right” and in determining the substantive or procedural characterisation to be given to the impugned restriction, the starting point must be the provisions of the relevant domestic law and their interpretation by the domestic courts (see *Masson and Van Zon v. the Netherlands*, 28 September 1995, § 49, Series A no. 327-A). Where, moreover, the superior national courts have analysed in a comprehensive and convincing manner the precise nature of the impugned restriction, on the basis of the relevant Convention case-law and principles drawn therefrom, this Court would need strong reasons to differ from the conclusion reached by those courts by substituting its own views for those of the national courts on a question of interpretation of domestic law (see *Z and Others v. the United Kingdom*, cited above, § 101) and by finding, contrary to their view, that there was arguably a right recognised by domestic law.

96. Finally, in carrying out this assessment, it is necessary to look beyond the appearances and the language used and to concentrate on the realities of the situation (see *Van Droogenbroeck v. Belgium*, 24 June 1982, § 38, Series A no. 50). The Court must not be unduly influenced by, for example, the legislative techniques used (see *Fayed*, cited above, § 67) or by the labels put on the relevant restriction in domestic law: the oft-used word “immunity” can mean an “immunity from liability” (in principle, a substantive limitation) or an “immunity from suit” (suggestive of a procedural limitation) (see *Roche*, cited above, §§ 119-21).

97. Nevertheless, it would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6 § 1 – namely that civil claims must be capable of being submitted to a judge for adjudication – if, for example, a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons (see *Fayed*, cited above, § 65).

98. Article 6 § 1 may also be relied on by “anyone who considers that an interference with the exercise of one of his (civil) rights is unlawful and complains that he has not had the possibility of submitting that claim to a tribunal meeting the requirements of Article 6 § 1” (see *Le Compte, Van Leuven and De Meyere v. Belgium*, 23 June 1981, § 44, Series A no. 43). Where there is a serious and genuine dispute as to the lawfulness of such an interference, going either to the very existence or the scope of the asserted civil right, Article 6 § 1 entitles the individual “to have this question of domestic law determined by a tribunal” (see *Sporrong and Lönnroth v. Sweden*, 23 September 1982, § 81, Series A no. 52; see also *Tre Traktörer AB v. Sweden*, 7 July 1989, § 40, Series A no. 159).

99. The right is not absolute, however. It may be subject to legitimate restrictions such as statutory limitation periods, security for costs orders, regulations concerning minors and persons of unsound mind (see *Stubbings and Others v. the United Kingdom*, 22 October 1996, §§ 51-52, *Reports* 1996-IV; *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, §§ 62-67, Series A no. 316-B; and *Golder*, cited above, § 39). Where the individual's access is limited either by operation of law or in fact, the Court will examine whether the limitation imposed impaired the essence of the right and, in particular, whether it pursued a legitimate aim and there was a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Ashingdane v. the United Kingdom*, 28 May 1985, § 57, Series A no. 93). If the restriction is compatible with these principles, no violation of Article 6 will arise (see *Z and Others v. the United Kingdom*, cited above, §§ 92-93).

2. Application of these principles in the instant case

(a) Applicability of Article 6 of the Convention

100. In the instant case, the applicants brought an action in damages in tort against the State under Article 2043 of the Civil Code and also relied in their claim on Article 6 of the Criminal Code, Article 174 of the Wartime Military Criminal Code and on the provisions of the Protocol Additional to the Geneva Conventions (Protocol I) and of the London Convention of 1951 (see paragraphs 22-25 and 30-31 above). They relied on various authorities although, as the respondent Government pointed out, none of them were exactly on all fours with the present case because they primarily concerned the individual liability of members of the armed forces. The respondent Government cited a decision concerning political acts. However, while it may have been of some relevance to the decision in the instant case, it was not sufficiently similar to qualify as a precedent. It was therefore on the facts of the applicants' own case that the domestic courts were called upon to decide for the first time whether such a situation came within Article 2043 of the Civil Code.

101. The Court therefore considers that there was from the start of the proceedings a genuine and serious dispute over the existence of the right to which the applicants claimed to be entitled under the civil law. The respondent Government's argument that there was no arguable (civil) right for the purposes of Article 6 because of the Court of Cassation's decision that, as an act of war, the impugned act was not amenable to judicial review, can be of relevance only to future allegations by other complainants. The Court of Cassation's judgment did not make the applicants' complaints retrospectively unarguable (see *Z and Others v. the United Kingdom*, cited above, § 89). In these circumstances, the Court finds that the applicants had, on at least arguable grounds, a claim under domestic law.

102. Accordingly, Article 6 is applicable to the applicants' action against the State. The Court therefore dismisses the respondent Government's preliminary objection on this point. It must therefore examine whether the requirements of that provision were complied with in the relevant proceedings.

(b) Compliance with Article 6 of the Convention

103. In the present case, the applicants alleged that the Court of Cassation's ruling that the Italian courts had no jurisdiction had prevented them from gaining access to a court and securing a decision on the merits of their claim.

104. The applicants and the Government of Serbia and Montenegro considered that a right to reparation arose directly from the wording of the relevant Codes, whereas the other two Governments argued that such a right could not apply to acts of war, or to peacemaking or peacekeeping operations. The applicants submitted that their right to reparation derived from Article 2043 of the Civil Code, while also relying on Article 6 of the Criminal Code, Article 174 of the Wartime Military Criminal Code and the Protocol Additional to the Geneva Conventions (Protocol I).

105. First and foremost the Court would note that the applicants were not in practice prevented from bringing their complaints before the domestic courts.

106. The Court of Cassation considered the answer to be clear, which explains why it rejected this jurisdictional point in rather summary terms. It found as follows: the impugned act was an act of war; since such acts were a manifestation of political decisions, no court possessed the power to review the manner in which that political function was carried out; further, the legislation that gave effect to the instruments of international law on which the applicants relied did not expressly afford injured parties a right to claim reparation from the State for damage sustained as a result of a violation of the rules of international law.

107. The Court reiterates the fundamental principles established by its case-law on the interpretation and application of domestic law. While the Court's duty, according to Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention, it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention.

108. Moreover, it is primarily for the national authorities, notably the courts, to interpret and apply domestic law. This also applies where domestic law refers to rules of general international law or international agreements. The Court's role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention (see *Waite and Kennedy v. Germany* [GC], no. 26083/99, § 54, ECHR 1999-I; *Streletz*,

Kessler and Krenz v. Germany [GC], nos. 34044/96, 35532/97 and 44801/98, § 49, ECHR 2001-II; and *Prince Hans-Adam II of Liechtenstein*, cited above, §§ 43-50).

109. Although it is not its role to express any view on the applicability of the Protocol Additional to the Geneva Conventions (Protocol I) or the London Convention, the Court notes that the Court of Cassation's comments on the international conventions do not appear to contain any errors of interpretation. There are two reasons for this: firstly, the statement that Protocol I regulates relations between States is true; secondly, the applicants relied on paragraph 5 of Article VIII of the London Convention, which concerns acts "... causing damage *in the territory of the receiving State* to third parties ..." (see paragraph 31 above), whereas the applicants' damage was sustained in Serbia, not Italy.

As to the assertion that it is the only body with power to find violations of the Convention, the Court reiterates that under Article 1, which provides "[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of th[e] Convention", the primary responsibility for implementing and enforcing the rights and freedoms guaranteed by the Convention is laid on the national authorities. The machinery of application to the Court is thus subsidiary to national systems safeguarding human rights (see *Cocchiarella v. Italy* [GC], no. 64886/01, § 38, ECHR 2006-V). Since, in the instant case, the complaint under Article 2 of the Convention has been declared inadmissible (see paragraph 4 above), the Court does not consider that the effects of the Court of Cassation's interpretation give rise to any problems of compatibility.

110. The Court further notes that by virtue of Articles 41 and 37 of the Code of Civil Procedure, the preliminary jurisdictional point taken by the ministries in this case would have had to be raised at some point, even by the trial court of its own motion, in view of the involvement of a public authority (see paragraph 23 above). It did not, therefore, amount to a form of immunity which the State was at liberty to waive.

111. Consequently, it is not possible to conclude from the manner in which the domestic law was interpreted or the relevant international treaties were applied in domestic law that a "right" to reparation under the law of tort existed in such circumstances. Even if the applicants' assertion is correct that, as a result of changes in the case-law, it has been possible to claim such a right since 2004, this does not justify the conclusion that such a right existed before then.

112. The Court also notes that the Court of Cassation had already ruled in an earlier case that the Italian courts had no jurisdiction over the authorities for acts of a political nature and that such acts did not give rise to a cause of action against the State because they did not damage personal legal interests, which were the only interests capable of affording a right to

compensation under the domestic case-law (see paragraph 26 above). Indeed, it was after the hearing before it that the Court of Cassation provided clarification as to what constituted an arguable claim in law. In determining the limits of its jurisdiction, the Court of Cassation marked out the bounds of the law of tort.

113. The Court does not accept the applicants' assertion that the impugned decision constituted an immunity, either *de facto* or in practice, because of its allegedly absolute or general nature. As the respondent Government rightly noted, the decision concerned only one aspect of the right to bring an action against the State, this being the right to claim damages for an act of government related to an act of war, and cannot be regarded as an arbitrary removal of the courts' jurisdiction to determine a whole range of civil claims (see *Fayed*, cited above, § 65). As was pointed out by the British Government and as the Court observed in paragraph 93 above, it is a principle of Convention case-law that Article 6 does not in itself guarantee any particular content for civil rights and obligations in national law. It is not enough to bring Article 6 § 1 into play that the non-existence of a cause of action under domestic law may be described as having the same effect as an immunity, in the sense of not enabling the applicant to sue for a given category of harm (see *Z and Others v. the United Kingdom*, cited above, § 98).

114. The Court considers that the Court of Cassation's ruling in the present case does not amount to recognition of an immunity but is merely indicative of the extent of the courts' powers of review of acts of foreign policy such as acts of war. It comes to the conclusion that the applicants' inability to sue the State was the result not of an immunity but of the principles governing the substantive right of action in domestic law. At the relevant time, the position under the domestic case-law was such as to exclude in this type of case any possibility of the State being held liable. There was, therefore, no limitation on access to a court of the kind in issue in *Ashingdane* (cited above, § 57).

115. It follows that the applicants cannot argue that they were deprived of any right to a determination of the merits of their claims. Their claims were fairly examined in the light of the domestic legal principles applicable to the law of tort. Once the Court of Cassation had considered the relevant legal arguments that brought the applicability of Article 6 § 1 of the Convention into play, the applicants could no longer claim any entitlement under that provision to a hearing of the facts. Such a hearing would only have served to protract the domestic proceedings unnecessarily because, even assuming that the Court of Cassation's decision did not automatically bring the proceedings pending in the Rome District Court to an end, the District Court would only have had power to determine the nature of the impugned acts and, in the circumstances of the case, would have had no alternative but to dismiss the claim.

The Court agrees with the British Government that the present case bears similarities to the aforementioned case of *Z and Others v. the United Kingdom*. As in that case, the applicants in the present case were afforded access to a court; however, it was limited in scope, as it did not enable them to secure a decision on the merits.

116. In the light of the foregoing, the Court finds that there has been no violation of Article 6 of the Convention.

FOR THESE REASONS, THE COURT

1. *Joins to the merits*, unanimously, the respondent Government's preliminary objection with respect to the applicability of Article 6 of the Convention;
2. *Declares*, unanimously, the remainder of the application admissible;
3. *Holds*, unanimously, that Article 6 of the Convention is applicable in the instant case and, consequently, *dismisses* the respondent Government's preliminary objection;
4. *Holds*, by ten votes to seven, that there has been no violation of Article 6 of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 14 December 2006.

Lawrence Early
Registrar

Luzius Wildhaber
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) concurring opinion of Judge Costa;
- (b) concurring opinion of Judge Bratza joined by Judge Rozakis;
- (c) dissenting opinion of Judge Zagrebelsky joined by Judges Zupančič, Jungwiert, Tsatsa-Nikolovska, Ugrehelidze, Kovler and Davíd Thór Björgvinsson.

L.W.
T.L.E.

CONCURRING OPINION OF JUDGE COSTA

(Translation)

1. I voted with the majority on the operative provisions of the judgment, in particular points 3 and 4 thereof, but do not agree with the reasoning. I should like to explain why, but will confine myself to the salient points.

2. What, fundamentally, was this case about? As in *Banković and Others v. Belgium and Others* ((dec.) [GC], no. 52207/99, ECHR 2001-XII), it concerned the tragic consequences of the partial destruction of the Radio-televizija Srbija (RTS) building in Belgrade after it was hit by a missile fired by a NATO aircraft. Five of the people who died as a result of the air strike, which was launched in connection with the Kosovo conflict, were relatives of the applicants in the *Markovic* case.

3. The applicants considered the Italian authorities and the Command of NATO's Allied Forces in Southern Europe responsible for the deaths and brought an action in damages against them in the Rome District Court (they subsequently discontinued the action against NATO forces).

4. The Italian authorities considered that the dispute raised an issue of jurisdiction (*giurisdizione*) and, relying on a provision of the Code of Civil Procedure, sought a preliminary ruling on this question from the Court of Cassation, sitting as a full court, as they were entitled to do like any other party to proceedings.

5. The Court of Cassation held that the District Court had no jurisdiction. In view of the nature of the dispute and as is noted in paragraph 19 of the present judgment, this decision brought the action pending in the District Court to an end, *ipso jure*.

6. Under these circumstances, the applicants lodged an application with the Court in which they argued that Article 6 § 1 of the Convention was applicable and had been violated as Italy had denied them access to a court.

7. The majority agreed that Article 6 § 1 was applicable but held that there had been no violation.

8. In essence, the Court's decision that that provision was applicable was based on the fact that the applicants, whose action was founded on the law of tort (Article 2043 of the Civil Code) had, from the outset, possessed on at least arguable grounds a claim under domestic law.

9. I was somewhat hesitant about joining the majority in finding Article 6 § 1 applicable. I have had similar reservations in the past, in particular in the case of *Prince Hans-Adam II of Liechtenstein v. Germany* ([GC], no. 42527/98, ECHR 2001-VIII) and would refer to my concurring opinion annexed to that judgment. However, the Court has found Article 6 § 1 to be applicable in similar situations on a number of occasions in the past, in particular when there is a serious and genuine dispute over the very existence of a "right" within the meaning of Article 6 § 1 (see, among other

authorities, *Bentham v. the Netherlands*, 23 October 1985, Series A no. 97; *Mennitto v. Italy* [GC], no. 33804/96, §§ 25-27, ECHR 2000-X; *Z and Others v. the United Kingdom* [GC], no. 29392/95, § 89, ECHR 2001-V; and *Prince Hans-Adam II of Liechtenstein*, cited above; and, for the opposite view, *Roche v. the United Kingdom* [GC], no. 32555/96, §§ 124-25, ECHR 2005-X). I therefore decided to defer to the dominant line of authority in the case-law. Indeed, a reasonably forceful case can be made for saying that, since the Rome District Court did not dismiss the application before it *de plano* for lack of jurisdiction (as a separate provision of the Code of Civil Procedure permitted it to do) or of a cause of action and, since the full court of the Court of Cassation had to be called upon to decide the issue, an “arguable” claim existed for the purposes of the Court’s case-law.

10. That, however, is not the main point. The Court was thus unanimous in holding Article 6 to be applicable.

11. Conversely, it was extremely divided on the question whether or not there had been a violation of that provision.

12. The first argument on which the majority relied in concluding that there had been no violation is not one that I am able to accept. It runs as follows: “First and foremost the Court would note that the applicants were not in practice prevented from bringing their complaints before the domestic courts” (see paragraph 105 of the judgment). While this may be true, so what? Although they were able to bring proceedings in the Rome District Court, the District Court was prevented by the Court of Cassation’s judgment from examining their claim as the proceedings were, I repeat, brought to an end *ipso jure*, before they had even got under way. Surely it is strange to say that they were not prevented from bringing their complaints before the domestic courts. Can the right of access to a court be theoretical and illusory (in this instance amounting to mere “physical” access), or must it be practical and effective as has been stated in other spheres in dozens of judgments beginning with that in *Artico v. Italy* (13 May 1980, Series A no. 37). In the instant case, this would have meant enabling the relevant court to deliver a reasoned decision (even one dismissing the claim) on the merits of the dispute, without a *judex ex machina* saying that it was precluded from deciding anything at all (paragraph 113 of the judgment is instructive here, too).

13. But allow me to move on. Not content with this first argument, which logically should have been self-sufficient (“first and foremost”), the judgment goes on to construct, in paragraphs 106 to 116, a lengthy rationale which in substance boils down to holding that:

(i) the Italian Court of Cassation is the best-placed Italian court to decide issues of domestic law;

(ii) its decision “was the result not of an immunity but of the principles governing the substantive right of action in domestic law” (paragraph 114);

(iii) the fact that there was no possibility under Italian law of the State being held liable did not amount to a “limitation on access to a court of the kind in issue in *Ashingdane*” (same paragraph).

14. I have to say that I find this line of reasoning unconvincing and self-contradictory. It is unconvincing because if all the Court needed to do was to recognise that the Court of Cassation had the right to interpret domestic law, the solution was to hand without any need for European supervision. As to the reference to *Ashingdane* (*v. the United Kingdom*, 28 May 1985, Series A no. 93), it is logically flawed as the Court in that case held that there had been *no violation* (by six votes to one, the sole judge in the minority being my late predecessor, Judge Pettiti). How and by what miraculous process could the fact that in the present case there was no limitation “of the kind in issue in *Ashingdane*” lead to the conclusion that there has been *no violation* of Article 6 § 1? That I fail to understand.

15. To my mind, it would have been simpler – and clearer – to apply the standard principles. The right of access to a court is not absolute, but may be subject to implied limitations. Some of these limitations are inherent in the right of access to a court, for instance those arising out of State immunity in international law.

16. As an example, the Court applied these principles in *Fogarty v. the United Kingdom* ([GC], no. 37112/97, ECHR 2001-XI), with a dissenting opinion by my colleague Judge Loucaides and a concurring opinion by me and my colleagues Judges Caflisch and Vajić. It is true that *Fogarty* concerned immunity from jurisdiction granted by the respondent State to a third-party State (the United States). But the situation is readily transposable. The concept of *act of government* is familiar to both comparative law and international law and there is no more typical example of an act of government than the decision to send troops into battle or, as with Italy in the instant case, to participate in air strikes as a member of an international organisation, in particular by supplying a base for the strikes and logistical support. It is clear that Article 2043 of the Italian Civil Code affords a very wide array of remedies in quasi-tort and in general applies to the Italian State and in proceedings in the ordinary courts (such as the Rome District Court), not in the administrative courts, unlike the position in countries such as France. But that is no bar to the domestic courts’ jurisdiction to hear claims against the Italian State being ousted when the *basis* of liability lies in what is undoubtedly an act of government. In other words, in Italian domestic law, no claim can be made under Article 2043 of the Civil Code when the allegedly unlawful act that caused the injury is an act of government, the result of the execution of such an act or an indirect consequence thereof.

17. Does this exemption from liability in domestic law constitute a disproportionate interference with the right of access to a court afforded by the Convention? Does it amount to a denial of justice that is incompatible

with the Convention? This is a debatable point and I can certainly understand the view expressed by the minority who voted in favour of finding a violation of Article 6. However, if one decides not to go that far – for reasons which, in my view, are in no way absurd and accord with the administrative law of many European countries and general international law as they stand here and now – then one should say so and cite a standard line of authority. It is for these reasons that I am critical of the reasoning in the *Markovic* case, without, however, disagreeing with the conclusions.

CONCURRING OPINION OF JUDGE BRATZA JOINED BY JUDGE ROZAKIS

1. I share the view of the majority of the Grand Chamber that there has been no violation of Article 6 of the Convention in the present case and can in general agree with the reasoning in the Court's judgment. I add some remarks of my own only because of the importance of the central question which has divided the Court, namely whether the decision of the Italian Court of Cassation that the national courts had no jurisdiction to entertain the applicants' claim for damages in respect of the deaths of their relatives amounted to an unjustified restriction on their access to a court for the purposes of Article 6.

2. The distinction between provisions of domestic law and practice which bar or restrict access to a judicial remedy to determine the merits of claims relating to "rights" of a civil nature recognised in domestic law and which will, unless justified, contravene Article 6 and those which delimit the substantive content of the "right" itself and to which in principle Article 6 has no application, is well-established in the Court's case-law. The borderline between procedural restrictions and substantive limitations has frequently proved difficult to draw in practice. It remains, nevertheless, an important distinction in view of the settled principle that Article 6 does not guarantee any particular content for "rights" in the substantive law of the Contracting States and that its guarantees extend only to rights which can be said, at least on arguable grounds, to be recognised in the domestic law of the State concerned.

3. Certain provisions fall clearly into the category of procedural restrictions: these include the examples referred to in the judgment of statutory limitation periods, orders for security for costs and regulations governing access to a court by minors and persons of unsound mind. A further example is provided by the case of *Tinnelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom* (10 July 1998, *Reports of Judgments and Decisions* 1998-IV) which concerned the issue of a conclusive ministerial certificate, the effect of which was to preclude the domestic courts' examination of the merits of claims of discriminatory treatment. Perhaps closer to the borderline are cases concerning the grant of various immunities from suit. However, in cases concerning the conferring of immunities on States (see *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, ECHR 2001-XI, and *Fogarty v. the United Kingdom* [GC], no. 37112/97, ECHR 2001-XI) and on international organisations (see *Waite and Kennedy v. Germany* [GC], no. 26083/99, ECHR 1999-I), the Court interpreted such immunities as procedural bars which required justification rather than as limitations on a substantive right under domestic law.

4. Of the cases falling the other side of the borderline, those of *Z and Others v. the United Kingdom* ([GC], no. 29392/95, ECHR 2001-V) and, more recently, *Roche v. the United Kingdom* ([GC], no. 32555/96, ECHR 2005-X) are perhaps the most significant. In *Roche*, the Court, taking as its starting-point the assessment of the House of Lords in *Matthews v. Ministry of Defence*, concluded that section 10 of the Crown Proceedings Act was a provision of substantive law which delimited the rights of servicemen to claim in tort against the Crown for personal injuries sustained while on duty and was not to be seen as conferring on the Crown an immunity from a claim in negligence which would otherwise have been open to a serviceman. More directly relevant to the present case, the Court in *Z and Others v. the United Kingdom* concluded that the inability of the applicants to sue the local authority in negligence for failing to take steps to remove them from the care of the parents by whom they had been neglected and abused, flowed not from an immunity conferred on the local authority but from the applicable principles governing the substantive right of action in domestic law, an essential element of which was that it should be just and reasonable to impose a duty of care on the defendants in the particular circumstances of the case.

5. The present case does not fit easily into either of the established categories. The applicants were prevented from having the merits of their claim in damages determined by the Italian courts by the decision of the Court of Cassation that those courts lacked jurisdiction to entertain the claim. In the proceedings for a preliminary ruling the applicants argued that the Italian courts had such jurisdiction on the grounds, *inter alia*, that the alleged unlawful acts which had resulted in the deaths of their relatives should be regarded as having been committed in Italy, in that the relevant military action had been organised on Italian soil and part of it had taken place there: it was contended that Italy had lent substantial and logistical support to the NATO action and had, unlike other NATO members, provided the airbases from which the aircraft which bombed Belgrade and the RTS had taken off. The applicants relied in addition on the Wartime Military Criminal Code, on the London Convention of 1951 and on the Protocol Additional to the Geneva Conventions (Protocol I) as founding the national court's jurisdiction.

6. In ruling that the courts had no jurisdiction to entertain the claims, the Court of Cassation held that the nature of the acts and functions which were relied on to impute liability to the Italian State – in particular, the conduct of hostilities through aerial warfare – were such that the courts had no competence to review the manner in which those functions were performed. The Court of Cassation further rejected, on grounds set out in the judgment, the applicants' claim that the jurisdiction of the Italian courts was to be found as a matter of domestic law in the international instruments relied on.

7. In marked contrast to the typical case of a procedural bar on access to a court, the fact that the Italian courts were unable to examine the merits of the claim stemmed not from a legislative measure or the exercise of a discretion by the executive to exclude the jurisdiction of the courts or to limit their powers of review or to remove a particular class of claim from judicial scrutiny. Moreover, the Court of Cassation's decision that the national courts lacked jurisdiction cannot in my view be equated with the conferring of a blanket immunity on the defendants to the suit. The decision to decline jurisdiction was a self-imposed limitation, the Court of Cassation concluding not only that such jurisdiction was not conferred by the instruments relied on by the applicants, but that the nature of the applicants' claim gave rise to issues which were not capable of being determined in the national courts. It did so by applying the concept of act of government, a familiar concept in systems of civil law, whereby political acts of government in fields including international relations, foreign policy and the conduct of hostilities are not capable of being reviewed by the domestic courts.

8. In my view, the decision of the Court of Cassation is to be seen not as creating a procedural bar to the determination of the applicants' rights by the national courts but rather as a substantive limitation on those rights, the Court of Cassation concluding that, because of the nature of the issues raised by their claim, the applicants had no justiciable cause of action in domestic law.

9. It is argued that the Court of Cassation's decision was inconsistent with its own previous and subsequent case-law, that the bombing of the RTS could not be classified in domestic law as an act of government capable of excluding judicial review and that, in holding that there was no jurisdiction to determine the applicants' claim, the Court of Cassation had wrongly disregarded or misinterpreted the provisions of domestic and international law on which the claim had been based. Reliance is also based on the paucity of the reasoning of the court and on the fact that there was no weighing of the competing interests by the court in holding jurisdiction to be excluded.

10. As to the former argument, questions of interpretation and application of domestic law are, as the judgment emphasises, primarily for the national courts to determine and there exist in my view no grounds on which the Court could substitute its own view for that of the Court of Cassation or hold those views to be arbitrary or manifestly unreasonable.

11. The latter argument gives me greater cause for doubt. The reasoning of the Court of Cassation was brief and open to the criticism that it contained no exposition of the boundaries of the doctrine of "act of government" which it was applying and no clear analysis of the issues to which the applicants' claim gave rise, which rendered the case non-justiciable. However, succinct as the court's reasoning is, it seems to me

that the grounds for the decision emerge sufficiently clearly, particularly when read with the earlier case-law cited by the Court of Cassation itself and referred to in paragraphs 26 and 27 of the Court's judgment. The applicants' claim concerned deaths which occurred as the result of the bombing of the radio station in Belgrade as part of NATO operations during the highly complex Kosovo conflict and the determination of the merits of the claim would inevitably involve the national courts having to decide questions relating to the legality of the operation as a matter of international law, as well as reviewing the legitimacy of the acts and decisions of the Italian government in the exercise of their sovereign powers in the realm of foreign policy and the conduct of hostilities. It was the clear view of the Court of Cassation that these issues fell outside the proper scope of review of the national courts and that the applicants had no cause of action which was capable of being determined by those courts.

12. The doctrine of "act of government" has no very precise boundaries and the application of the doctrine must inevitably depend on the particular circumstances of the case in which it is raised. Moreover, like the doctrine of State immunity, with which it may sometimes overlap, it is not static but is liable to change and development over time. In my view, in concluding at the material time that, in the particular circumstances of the case before it, the doctrine was not only material but precluded the national courts from determining the issues raised by the case, the Court of Cassation did not exceed any acceptable limits.

Accordingly, there has in my view been no unjustified restriction on the applicants' access to a court in violation of Article 6 of the Convention.

DISSENTING OPINION OF JUDGE ZAGREBELSKY
JOINED BY JUDGES ZUPANČIČ, JUNGWIERT, TSATSA-
NIKOLOVSKA, UGREKHELIDZE, KOVLER AND DAVID
THÓR BJÖRGVINSSON

(Translation)

This case, which is solely concerned with the right to a court under Article 6 of the Convention, raises a question of paramount importance under the Convention, namely the position of the individual when set face to face with authority. This is authority in its most formidable form: authority based on “reason of State”. It was by pure chance that the question arose in a case against Italy. It could just as easily have been another State. The question is thus of interest to all.

In his address to the Parliamentary Assembly on 19 August 1949 presenting the proposal to institute the European Court of Human Rights, P.H. Teitgen said: “Three things still threaten our freedom. The first threat is the eternal reason of State. Behind the State, whatever its form, were it even democratic, there ever lurks as a permanent temptation, this reason of State. ... Even in our democratic countries we must be on guard against this temptation of succumbing to reason of State.”¹ Is there any reason to suppose that this warning addressed to the fourteen member States of which the Assembly of the Council of Europe was composed at the time is of any less relevance to our present-day Europe of forty-six nations?

I regret that the conclusion adopted by the majority should have added the Court’s authoritative backing to the strong plea that is made, even today, in favour of “reason of State”. “Reason of State” has little time for law, still less for the “rule of law”, which one can scarcely conceive of without there being a possibility of having access to the courts (see *Golder v. the United Kingdom*, 21 February 1975, § 34, Series A no. 18; and, to the same effect with respect to the Italian legal system, the Constitutional Court’s judgment no. 26 of 1999).

The Court of Cassation stated in the present case: “... protected individual interests are no bar to carrying out functions of a political nature.” Political functions and individual rights cannot, therefore, coexist, as no rights can be asserted in relation to political acts. That is a rather bald statement, one that is incompatible with the Convention and at least dubious under domestic law, as reflected in the relevant provisions of the Constitution (see paragraph 20 of the judgment), in the fact that the scope of Article 31 of Decree no. 1024 of 1924 is limited to the sole administrative court with powers of review (*Consiglio di Stato*) and in the lack of any

1. Collected edition of the “Travaux préparatoires”, vol. 1, p. 41, Martinus Nijhoff, The Hague, 1975.

example among the decisions of the Court of Cassation cited by the Government of a situation comparable to that which obtained in the present case (see paragraph 100 of the judgment). Indeed, the Court itself said that the applicants had, at least on arguable grounds, a claim under domestic law, which is why Article 6 was adjudged to be applicable (see paragraph 101 of the judgment).

I also note that the Court of Cassation did not specify – although it is true that the distinction is somewhat artificial in concrete cases – whether it considered there to be “immunity from liability” or “immunity from suit” (see paragraph 96 of the judgment).

In common with the respondent Government and the British Government, the majority (see paragraph 115 of the judgment) referred to *Z and Others v. the United Kingdom* ([GC], no. 29392/95, § 93, ECHR 2001-V) in which the Court concluded that, even though the facts and merits of the case had not been examined, the degree of access to the court given to the applicants was sufficient to satisfy the requirements of Article 6. The applicants had sought to persuade the courts to expand the scope of the right to compensation beyond what had previously been accepted. The parties’ arguments were heard at each of the various levels of jurisdiction through which the case passed and were exhaustively addressed in the final judgment. However, the position in the present case was quite the opposite. Although the applicants were given access to the Italian courts, it was only to be told that neither the civil courts, nor any other Italian court, had jurisdiction to hear their case. The Court of Cassation thereby restricted for all practical purposes the scope of the general law of reparation contained in Article 2043 of the Civil Code. Furthermore, unlike the domestic courts in *Z and Others v. the United Kingdom*, it did not balance the competing interests at stake and made no attempt to explain why in the specific circumstances of the applicants’ case the fact that the impugned act was of a political nature should defeat their civil action.

It is easy to see how the discretionary – sometimes wholly discretionary – nature of political or governmental acts may lead to the exclusion of all right to contest them. From this perspective, the exclusion may be justified by the nature of the function performed by the government and the need to protect freedom of political decision. It is not only fields such as foreign affairs, national defence and general security that are concerned by the exclusion. However, in order to be compatible with the principle of the rule of law and the right of access to the courts inherent therein, the scope of the exclusion clearly cannot extend beyond the bounds laid down in the legal rules that regulate and circumscribe the exercise of the relevant governmental attributions (act of government). The aforesaid legitimate aim cannot go beyond the scope of the discretion which the government authority is entitled to exercise within the limitations imposed by law. In the present case, the applicants argued in the domestic courts that the Italian

authorities' actions had contravened the rules of national law and international customary law on armed conflict. In so doing, they raised the question of the limits that should be placed on the notion of a "reason of State" free from all judicial scrutiny.

It is a matter of great concern that neither the Court of Cassation nor the Court provided any definition of what might qualify as an "act of government" or "political act" (which are not identical concepts) or of what the limitations on such acts might be. Any act by a public authority will, directly or indirectly, be the result of a political decision, whether it is general or specific in content. However, to my mind, because it is too vague and too general a concept, the "function of a political nature" formula precludes any "implied limitation" on the right of access to a court. In paragraph 113 of the judgment, the Court seeks to limit the scope of the principle it has accepted by noting that the Court of Cassation's decision: "concerned only one aspect of the right to bring an action against the State, this being the right to claim damages for an act of government related to an act of war." However, the Court of Cassation's decision, which in the Court's view satisfied the requirements of the Convention, was merely based on the political nature of the impugned act (see paragraph 106 of the judgment). Nor is it clear how or why a distinction may be drawn between political acts of war and other forms of political act for the purposes of deciding whether access should be given to a court.

In reaching its conclusion, the Court of Cassation chose to disregard the nature of the court proceedings instituted by the applicants: these proceedings did not directly concern Italy's participation in the armed conflict as a member of NATO and their purpose was not to have an act of government set aside. Their aim was simply to obtain compensation for the remote consequences of the political act concerned, consequences that were purely potential and unrelated to the purpose of the acts. Despite the general nature of the right set out in Article 2043 of the Italian Civil Code, the Court of Cassation ultimately refused to accept that any Italian court had jurisdiction to hear the applicants' claims under domestic law, solely because the decision to participate in the aforementioned military operations was political in nature. The Court of Cassation thus went beyond any legitimate aim the political-act doctrine may be recognised as furthering and far beyond the bounds of proportionality.

I can understand why the States should seek to protect themselves against the threat of legal actions such as that in the present case. However, I regret that the majority of the Court should have accepted a solution which strikes a blow at the very foundation of the Convention.