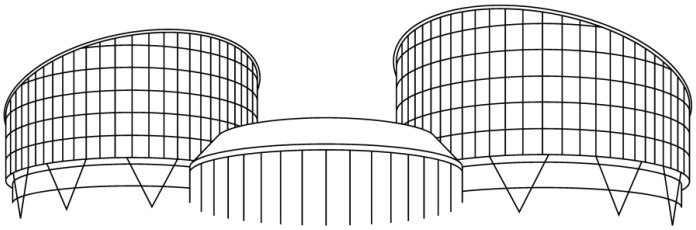

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF MARGUŠ v. CROATIA

(Application no. 4455/10)

JUDGMENT

STRASBOURG

27 May 2014

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

In the case of Marguš v. Croatia,

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

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

and Lawrence Early, *Jurisconsult,*

Having deliberated in private on 26 June and 23 October 2013 and 19 March 2014,

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

PROCEDURE

1. The case originated in an application (no. 4455/10) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Croatian national, Mr Fred Marguš ("the applicant"), on 31 December 2009.

2. The applicant, who had been granted legal aid, was represented by Mr P. Sabolić, a lawyer practising in Osijek. The Croatian Government ("the Government") were represented by their Agent, Ms Š. Stažnik.

3. The applicant alleged, in particular, that his right to a fair trial had been violated in that the same judge had presided over both sets of criminal proceedings against him and he had been removed from the courtroom at the concluding hearing in the second set of proceedings. He also complained that his right not to be tried twice had been violated.

4. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). On 5 September 2011 the Vice-President of the Section decided to give notice of the application to the Government.

5. On 13 November 2012 a Chamber composed of A. Kovler, President, N. Vajić, P. Lorenzen, E. Steiner, K. Hajiyev, L-A. Sicilianos, E. Møse, judges, and also of S. Nielsen, Section Registrar, delivered its judgment. It unanimously declared the complaint under Article 6 of the Convention concerning the impartiality of judge M.K. and the applicant's removal from the courtroom, as well as the complaint under Article 4 of Protocol No. 7, admissible and held unanimously that there had been no violation of any of these provisions.

6. On 27 December 2012 the applicant requested that the case be referred to the Grand Chamber in accordance with Article 43 of the Convention, and the panel of the Grand Chamber accepted the request on 18 March 2013.

7. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24 of the Rules of Court.

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

9. In addition, third-party comments were received from a group of academic experts associated with Middlesex University London, which had been granted leave by the President of the Grand Chamber to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2).

10. A hearing took place in public in the Human Rights Building, Strasbourg, on 26 June 2013 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Ms Š. Stažnik, *Agent*,
Ms J. Dolmagić,
Ms N. Katić, *Advisers*;

(b) *for the applicant*
Mr P. Sabolić, *Counsel*.

The Court heard addresses by Mr Sabolić and Ms Stažnik, as well as their replies to questions put by Judges Kalaydjieva, Vučinić and Turković.

11. After the hearing it was decided that Ksenija Turković, the judge elected in respect of Croatia, was unable to sit in the case (Rule 28). The Government accordingly appointed Ineta Ziemele, the judge elected in respect of Latvia, to sit in her place (Article 26 § 4 of the Convention and Rule 29 § 1). In consequence the first substitute, Judge Ann Power-Forde

became a full member of the Grand Chamber. Judge Zdravka Kalaydjieva withdrew from the case and was replaced by the second substitute, Judge Ján Šikuta. Judge André Potocki withdrew from the case and was replaced by the third substitute, Judge Angelika Nuβberger (Rule 28).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

12. The applicant was born in 1961 and is currently serving a prison term in Lepoglava State Prison.

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

13. On 19 December 1991 the Osijek Police Department lodged a criminal complaint against the applicant and five other persons with the Osijek County Court, alleging that the applicant, a member of the Croatian Army, had killed several civilians.

14. On 20 April 1993 the Osijek Military Prosecutor indicted the applicant before the Osijek County Court on charges of murder, inflicting grievous bodily harm, causing a risk to life and assets, and theft. The relevant part of the indictment reads:

> "the first accused, Fred Marguš
>
> 1. on 20 November 1991 at about 7 a.m. in Čepin ... fired four times at S.B. with an automatic gun ... as a result of which S.B. died;
>
> ...
>
> 2. at the same time and place as under (1) ... fired several times at V.B. with an automatic gun ... as a result of which V.B. died;
>
> ...
>
> 3. on 10 December 1991 took N.V. to the 'Vrbik' forest between Čepin and Ivanovac ... and fired at him twice with an automatic gun ... as a result of which N.V. died;
>
> ...
>
> 4. at the same place and time as under (3) fired at Ne.V. with an automatic gun ... as a result of which she died;
>
> ...
>
> 6. on 28 August 1991 at about 3 a.m. threw an explosive device into business premises in Čepinski Martinovec ... causing material damage;
>
> ...

7. on 18 November 1991 at 00.35 a.m. in Čepin placed an explosive device in a house ... causing material damage ...;

...

8. on 1 August 1991 at 3.30 p.m. in Čepin ... fired at R.C., causing him slight bodily injury and then ... kicked V.Ž ... causing him grievous bodily injury ... and also kicked R.C. ... causing him further slight bodily injuries ...;

...

9. between 26 September and 5 October 1991 in Čepin ... stole several guns and bullets ...;

..."

He was further charged with appropriating several tractors and other machines belonging to other persons.

15. On 25 January 1996 the Osijek Deputy Military Prosecutor dropped the charges under counts 3, 4, 6, 7 and 9 of the indictment as well as the charges of appropriating goods belonging to others. A new count was added, by which the applicant was charged with having fired, on 20 November 1991 at about 7 a.m. in Čepin, at a child, Sl.B., causing him grievous bodily injury. The former count 8 of the indictment thus became count 4.

16. On 24 September 1996 the General Amnesty Act was enacted. It stipulated that a general amnesty was to be applied in respect of all criminal offences committed in connection with the war in Croatia between 17 August 1990 and 23 August 1996, save in respect of those acts which amounted to the gravest breaches of humanitarian law or to war crimes, including the crime of genocide (see paragraph 27 below).

17. On 24 June 1997 the Osijek County Court, sitting as a panel presided over by judge M.K., terminated the proceedings pursuant to the General Amnesty Act. The relevant part of this ruling reads:

"The Osijek County Court ... on 24 June 1997 has decided as follows: the criminal proceedings against the accused Fred Marguš on two charges of murder ... inflicting grievous bodily harm ... and causing a risk to life and assets ... instituted on the indictment lodged by the Osijek County State Attorney's Office ... on 10 February 1997 are to be concluded under section 1(1) and (3) and section 2(2) of the General Amnesty Act.

...

Reasoning

The indictment of the Osijek Military State Attorney's Office no. Kt-1/93 of 20 April 1993 charged Fred Marguš with three offences of aggravated murder under Article 35 § 1 of the Criminal Code; one offence of aggravated murder under Article 35 § 2(2) of the Criminal Code; two criminal offences of causing a risk to life and assets ... under Article 153 § 1 of the Criminal Code; one criminal offence of inflicting grievous bodily harm under Article 41 § 1 of the Criminal Code; one criminal offence of theft of weapons or other fighting equipment under Article 223

§§ 1 and 2 of the Criminal Code; and one criminal offence of aggravated theft under Article 131 § 2 of the Criminal Code ...

The above indictment was significantly altered at a hearing held on 25 January 1996 before the Osijek Military Court, when the Deputy Military Prosecutor withdrew some of the charges and altered the factual and legal description and the legal classification of some of the offences.

Thus, the accused Fred Marguš was indicted for two offences of murder under Article 34 § 1 of the Criminal Code, one criminal offence of inflicting grievous bodily harm under Article 41 § 1 of the Criminal Code and one criminal offence of causing a risk to life and assets ... under Article 146 § 1 of the Criminal Code ...

After the military courts had been abolished, the case file was forwarded to the Osijek County State Attorney's Office, which took over the prosecution on the same charges and asked that the proceedings be continued before the Osijek County Court. The latter forwarded the case file to a three-judge panel in the context of application of the General Amnesty Act.

After considering the case file, this panel has concluded that the conditions under section 1(1) and (3) and section 2(2) of the General Amnesty Act have been met and that the accused is not excluded from amnesty.

The above-mentioned Act provides for a general amnesty in respect of criminal offences committed during the aggression, armed rebellion or armed conflicts .... in the Republic of Croatia. The general amnesty concerns criminal offences committed between 17 August 1990 and 23 August 1996.

The general amnesty excludes only the perpetrators of the gravest breaches of humanitarian law which amount to war crimes, and certain criminal offences listed in section 3 of the General Amnesty Act. It also excludes the perpetrators of other criminal offences under the Criminal Code ... which were not committed during the aggression, armed rebellion or armed conflicts and which are not connected with the aggression, armed rebellion or armed conflicts in Croatia.

The accused, Fred Marguš, is indicted for three criminal offences committed in Čepin on 20 November 1991 and one criminal offence committed in Čepin on 1 August 1991.

The first three of these offences concern the most difficult period and the time of the most serious attacks on Osijek and Eastern Croatia immediately after the fall of Vukovar, and the time of the most severe battles for Laslovo. In those battles, the accused distinguished himself as a combatant, showing exceptional courage and being recommended for promotion to the rank of lieutenant by the commander of the Third Battalion of the 106th Brigade of the Croatian Army, who was his superior officer at that time.

In the critical period concerning the first three criminal offences, the accused was acting in his capacity as a member of the Croatian Army; in that most difficult period, acting as commander of a unit, he tried to prevent the fall of a settlement into enemy hands, when there was an immediate danger of this happening. The fourth criminal offence was committed on 1 August 1991, when the accused was acting in his capacity as an on-duty member of the Reserve Forces in Čepin and was dressed in military camouflage uniform and using military weapons.

...

The actions of the accused, in view of the time and place of the events at issue, were closely connected with the aggression, armed rebellion and armed conflicts in Croatia, and were carried out during the period referred to in the General Amnesty Act.

...

Against this background, this court finds that all the statutory conditions for application of the General Amnesty Act have been met ...”

18. On an unspecified date the State Attorney lodged a request for the protection of legality (*zahtjev za zaštitu zakonitosti*) with the Supreme Court, asking it to establish that section 3(2) of the General Amnesty Act had been violated.

19. On 19 September 2007 the Supreme Court, when deciding upon the above request, established that the above ruling of the Osijek County Court of 24 June 1997 violated section 3(2) of the General Amnesty Act. The relevant parts of the Supreme Court’s ruling read:

“...

Section 1(1) of the General Amnesty Act provides for a general amnesty from criminal prosecution and trial for the perpetrators of criminal offences committed in connection with the aggression, armed rebellion or armed conflicts ... in Croatia. Under paragraph 3 of the same section the amnesty concerns criminal offences committed between 17 August 1990 and 23 August 1996. ...

For the correct interpretation of these provisions – apart from the general condition that the criminal offence in question had to have been committed in the period between 17 August 1990 and 23 August 1996 (which has been met in the present case) – there must exist a direct and significant connection between the criminal offence and the aggression, armed rebellion or armed conflicts. This interpretation is in accordance with the general principle that anyone who commits a criminal offence has to answer for it. Therefore, the above provisions have to be interpreted in a sensible manner, with the necessary caution, so that the amnesty does not become a contradiction of itself and call into question the purpose for which the Act in question was enacted. Hence, the expression ‘in connection with the aggression, armed rebellion or armed conflicts’ used in the General Amnesty Act, which does not specifically define the nature of that connection, has to be interpreted to mean that the connection must be direct and significant.

...

Part of the factual description of the criminal offences with which the accused Fred Marguš is charged ... which suggests some connection with the aggression against the Republic of Croatia or armed rebellion and armed conflicts in Croatia, relates to the arrival of the victims of these offences – S.B., V.B. and the minor Sl.B. – in Čepin, together with their neighbours, after they had all fled the village of Ivanovac on account of the attack by the so-called ‘Y[ugoslav] P[eoples’] A[rmy]’. It should be stressed that it is not in dispute that the accused Fred Marguš was a member of the Croatian Army. However, these circumstances are not such as to amount to a direct link with the aggression, armed rebellion or armed conflicts in Croatia which is required for the General Amnesty Act to apply.

The factual description of the criminal offences under count 4 of the indictment states that the accused committed these acts as a member of the Reserve Forces in Čepin, after his tour of duty had terminated. This characteristic in itself does not

represent a significant link between the criminal offences and the war because, were this to be the case, the amnesty would encompass all criminal offences committed between 27 August 1990 and 23 August 1996 by members of the Croatian Army or the enemy units (save for those specifically listed in section 3(1) of the General Amnesty Act); this was certainly not the intention of the legislature.

Finally, the accused's war career, described in detail in the impugned ruling, cannot be a criterion for application of the General Amnesty Act ...

The factual description of the criminal offences in the indictment ... does not show that the acts in question were committed during the aggression, armed rebellion or armed conflicts in Croatia, or that they were committed in connection with them.

..."

B. The second set of criminal proceedings against the applicant (no. K-33/06)

20. On 26 April 2006 the Osijek County State Attorney's Office indicted the applicant on charges of war crimes against the civilian population. The proceedings were conducted by a three-judge panel of the Osijek County Court, including judge M.K. During the entire proceedings the applicant was represented by a lawyer.

21. A concluding hearing was held on 19 March 2007 in the presence of, *inter alia*, the applicant and his defence lawyer. The applicant was removed from the courtroom during the closing arguments of the parties. The applicant's lawyer remained in the courtroom and presented his closing arguments. The relevant part of the written record of that hearing reads as follows:

"The president of the panel notes that the accused Marguš interrupted the Osijek County Deputy State Attorney ("the Deputy State Attorney") in his closing arguments and was warned by the panel to calm down; the second time he interrupted the Deputy State Attorney he was warned orally.

After the president of the panel warned the accused Marguš orally, the latter continued to comment on the closing arguments of the Deputy State Attorney. The panel therefore decides, and the president of the panel orders, that the accused Marguš be removed from the courtroom until the pronouncement of the judgment.

..."

22. The applicant was subsequently removed from the courtroom and the Deputy State Attorney, the lawyers for the victims, the defence lawyers and one of the accused gave their closing arguments.

23. The pronouncement of the judgment was scheduled for 21 March 2007 and the hearing was concluded. The applicant was present at the pronouncement of the judgment. He was found guilty as charged and sentenced to fourteen years' imprisonment. The relevant part of the judgment reads as follows:

"...

The accused Fred Marguš ...

and

the accused T.D. ...

are guilty [in that]

in the period between 20 and 25 November 1991 in Čepin and its surroundings, contrary to Article 3 § 1 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 and Article 4 §§ 1 and 2(a) and Article 13 of the Additional Protocol to the Geneva Conventions of 12 August 1949 Relative to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977, while defending that territory from armed attacks by the local rebel Serb population and the so-called Yugoslav People's Army in their joint attack on the constitutional legal order and territorial integrity of the Republic of Croatia, Fred Marguš, in his capacity as the commander of Unit 2 in the 3rd Corps of the 130th brigade of the Croatian army, and the accused T.D., as a member of the same Unit under the command of Fred Marguš, [acted as follows] with the intention of killing Serb civilians;

the accused Fred Marguš

(a) on 20 November 1991 at about 8 a.m. in Čepin, recognised V.B. and S.B. who were standing ... in front of the Fire Brigade Headquarters in Ivanovac and were fleeing their village because of the attacks by the Yugoslav People's Army, ... fired at them with an automatic gun ... which caused S.B. to sustain a gunshot wound to the head ... and neck as a result of which S.B. immediately died, while V.B. was wounded and fell to the ground. The accused then drove away and soon afterwards came back, and, seeing that V.B. was still alive and accompanied by his nine-year-old son Sl.B. and ... his wife M.B., again fired the automatic gun at them, and thus shot V.B. twice in the head ... twice in the arm ... as a result of which V.B. soon died while Sl.B. was shot in the leg ... which amounted to grievous bodily harm;

(b) in the period between 22 and 24 November 1991 in Čepin, arrested N.V. and Ne.V., threatening them with firearms, appropriated their Golf vehicle ... took them to the basement of a house ... where he tied them by ropes to chairs and kept them locked in without food or water and, together with the members of his Unit ... beat and insulted them, asked them about their alleged hostile activity and possession of a radio set, and during that time prevented other members of the Unit from helping them ... after which he took them out of Čepin to a forest ... where they were shot with several bullets from firearms ... as a result of which N.V. ... and Ne.V. died;

(c) on 23 November 1991 at about 1.30 p.m. at the coach terminal in Čepin, arrested S.G. and D.G. and their relative Lj.G. and drove them to a house ... tied their hands behind their backs and, together with the late T.B., interrogated them about their alleged hostile activity and in the evening, while they were still tied up, drove them out of Čepin ... where he shot them ... as a result of which they died;

the accused Fred Marguš and T.D. [acting] together

(d) on 25 November 1991 at about 1 p.m. in Čepin, on seeing S.P. driving his Golf vehicle ... stopped him at the request of Fred Marguš ... ... and drove him to a field ... where ... Fred Marguš ordered T.D. to shoot S.P., [an order] which T.D. obeyed, shooting S.P. once ... after which Fred Marguš shot him several times with an automatic gun ... as a result of which S.P. ... died and Fred Marguš appropriated his vehicle.

...”

24. The applicant’s conviction was upheld by the Supreme Court on 19 September 2007 and his sentence was increased to fifteen years’ imprisonment. The relevant part of the judgment by the Supreme Court reads as follows:

> “Under Article 36 § 1(5) of the Code of Criminal Procedure (CCP), a judge is exempted from performing judicial functions if he or she participated in the same case in the adoption of a ruling of a lower court or if he participated in adopting the impugned ruling.
>
> It is true that judge M.K. participated in the proceedings in which the impugned judgment was adopted. He was the president of a panel of the Osijek County Court which adopted the ruling ... of 24 June 1997 by which the proceedings against the accused Fred Marguš were terminated under section 1(1) and (3) and section 2(2) of the General Amnesty Act ...
>
> Even though both sets of proceedings were instituted against the same accused, it was not the same case. The judge in question participated in two different cases before the Osijek County Court against the same accused. In the case in which the present appeal has been lodged, judge M.K. did not participate in adopting any decision of a lower court or in a decision which is the subject of an appeal or an extraordinary remedy.
>
> ...
>
> The accused incorrectly argued that the first-instance court had acted contrary to Article 346 § 4 and Article 347 §§ 1 and 4 of the CCP when it held the concluding hearing in his absence and in the absence of his defence lawyer because it had removed him from the courtroom when the parties were presenting their closing arguments. Thus, he claimed, he had been prevented from giving his closing arguments. Furthermore, he had not been informed about the conduct of the hearing in his absence, and the decision to remove him from the courtroom had not been adopted by the trial panel.
>
> Contrary to the allegations of the accused, the written record of the hearing held on 19 March 2007 shows that the accused Fred Marguš interrupted the [Osijek] County Deputy State Attorney in his closing arguments and was twice warned by the president of the trial panel. Since he continued with the same behaviour, the trial panel decided to remove him from the courtroom ...
>
> Such action by the trial court is in conformity with Article 300 § 2 of the CCP. The accused Fred Marguš started to disturb order in the courtroom during the closing arguments of the [Osijek County Deputy] State Attorney and persisted in doing so, after which he was removed from the courtroom by a decision of the trial panel. He was again present in the courtroom when judgment was pronounced on 21 March 2007.
>
> Since the trial court complied fully with Article 300 § 2 of the CCP, the accused’s appeal is unfounded. In the case in issue there has been no violation of the defence rights, and the removal of the accused from the courtroom during the closing arguments of the parties had no effect on the judgment.
>
> ...

> The accused Fred Marguš further argues ... that the impugned judgment violated the '*ne bis in idem*' principle ... because the proceedings had already been discontinued in respect of some of the charges giving rise to the impugned judgment ...
>
> ...
>
> It is true that criminal proceedings were conducted before the Osijek County Court under the number K-4/97 against the accused Fred Marguš in respect of, *inter alia*, four criminal offences ... of murder ... committed against S.B., V.B., N.V. and Ne.V, as well as the criminal offence ... of creating a risk to life and assets ... These proceedings were terminated by final ruling of the Osijek County Court no. Kv 99/97 (K-4/97) of 24 June 1997 on the basis of the General Amnesty Act ...
>
> Despite the fact that the consequences of the criminal offences which were the subject of the proceedings conducted before the Osijek County Court under the number K 4/97, namely the deaths of S.B., V.B., N.V. and Ne.V. and the grievous bodily injury of Sl.B., are also part of the factual background [to the criminal offences assessed] in the proceedings in which the impugned judgment has been adopted, the offences [tried in the two sets of the criminal proceedings at issue] are not the same.
>
> Comparison between the factual background [to the criminal offences assessed] in both sets of proceedings shows that they are not identical. The factual background [to the offences referred to] in the impugned judgment contains a further criminal element, significantly wider in scope than the one forming the basis for the proceedings conducted before the Osijek County Court under the number K-4/97. [In the present case] the accused Fred Marguš is charged with violation of the rules of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 and of the Additional Protocol to the Geneva Conventions of 12 August 1949 Relative to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977, in that, in the period between 20 and 25 November 1991, while defending that territory from armed attacks by the local rebel Serb population and the so-called Yugoslav People's Army in their joint attack on the constitutional legal order and territorial integrity of the Republic of Croatia, and in violation of the rules of international law, he killed and tortured civilians, treated them in an inhuman manner, unlawfully arrested them, ordered the killing of a civilian and robbed the assets of the civilian population. The above acts constitute a criminal offence against the values protected by international law, namely a war crime against the civilian population under Article 120 § 1 of the Criminal Code.
>
> Since the factual background to the criminal offence at issue, and its legal classification, differ from those which were the subject of the earlier proceedings, such that the scope of the charges against the accused Fred Marguš is significantly wider and different from the previous case (case-file no. K-4/97), the matter is not *res judicata* ..."

25. A subsequent constitutional complaint by the applicant was dismissed by the Constitutional Court on 30 September 2009. The Constitutional Court endorsed the views of the Supreme Court.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Relevant law

26. The relevant part of the Croatian Constitution (*Ustav Republike Hrvatske*, Official Gazette nos. 41/2001 and 55/2001) reads as follows:

Article 31

"...

(2) No one shall be liable to be tried or punished again in criminal proceedings for an offence of which he has already been finally acquitted or convicted in accordance with the law.

Only the law may, in accordance with the Constitution or an international agreement, prescribe the situations in which proceedings may be reopened under paragraph (2) of this Article and the grounds for reopening."

27. The relevant provisions of the Code of Criminal Procedure (*Zakon o kaznenom postupku* – Official Gazette nos. 110/1997, 27/1998, 58/1999, 112/1999, 58/2002, 62/2003, 178/2004 and 115/2006) provide as follows:

Article 300

"(1) Where the accused ... disturbs order at a hearing or does not comply with the orders of the presiding judge, the latter shall warn the accused ... The panel may order that the accused be removed from the courtroom ...

(2) The panel may order that the accused be removed from the courtroom for a limited time. Where the accused again disturbs order [he or she may be removed from the courtroom] until the end of the presentation of evidence. Before the closure of the presentation of evidence the presiding judge shall summon the accused and inform him about the conduct of the trial. If the accused continues to disturb order and insults the dignity of the court, the panel may again order that he be removed from the courtroom. In that case the trial shall be concluded in the accused's absence and the presiding judge or another member of the panel shall inform him or her about the judgment adopted, in the presence of a typist.

..."

Article 350 (former Article 336)

"(1) A judgment may refer only to the accused and the offence which are the subject of the indictment as initially submitted or as altered at the hearing.

(2) The court is not bound by the prosecutor's legal classification of the offence."[1]

[1] See the Supreme Court's practice in respect of this provision in paragraphs 32-34 below.

Types of judgments

Article 352

"(1) A judgment shall dismiss the charges, acquit the accused or find him or her guilty.

..."

Article 354

A judgment acquitting the accused shall be adopted when:

(1) the offence with which the accused is charged is not a criminal offence under the law;

(2) there are circumstances that exclude the accused's guilt;

(3) it has not been proved that the accused committed the criminal offence with which he or she is charged."

Article 355

(1) A judgment finding the accused guilty shall contain the following details:

1. the offence of which the accused is found guilty, stating the facts and circumstances constituting the specific ingredients of a given criminal offence as well as those on which the application of a specific provision of the Criminal Code depends;

2. the statutory name and description of the criminal offence and the provisions of the Criminal Code which have been applied;

3. the sentence to be applied or whether, under the provisions of the Criminal Code, a sentence is not to be applied or imprisonment is to be substituted by community service;

4. any decision on suspended sentence;

5. any decision on security measures and confiscation of material gains;

7. the decision on costs and on any civil claim and whether a final judgment is to be published in the media.

..."

Article 367

"(1) A grave breach of criminal procedure shall be found to exist where

...

3. a hearing has been held without a person whose presence is obligatory under the law ...

..."

Reopening of proceedings

Article 401

"Criminal proceedings concluded by a final ruling or a final judgment may be reopened at the request of an authorised person, only in the circumstances and under the conditions set out in this Code."

Article 406

"(1) Criminal proceedings concluded by a final judgment dismissing the charges may exceptionally be reopened to the detriment of the accused:

...

5. where it has been established that amnesty, pardon, statutory limitation or other circumstances excluding criminal prosecution are not applicable to the criminal offence referred to in the judgment dismissing the charges.

..."

Article 408

"(1) The court competent to decide upon a request for the reopening of the proceedings is the one which adjudicated the case at first instance ...

(2) The request for reopening shall contain the statutory basis for reopening and evidence supporting the request ...

..."

Request for the protection of legality

Article 418

"(1) The State Attorney may lodge a request for the protection of legality against final judicial decisions and court proceedings preceding such decisions in which a law has been violated.

(2) The State Attorney shall lodge a request for the protection of legality against a judicial decision adopted in proceedings in which fundamental human rights and freedoms guaranteed by the Constitution, statute or international law have been violated.

..."

Article 419

"(1) The Supreme Court of the Republic of Croatia shall determine requests for the protection of legality.

..."

Article 420

"(1) When determining a request for the protection of legality the [Supreme] Court shall assess only those violations of the law relied on by the State Attorney.

..."

Article 422

"(2) Where a request for the protection of legality has been lodged to the detriment of the accused and the [Supreme] Court establishes that it is well founded, it shall merely establish that there has been a violation of the law, without altering a final decision."

28. Under the Criminal Code (*Kazeni zakon*, Offcial Gazette nos. 53/1991, 39/1992 and 91/1992) the circumstances excluding an individual's guilt are lack of accountability (*neubrojivost*), error in law or error in fact.

29. The relevant part of the General Amnesty Act of 24 September 1996 (Official Gazette no. 80/1996, *Zakon o općem oprostu*) reads as follows:

Section 1

"This Act grants general amnesty from criminal prosecution and trial to the perpetrators of criminal offences committed during the aggression, armed rebellion or armed conflicts and in connection with the aggression, armed rebellion or armed conflicts in the Republic of Croatia.

No amnesty shall apply to the execution of final judgments in respect of perpetrators of the criminal offences under paragraph 1 of this section.

Amnesty from criminal prosecution and trial shall apply to offences committed between 17 August 1990 and 23 August 1996."

Section 2

"No criminal prosecution or trial proceedings shall be instituted against the perpetrators of the criminal offences under section 1 of this Act.

Where a criminal prosecution has already commenced it shall be discontinued and where trial proceedings have been instituted a court shall issue a ruling terminating the proceedings of its own motion.

Where a person granted amnesty under paragraph 1 of this section has been detained, he or she shall be released."

Section 3

"No amnesty under section 1 of this Act shall be granted to perpetrators of the gravest breaches of humanitarian law which have the character of war crimes, namely the criminal offence of genocide under Article 119 of the Basic Criminal Code of the Republic of Croatia (Official Gazette no. 31/1993, consolidated text, nos. 35/1993, 108/1995, 16/1996 and 28/1996); war crimes against the civilian population under Article 120; war crimes against the wounded and sick under Article 121; war crimes against prisoners of war under Article 122; organising groups [with the purpose of committing] or aiding and abetting genocide and war crimes under Article 123; unlawful killing and wounding of the enemy under Article 124; unlawful taking of possessions from the dead or wounded on the battleground under Article 125; use of unlawful means of combat under Article 126; offences against negotiators under Article 127; cruel treatment of the wounded, sick and prisoners of war under Article 128; unjustified delay in repatriation of prisoners of war under Article 129; destruction of the cultural and historical heritage under Article 130; inciting war of aggression under Article 131; abuse of international symbols under Article 132; racial

and other discrimination under Article 133; establishing slavery and transferring slaves under Article 134; international terrorism under Article 135; putting at risk persons under international protection under Article 136; taking hostages under Article 137; and the criminal offence of terrorism under the provisions of international law.

No amnesty shall be granted to perpetrators of other criminal offences under the Basic Criminal Code of the Republic of Croatia (Official Gazette no. 31/1993, consolidated text, nos. 35/1993, 108/1995, 16/1996 and 28/1996) and the Criminal Code of the Republic of Croatia (Official Gazette no. 32/1993, consolidated text, nos. 38/1993, 28/1996 and 30/1996) which were not committed during the aggression, armed rebellion or armed conflicts and are not connected with the aggression, armed rebellion or armed conflicts in the Republic of Croatia.

...”

Section 4

“A State Attorney may not lodge an appeal against a court decision under section 2 of this Act where the court granted amnesty in favour of the perpetrator of a criminal offence covered by this Act on the basis of the legal classification given to the offence by a State Attorney.”

B. Relevant practice

1. Practice of the Constitutional Court

30. In its decision no. U-III/543/1999 of 26 November 2008 the Constitutional Court held, in so far as relevant, as follows:

“6. The question before the Constitutional Court is whether there was a second trial concerning an event constituting the offence for which the General Amnesty Act was applied, and thus whether the proceedings concerned a ‘same offence’ in respect of which, under Article 31 § 2 of the Constitution, it is not possible to institute a new, separate and unrelated set of proceedings. Such proceedings would infringe [the principle of] legal certainty and permit multiple sanctions to be imposed for one and the same conduct which may be the subject of only one criminal sanction. In answering this question, the Constitutional Court should examine two issues: (a) the similarity between the descriptions of the events constituting the offences with which the appellant was charged in the first and second set of proceedings, in order to verify whether the decision on the application of amnesty and the final conviction in the subsequent proceedings concern the same subject, that is, the same ‘criminal quantity’, irrespective of whether they concern the same historical events; and after that ... (b) whether the case at issue concerns a situation in which it was not possible to bring fresh charges in relation to the facts already adjudicated in the first decisions of the courts (applying the amnesty), but in which, under Article 31 § 3 of the Constitution, it was possible to seek the reopening of the proceedings as provided for by the relevant law. Article 406 § 1 (5) of the Code of Criminal Procedure allows for the reopening of proceedings which were terminated by a final judgment dismissing the charges, where ‘it has been established that amnesty, pardon, statutory limitation or other circumstances excluding criminal prosecution are not applicable to the criminal offence referred to in the judgment dismissing the charges’.

6.1. The Constitutional Court can examine the similarity between the descriptions of the events constituting the offences only by reference to the normative standards. In so doing it is bound, just like the lower courts, by the constituent elements of the offences, irrespective of their legal classification. The descriptions of the events forming the basis for the charges in the judgment of the Bjelovar Military Court (no. K-85/95-24) and the Supreme Court (no. I-Kž-257/96), and the impugned judgments of the Sisak County Court (no. K-108/97) and the Supreme Court (no. I Kž-211/1998-3), undoubtedly suggest that they concern the same events, which were merely given different legal classifications. All the relevant facts had been established by the Bjelovar Military Court (which finally terminated the proceedings) and no other new facts were established in the subsequent proceedings before the Sisak County Court. The only difference in the description of the charges was in the time of the commission of the offences, which does not suggest that the events were different but rather that the courts were unable to establish the exact time of the offences. As regards the identical nature of the events, it is also relevant to note that the Supreme Court emphasised in the impugned judgment that the events were the same, so there is no doubt about this aspect.

6.2. In the impugned judgment the Supreme Court held that the conduct at issue constituted not only the offence of armed rebellion under Article 235 § 1 of the Criminal Code of the Republic of Croatia, in respect of which the judgment dismissing the charges was adopted, but also the offence of war crimes against the civilian population under Article 120 §§ 1 and 2 of the Basic Criminal Code of the Republic of Croatia, the offence of which [the appellant] was later convicted. It follows from this reasoning of the Supreme Court that the same conduct constituted the elements of two offences and that the situation was one of a single act constituting various offences.

6.3. The Constitutional Court finds that in the impugned judgment the Supreme Court erred in finding that the same perpetrator, after a final judgment had been adopted in respect of a single act constituting one offence, could be tried again in the new set of proceedings for the same act constituting another offence. Under Article 336 § 2 of the Code of Criminal Procedure the court is not bound by the prosecutor's classification of the offence. The Bjelovar Military Court, if it considered that the facts underlying the charges constituted the offence of war crimes against the civilian population under Article 120 § 1 of the Basic Criminal Code of the Republic of Croatia, should therefore have found that it had no competence to determine the case (because it had no competence to try war crimes), and should have forwarded the case to the competent court, which could have convicted [the appellant] of the offence of war crimes against the civilian population, in respect of which no amnesty could be applied. Since the Bjelovar Military Court did not act in such a manner, it follows that, owing to the final nature of its judgment, the decision dismissing the charges became *res judicata*. The subsequent conviction in this case is a violation of the *ne bis in idem* rule, irrespective of the fact that the operative part of the first judgment did not concern 'the merits', sometimes understood simply as a resolution of the question whether the accused committed the offence or not. The formal distinction between an acquittal and a judgment dismissing the charges cannot be the only criterion for the resolution of the question whether a new and unrelated set of criminal proceedings may be instituted in respect of the same 'criminal quantity': although it is contained in the judgment dismissing the charges, the decision on the application of amnesty, in the legal sense, creates the same legal consequences as an acquittal, and in both judgments a factual issue remains unproven.

6.4. Therefore the Constitutional Court cannot accept the reasoning of the Supreme Court's judgment no. I Kž-211/1998-3 of 1 April 1999, according to which the judgment or ruling on the discontinuance of the proceedings for the offence of armed rebellion concerning the same event does not exclude the possibility of a subsequent prosecution and conviction for the offence of war crimes against the civilian population on the grounds that the latter offence endangers not only the values of the Republic of Croatia but also humanity in general and international law. In any event, the Supreme Court later departed from that position in case no. I Kž-8/00-3 of 18 September 2002, finding that the judgment dismissing the charges 'without any doubt concerns the same event, in terms of the time, place and manner of commission; the event was simply given a different classification in the impugned judgment than in the ruling of the Zagreb Military Court'. It also stated the following: '*When, as in the case at issue, the criminal proceedings have been discontinued in respect of the offence under Article 244 § 2 of the Criminal Code of the Republic of Croatia, and where the actions ... are identical to those of which [the accused] was found guilty in the impugned judgment ... under the* ne bis in idem *principle provided for in Article 32 § 2 of the Constitution, new criminal proceedings cannot be instituted because the matter has been adjudicated.'*

..."

31. Constitutional Court decision no. U-III-791/1997 of 14 March 2001 referred to a situation where the criminal proceedings against the accused had been terminated under the General Amnesty Act. Its relevant parts read as follows:

"16. The provision of the Constitution which excludes the possibility of an accused being tried again for an offence of which he or she has already been 'finally acquitted or convicted in accordance with the law' refers exclusively to a situation where a judgment has been adopted in criminal proceedings which acquits the accused or finds him or her guilty of the charges brought against him or her in the indictment.

...

19. ... a ruling which does not finally acquit the accused but terminates the criminal proceedings cannot form the basis for application of the constitutional provisions concerning the prohibition on being tried or punished again ..."

2. Practice of the Supreme Court

32. The relevant part of ruling no. I Kž-533/00-3 of 11 December 2001 reads as follows:

"Under Article 336 § 2 of the Code of Criminal Procedure the court is not bound by the prosecutor's legal classification of the offence, and it was therefore empowered to decide upon a different criminal offence since that offence is more favourable [to the accused] ..."

33. The relevant part of ruling no. I Kž 257/02-5 of 12 October 2005 reads as follows:

"Since under Article 336 § 2 of the Code of Criminal Procedure the court is not bound by the prosecutor's legal classification of the offence, and given that the possible sentence for the criminal offence of incitement to abuse of authority in financial affairs under Article 292 § 2 is more lenient than the possible sentence for

the criminal offence under Article 337 § 4 of the Criminal Code, the first-instance court was empowered to classify the acts in question as the criminal offence under Article 292 § 2 of the Criminal Code ..."

34. The relevant part of ruling no. I Kž 657/10-3 of 27 October 2010 reads as follows:

"Even though the first-instance court correctly stated that a court is not bound by the prosecutor's legal classification of the offence, the terms of the indictment were nevertheless exceeded because the first-instance court put the accused in a less favourable position by convicting him of two criminal offences instead of one ..."

III. RELEVANT INTERNATIONAL LAW MATERIALS

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

35. The relevant part of the Vienna Convention on the Law of Treaties of 23 May 1969 ("the Vienna Convention") provides:

SECTION 3. INTERPRETATION OF TREATIES

Article 31
General rule of interpretation

"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

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

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

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

4. A special meaning shall be given to a term if it is established that the parties so intended."

Article 32
Supplementary means of interpretation

"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable."

Article 33
Interpretation of treaties authenticated in two or more languages

"1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

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

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted."

B. The Geneva Conventions of 1949 for the Protection of Victims of Armed Conflicts and their Additional Protocols

36. The relevant part of common Article 3 of the Geneva Conventions of 1949 reads:

Article 3

"In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

..."

37. The relevant parts of the Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva, 12 August 1949 – hereafter "the First Geneva Convention") read:

Chapter IX. Repression of Abuses and Infractions

Article 49

"The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.

..."

Article 50

"Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

38. Articles 50 and 51 of the Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva, 12 August 1949 – hereafter "the Second Geneva Convention") contain the same text as Articles 49 and 50 of the First Geneva Convention.

39. Articles 129 and 130 of the Convention (III) relative to the Treatment of Prisoners of War (Geneva, 12 August 1949 – hereafter "the Third Geneva Convention") contain the same text as Articles 49 and 50 of the First Geneva Convention.

40. Articles 146 and 147 of the Convention (IV) relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949 – hereafter "the Fourth Geneva Convention") contain the same text as Articles 49 and 50 of the First Geneva Convention.

41. The relevant part of the Additional Protocol (II) to the Geneva Conventions, relating to the Protection of Victims of Non-International Armed Conflicts (Geneva, 8 June 1977) reads:

Article 4

"1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.

2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph I are and shall remain prohibited at any time and in any place whatsoever:

(a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; ..."

Article 6

"...

5. At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained."

Article 13

"1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules 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 part, unless and for such time as they take a direct part in hostilities."

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

42. The relevant parts of this Convention read as follows:

Article 1

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

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

Article 4

"Persons committing genocide or any of the other acts enumerated in Article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."

Article 5

"The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article 3."

D. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity[3]

43. The relevant part of this Convention reads as follows:

Article 1

"No statutory limitation shall apply to the following crimes, irrespective of the date of their commission:

(a) War crimes as they are defined in the Charter of the International Military Tribunal, Nurnberg, of 8 August 1945 and confirmed by resolutions 3 (1) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, particularly the 'grave breaches' enumerated in the Geneva Conventions of 12 August 1949 for the protection of war victims;

(b) Crimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, Nurnberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, eviction by armed attack or occupation and inhuman acts resulting from the policy of apartheid, and the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, even if such acts do not constitute a violation of the domestic law of the country in which they were committed."

Article 2

"If any of the crimes mentioned in article I is committed, the provisions of this Convention shall apply to representatives of the State authority and private individuals who, as principals or accomplices, participate in or who directly incite others to the commission of any of those crimes, or who conspire to commit them, irrespective of the degree of completion, and to representatives of the State authority who tolerate their commission."

Article 3

"The States Parties to the present Convention undertake to adopt all necessary domestic measures, legislative or otherwise, with a view to making possible the

[3] Adopted on 26 November 1968; entry into force on 11 November 1970. It was ratified by Croatia on 12 October 1992.

extradition, in accordance with international law, of the persons referred to in article II of this Convention."

Article 4

"The States Parties to the present Convention undertake to adopt, in accordance with their respective constitutional processes, any legislative or other measures necessary to ensure that statutory or other limitations shall not apply to the prosecution and punishment of the crimes referred to in articles 1 and 2 of this Convention and that, where they exist, such limitations shall be abolished.")

E. Statute of the International Criminal Court

44. Article 20 of the Statute reads:

Ne bis in idem

"1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.

2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.

3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice."

F. Customary Rules of International Humanitarian Law

45. Mandated by the States convened at the 26th International Conference of the Red Cross and Red Crescent, the International Committee of the Red Cross (ICRC) presented in 2005 a Study on Customary International Humanitarian Law (J.-M. Henckaerts and L. Doswald-Beck (eds.), Customary International Humanitarian Law, 2 Volumes, Cambridge University Press & ICRC, 2005). The Study contains a list of customary rules of international humanitarian law. Rule 159, which refers to non-international armed conflicts, reads:

"At the end of hostilities, the authorities in power must endeavour to grant the broadest possible amnesty to persons who have participated in a non-international armed conflict, or those deprived of their liberty for reasons related to the armed conflict, with the exception of persons suspected of, accused of or sentenced for war crimes."

G. United Nations Security Council

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

46. The relevant part of the Resolution reads:

> "The Security Council:
>
> ...
>
> 7. Urges the Government of the Republic of Croatia to eliminate ambiguities in implementation of the Amnesty Law, and to implement it fairly and objectively in accordance with international standards, in particular by concluding all investigations of crimes covered by the amnesty and undertaking an immediate and comprehensive review with United Nations and local Serb participation of all charges outstanding against individuals for serious violations of international humanitarian law which are not covered by the amnesty in order to end proceedings against all individuals against whom there is insufficient evidence;
>
> ..."

H. The International Covenant on Civil and Political Rights

47. Article 7 of the International Covenant on Civil and Political Rights provides:

> "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

I. The United Nations Human Rights Committee

1. General Comment 20, Article 7 (Forty-fourth session, 1992)

48. The United Nations Human Rights Committee noted in 1994 in its General Comment No. 20 on Article 7 of the International Covenant that some States had granted amnesty in respect of acts of torture. It went on to state that "[a]mnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible".

2. Concluding observations, Lebanon, 1 April 1997

49. Paragraph 12 reads as follows:

> "12. The Committee notes with concern the amnesty granted to civilian and military personnel for human rights violations they may have committed against civilians during the civil war. Such a sweeping amnesty may prevent the appropriate investigation and punishment of the perpetrators of past human rights violations,

undermine efforts to establish respect for human rights, and constitute an impediment to efforts undertaken to consolidate democracy."

3. Concluding observations, Croatia, 30 April 2001

50. Paragraph 11 reads as follows:

"The Committee is concerned with the implications of the Amnesty Law. While that law specifically states that the amnesty does not apply to war crimes, the term 'war crimes' is not defined and there is a danger that the law will be applied so as to grant impunity to persons accused of serious human rights violations. The Committee regrets that it was not provided with information on the cases in which the Amnesty Law has been interpreted and applied by the courts.

The State party should ensure that in practice the Amnesty Law is not applied or utilized for granting impunity to persons accused of serious human rights violations."

4. General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004

"18. Where the investigations referred to in paragraph 15 reveal violations of certain Covenant rights, States Parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (article 7), summary and arbitrary killing (article 6) and enforced disappearance (articles 7 and 9 and, frequently, 6). Indeed, the problem of impunity for these violations, a matter of sustained concern by the Committee, may well be an important contributing element in the recurrence of the violations. When committed as part of a widespread or systematic attack on a civilian population, these violations of the Covenant are crimes against humanity (see Rome Statute of the International Criminal Court, article 7).

Accordingly, where public officials or State agents have committed violations of the Covenant rights referred to in this paragraph, the States Parties concerned may not relieve perpetrators from personal responsibility, as has occurred with certain amnesties (see General Comment 20 (44)) and prior legal immunities and indemnities. Furthermore, no official status justifies persons who may be accused of responsibility for such violations being held immune from legal responsibility;

..."

J. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[4]

51. The relevant parts of this Convention provide:

[4] Adopted and opened for signature, ratification and accession by General Assembly Resolution 39/46 of 10 December 1984; entry into force 26 June 1987.

Article 4

"1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature."

Article 7

"1. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

..."

Article 12

"Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction."

Article 13

"Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given."

Article 14

"1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law."

K. The United Nations Commission on Human Rights

52. The relevant parts of the resolutions on impunity read:

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

"The Commission on Human Rights:

...

2. Also emphasizes the importance of taking all necessary and possible steps to hold accountable perpetrators, including their accomplices, of violations of international

human rights and humanitarian law, recognizes that amnesties should not be granted to those who commit violations of international humanitarian and human rights law that constitute serious crimes and urges States to take action in accordance with their obligations under international law;

...”

2. Resolution 2004/72, 21 April 2004

“The Commission on Human Rights:

...

3. Also recognizes that amnesties should not be granted to those who commit violations of human rights and international humanitarian law that constitute crimes, urges States to take action in accordance with their obligations under international law and welcomes the lifting, waiving, or nullification of amnesties and other immunities.

...”

3. Resolution 2005/81, 21 April 2005

“The Commission on Human Rights:

...

3. Also recognizes that amnesties should not be granted to those who commit violations of human rights and international humanitarian law that constitute crimes, urges States to take action in accordance with their obligations under international law and welcomes the lifting, waiving, or nullification of amnesties and other immunities, and recognizes as well the Secretary-General’s conclusion that United Nations-endorsed peace agreements can never promise amnesties for genocide, crimes against humanity, war crimes, or gross violations of human rights.

...”

L. European Parliament

Resolution A3-0056/93, 12 March 1993

53. The relevant text of the Resolution on human rights in the world and Community human rights policy for the years 1991/1992 reads:

“The European Parliament

...

7. Believes that the problem of impunity ... can take the form of amnesty, immunity, extraordinary jurisdiction and constrains democracy by effectively condoning human rights infringements and distressing victims;

8. Affirms that there should be no question of impunity for those responsible for war crimes in the former Yugoslavia ...”

M. The United Nations Special Rapporteur on Torture

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

54. In 1998, in the conclusions and recommendations of his fifth report on the question of the human rights of all persons subjected to any form of detention or imprisonment, in particular, torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur of the UN Commission on Human Rights stated with respect to the Draft Statute for an International Criminal Court:

> "228. In this connection, the Special Rapporteur is aware of suggestions according to which nationally granted amnesties could be introduced as a bar to the proposed court's jurisdiction. He considers any such move subversive not just of the project at hand, but of international legality in general. It would gravely undermine the purpose of the proposed court, by permitting States to legislate their nationals out of the jurisdiction of the court. It would undermine international legality, because it is axiomatic that States may not invoke their own law to avoid their obligations under international law. Since international law requires States to penalize the types of crime contemplated in the draft statute of the court in general, and torture in particular, and to bring perpetrators to justice, the amnesties in question are, ipso facto, violations of the concerned States' obligations to bring violators to justice. ..."

N. International Criminal Tribunal for the Former Yugoslavia (ICTY)

55. The relevant part of the *Furundžija case* (judgment of 10 December 1998) reads:

> "155. The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-state and individual levels. At the inter-state level, it serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture. It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, would produce the legal effects discussed above and in addition would not be accorded international legal recognition. Proceedings could be initiated by potential victims if they had *locus standi* before a competent international or national judicial body with a view to asking it to hold the national measure to be internationally unlawful; or the victim could bring a civil suit for damage in a foreign court, which would therefore be asked *inter alia* to disregard the legal value of the national authorising act. What is even more important is that perpetrators of torture acting upon or benefiting from those national measures may nevertheless be held criminally responsible for torture, whether in a foreign State, or in their own State under a subsequent regime. In short, in spite of possible national authorisation by legislative or judicial bodies to violate the principle banning torture, individuals remain bound to comply with that principle. As the International Military Tribunal at Nuremberg put it: "individuals have

international duties which transcend the national obligations of obedience imposed by the individual State."

O. American Convention on Human Rights[5]

56. The relevant part of this Convention reads as follows:

Article 1. Obligation to Respect Rights

"1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

2. For the purposes of this Convention, 'person' means every human being."

P. Inter-American Commission on Human Rights

1. Case 10.287 (El Salvador), Report of 24 September 1992

57. In 1992, in a report on a case with respect to the Las Hojas massacres in El Salvador in 1983 during which about 74 persons were allegedly killed by members of the Salvadoran armed forces with the participation of members of the Civil Defence, and which had led to a petition before the Inter-American Commission on Human Rights, the latter held that:

"... the application of [El Salvador's 1987 Law on Amnesty to Achieve National Reconciliation] constitutes a clear violation of the obligation of the Salvadoran Government to investigate and punish the violations of the rights of the Las Hojas victims, and to provide compensation for damages resulting from the violations

...

The present amnesty law, as applied in these cases, by foreclosing the possibility of judicial relief in cases of murder, inhumane treatment and absence of judicial guarantees, denies the fundamental nature of the most basic human rights. It eliminates perhaps the single most effective means of enforcing such rights, the trial and punishment of offenders."

2. Report on the situation of human rights in El Salvador, Doc. OEA/Ser.L/II.85 Doc. 28 rev. (1 June 1994)

58. In 1994, in a report on the situation of human rights in El Salvador, the Inter-American Commission on Human Rights stated, with regard to El Salvador's General Amnesty Law for Consolidation of Peace, as follows:

[5] Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969.

"... regardless of any necessity that the peace negotiations might pose and irrespective of purely political considerations, the very sweeping General Amnesty Law [for Consolidation of Peace] passed by El Salvador's Legislative Assembly constitutes a violation of the international obligations it undertook when it ratified the American Convention on Human Rights, because it makes possible a 'reciprocal amnesty' without first acknowledging responsibility ...; because it applies to crimes against humanity, and because it eliminates any possibility of obtaining adequate pecuniary compensation, primarily for victims."

3. Case 10.480 (El Salvador), Report of 27 January 1999

59. In 1999, in a report on a case concerning El Salvador's 1993 General Amnesty Law for Consolidation of Peace, the Inter-American Commission on Human Rights stated:

"113. The Commission should emphasize that [this law] was applied to serious human rights violations in El Salvador between January 1, 1980, and January 1, 1992, including those examined and established by the Truth Commission. In particular, its effect was extended, among other things, to crimes such as summary executions, torture, and the forced disappearance of persons. Some of these crimes are considered of such gravity as to have justified the adoption of special conventions on the subject and the inclusion of specific measures for preventing impunity in their regard, including universal jurisdiction and inapplicability of the statute of limitations ...

...

115. The Commission also notes that Article 2 of [this law] was apparently applied to all violations of common Article 3 [of the 1949 Geneva Conventions] and of [the 1977 Additional Protocol II], committed by agents of the State during the armed conflict which took place in El Salvador. ...

...

123. ... in approving and enforcing the General Amnesty Law, the Salvadoran State violated the right to judicial guarantees enshrined in Article 8(1) of the [1969 American Convention on Human Rights], to the detriment of the surviving victims of torture and of the relatives of ..., who were prevented from obtaining redress in the civil courts; all of this in relation to Article 1(1) of the Convention.

...

129. ... in promulgating and enforcing the Amnesty Law, El Salvador has violated the right to judicial protection enshrined in Article 25 of the [1969 American Convention on Human Rights], to the detriment of the surviving victims ..."

In its conclusions, the Inter-American Commission on Human Rights stated that El Salvador "has also violated, with respect to the same persons, common Article 3 of the Four Geneva Conventions of 1949 and Article 4 of [the 1977 Additional Protocol II]". Moreover, in order to safeguard the rights of the victims, it recommended that El Salvador should, "if need be, ... annul that law *ex-tunc*".

Q. Inter-American Court of Human Rights

60. In its judgment in the Barrios Altos case (judgment of 14 March 2001, Merits) involving the question of the legality of Peruvian amnesty laws, the Inter-American Court of Human Rights stated:

> "41. This Court considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.
>
> 42. The Court, in accordance with the arguments put forward by the Commission and not contested by the State, considers that the amnesty laws adopted by Peru prevented the victims' next of kin and the surviving victims in this case from being heard by a judge ...; they violated the right to judicial protection ...; they prevented the investigation, capture, prosecution and conviction of those responsible for the events that occurred in Barrios Altos, thus failing to comply with Article 1(1) of the [1969 American Convention on Human Rights], and they obstructed clarification of the facts of this case. Finally, the adoption of self-amnesty laws that are incompatible with the [1969 American Convention on Human Rights] meant that Peru failed to comply with the obligation to adapt internal legislation that is embodied in Article 2 of the [1969 American Convention on Human Rights].
>
> 43. The Court considers that it should be emphasized that, in the light of the general obligations established in Articles 1(1) and 2 of the [1969 American Convention on Human Rights], the States Parties are obliged to take all measures to ensure that no one is deprived of judicial protection and the exercise of the right to a simple and effective recourse, in the terms of Articles 8 and 25 of the [1969 American Convention on Human Rights]. Consequently, States Parties to the [1969 American Convention on Human Rights] which adopt laws that have the opposite effect, such as self-amnesty laws, violate Articles 8 and 25, in relation to Articles 1(1) and 2 of the [1969 American Convention on Human Rights]. Self-amnesty laws lead to the defenselessness of victims and perpetuate impunity; therefore, they are manifestly incompatible with the aims and spirit of the Convention. This type of law precludes the identification of the individuals who are responsible for human rights violations, because it obstructs the investigation and access to justice and prevents the victims and their next of kin from knowing the truth and receiving the corresponding reparation.
>
> 44. Owing to the manifest incompatibility of self-amnesty laws and the American Convention on Human Rights, the said laws lack legal effect and may not continue to obstruct the investigation of the grounds on which this case is based or the identification and punishment of those responsible, nor can they have the same or a similar impact with regard to other cases that have occurred in Peru, where the rights established in the [1969 American Convention on Human Rights] have been violated."

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

> "13. The international responsibility of the State for violations of internationally recognized human rights, – including violations which have taken place by means of the adoption and application of laws of self-amnesty, – and the individual penal responsibility of agents perpetrators of grave violations of human rights and of

International Humanitarian Law, are two faces of the same coin, in the fight against atrocities, impunity, and injustice. It was necessary to wait many years to come to this conclusion, which, if it is possible today, is also due, – may I insist on a point which is very dear to me, – to the awakening of the universal juridical conscience, as the material source par excellence of International Law itself."

61. In the case of *Almonacid-Arellano et al v. Chile*, judgment of 26 September 2006 (Preliminary Objections, Merits, Reparations and Costs) the Inter-American Court of Human Rights noted:

"154. With regard to the *ne bis in idem* principle, although it is acknowledged as a human right in Article 8(4) of the American Convention, it is not an absolute right, and therefore, is not applicable where: i) the intervention of the court that heard the case and decided to dismiss it or to acquit a person responsible for violating human rights or international law, was intended to shield the accused party from criminal responsibility; ii) the proceedings were not conducted independently or impartially in accordance with due procedural guarantees, or iii) there was no real intent to bring those responsible to justice. A judgment rendered in the foregoing circumstances produces an 'apparent' or 'fraudulent' *res judicata* case. On the other hand, the Court believes that if there appear new facts or evidence that make it possible to ascertain the identity of those responsible for human rights violations or for crimes against humanity, investigations can be reopened, even if the case ended in an acquittal with the authority of a final judgment, since the dictates of justice, the rights of the victims, and the spirit and the wording of the American Convention supersedes the protection of the *ne bis in idem* principle.

155. In the instant case, two of the foregoing conditions are met. Firstly, the case was heard by courts which did not uphold the guarantees of jurisdiction, independence and impartiality. Secondly, the application of Decree Law No. 2.191 did actually prevent those allegedly responsible from being brought before the courts and favored impunity for the crime committed against Mr. Almonacid-Arellano. The State cannot, therefore, rely on the *ne bis in idem* principle to avoid complying with the order of the Court (*supra* para. 147)."

62. The same approach was followed in the case of *La Cantuta v Peru*, judgment of 29 November 2006 (Merits, Reparations and Costs), the relevant part of which reads as follows:

"151. In this connection, the Commission and the representatives have asserted that the State has relied on the concept of double jeopardy to avoid punishing some of the alleged instigators of these crimes; however, double jeopardy does not apply inasmuch as they were prosecuted by a court who had no jurisdiction, was not independent or impartial and failed to meet the requirements for competent jurisdiction. In addition, the State asserted that 'involving other people who might be criminally liable is subject to any new conclusions reached by the *Ministerio Público* [General Attorney's Office] and the Judiciary in investigating the events and meting out punishments', and that 'the military court's decision to dismiss the case has no legal value for the General Attorney's Office's preliminary investigation. That is, the double jeopardy defense does not apply.'

152. This Court had stated earlier in the *Case of Barrios Altos* that

This Court considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those

responsible for serious human rights violations such as torture, extra-legal, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.

153. Specifically, in relation with the concept of double jeopardy, the Court has recently held that the *non bis in idem* principle is not applicable when the proceeding in which the case has been dismissed or the author of a violation of human rights has been acquitted, in violation of international law, has the effect of discharging the accused from criminal liability, or when the proceeding has not been conducted independently or impartially pursuant to the due process of law. A judgment issued in the circumstances described above only provides 'fictitious' or 'fraudulent' grounds for double jeopardy.

154. Therefore, in its complaint against the alleged instigators of the crimes (supra, para. 80.82), who were discharged by the military courts, the *Procuraduría Ad Hoc* (Ad Hoc Prosecutor's Office) deemed it inadmissible to consider the order for dismissal of the case issued by the military judges in the course of a proceeding aimed at granting impunity as a legal obstacle for conducting prosecutions or as a final judgment, since the judges had no jurisdiction and were not impartial, and thus the order may not provide grounds for double jeopardy."

63. In the case of *Anzualdo Castro v. Peru*, judgment of 22 September 2009 (Preliminary Objection, Merits, Reparations and Costs), the Inter-American Court of Human Rights reiterated that:

"182. ... [T]he State must remove all obstacles, both factual and legal, that hinder the effective investigation into the facts and the development of the corresponding legal proceedings, and use all available means to expedite such investigations and proceedings, in order to ensure the non-repetition of facts such as these. Specially, this is a case of forced disappearance that occurred within a context of a systematic practice or pattern of disappearances perpetrated by state agents; therefore, the State shall not be able to argue or apply a law or domestic legal provision, present or future, to fail to comply with the decision of the Court to investigate and, if applicable, criminally punish the responsible for the facts. For this reason and as ordered by this Tribunal since the delivery of the Judgment in the case of *Barrios Altos V. Peru*, the State can no longer apply amnesty laws, which lack legal effects, present or future (*supra* para. 163), or rely on concepts such as the statute of limitations on criminal actions, *res judicata* principle and the double jeopardy safeguard or resort to any other measure designated to eliminate responsibility in order to escape from its duty to investigate and punish the responsible."

64. In the case of *Gelman v. Uruguay* (judgment of 24 February 2011, Merits and Reparations), the Inter-American Court analysed at length the position under international law with regard to amnesties granted for grave breaches of fundamental human rights. In so far as relevant the judgment reads as follows:

"184. The obligation to investigate human rights violations falls within the positive measures that States must adopt in order to ensure the rights recognized in the Convention and is an obligation of means rather than of results, which must be assumed by the State as legal obligation and not as a mere formality preordained to be ineffective that depends upon the procedural initiative of the victims or their next of kin, or upon the production of evidence by private parties.

...

189. The mentioned international obligation to prosecute, and if criminal responsibility is determined, punish the perpetrators of the human rights violations, is encompassed in the obligation to respect rights enshrined in Article 1(1) of the American Convention and implies the right of the States Parties to organize all of the governmental apparatus, and in general, all of the structures through which the exercise of public power is expressed, in a way such that they are capable of legally guaranteeing the free and full exercise of human rights.

190. As part of this obligation, the States must prevent, investigate, and punish all violations of the rights recognized in the Convention, and seek, in addition, the reestablishment, if possible, of the violated right and, where necessary, repair the damage caused by the violation of human rights.

191. If the State's apparatus functions in a way that assures the matter remains with impunity, and it does not restore, in as much as is possible, the victim's rights, it can be ascertained that the State has not complied with the obligation to guarantee the free and full exercise of those persons within its jurisdiction.

...

195. Amnesties or similar forms have been one of the obstacles alleged by some States in the investigation, and where applicable, punishment of those responsible for serious human rights violations. This Court, the Inter-American Commission on Human Rights, the organs of the United Nations, and other universal and regional organs for the protection of human rights have ruled on the non-compatibility of amnesty laws related to serious human rights violations with international law and the international obligations of States.

196. As it has been decided prior, this Court has ruled on the non-compatibility of amnesties with the American Convention in cases of serious human rights violations related to Peru (*Barrios Altos* and *La Cantuta*), Chile (*Almonacid Arellano et al.*), and Brazil (*Gomes Lund et al.*).

197. In the Inter-American System of Human Rights, of which Uruguay forms part by a sovereign decision, the rulings on the non-compatibility of amnesty laws with conventional obligations of States when dealing with serious human rights violations are many. In addition to the decisions noted by this Court, the Inter-American Commission has concluded, in the present case and in others related to Argentina, Chile, El Salvador, Haití, Perú and Uruguay its contradiction with international law. The Inter-American Commission recalled that it:

> has ruled on numerous occasions in key cases wherein it has had the opportunity to express its point of view and crystallize its doctrine in regard to the application of amnesty laws, establishing that said laws violate various provisions of both the American Declaration as well as the Convention' and that '[t]hese decisions which coincide with the standards of other international bodies on human rights regarding amnesties, have declared in a uniform manner that both the amnesty laws as well as other comparable legislative measures that impede or finalize the investigation and judgment of agents of [a] State that could be responsible for serious violations of the American Declaration or Convention, violate multiple provisions of said instruments.

198. In the Universal forum, in its report to the Security Council, entitled *The rule of law and transitional justice in societies that suffer or have suffered conflicts*, the Secretary General of the United Nations noted that:

‘[...] the peace agreements approved by the United Nations cannot promise amnesty for crimes of genocide, war, or crimes against humanity, or serious infractions of human rights [...].’

199. In the same sense, the United Nations High Commissioner for Human Rights concluded that amnesties and other analogous measures contribute to impunity and constitute an obstacle to the right to the truth in that they block an investigation of the facts on the merits and that they are, therefore, incompatible with the obligations incumbent on States given various sources of international law. More so, in regards to the false dilemma between peace and reconciliation, on the one hand, and justice on the other, it stated that:

‘[t]he amnesties that exempt from criminal sanction those responsible for atrocious crimes in the hope of securing peace have often failed to achieve their aim and have instead emboldened their beneficiaries to commit further crimes. Conversely, peace agreements have been reached without amnesty provisions in some situations where amnesty had been said to be a necessary condition of peace and where many had feared that indictments would prolong the conflict.’

200. In line with the aforementioned, the Special Rapporteur of the United Nations on the issue of impunity, stated that:

‘[t]he perpetrators of the violations cannot benefit from the amnesty while the victims are unable to obtain justice by means of an effective remedy. This would lack legal effect in regard to the actions of the victims relating to the right to reparation.’

201. The General Assembly of the United Nations established in Article 18 of the Declaration on the Protection of all Persons from Enforced Disappearance that ‘persons who have or are alleged to have committed [enforced disappearance] shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction.’

202. The World Conference on Human Rights which took place in Vienna in 1993, in its Declaration and Program of Action, emphasized that States ‘should derogate legislation that favors the impunity of those responsible for serious human rights violations, [...] punish the violations,’ highlighting that in those cases States are obligated first to prevent them, and once they have occurred, to prosecute the perpetrators of the facts.

203. The Working Group on Enforced or Involuntary Disappearances of the United Nations has handled, on various occasions, the matter of amnesties in cases of enforced disappearances. In its General Comments regarding Article 18 of the Declaration on the Protection of All Persons Against Enforced Disappearance, it noted that it considers amnesty laws to be contrary to the provisions of the Declaration, even when it has been approved in referendum or by another similar type of consultation process, if directly or indirectly, due to its application or implementation, it terminates the State’s obligation to investigate, prosecute, and punish those responsible for the disappearances, if it hides the names of those who perpetrated said acts, or if it exonerates them.

204. In addition, the same Working Group stated its concern that in situations of post-conflict, amnesty laws are promulgated or other measures adopted that have impunity as a consequence, and it reminded States that:

in combating disappearances, effective preventive measures are crucial. Among them, it highlights [...] bringing to justice all persons accused of having committed

acts of enforced disappearance, ensuring that they are tried only by competent civilian courts, and that they do not benefit from any special amnesty law or other similar measures likely to provide exemption from criminal proceedings or sanctions, and providing redress and adequate compensation to victims and their families.

205. Also in the universal forum, the bodies of human rights protection established by treaties have maintained the same standards concerning the prohibition of amnesties that prevent the investigation and punishment of those who commit serious human rights crimes. The Human Rights Committee, in its General Comment 31, stated that States should assure that those guilty of infractions recognized as crimes in international law or in national legislation, among others—torture and other acts of cruel, inhumane, or degrading treatment, summary deprivations of life, and arbitrary detention, and enforced disappearances—appear before the justice system and not attempt to exempt the perpetrators of their legal responsibility, as has occurred with certain amnesty laws.

206. The Human Rights Committee ruled on the matter in the proceedings of individual petitions and in its country reports, noting in the case of *Hugo Rodríguez v. Uruguay*, that it cannot accept the posture of a State of not being obligated to investigate human rights violations committed during a prior regime given an amnesty law, and it reaffirmed that amnesty laws in regard to serious human rights violations are incompatible with the aforementioned International Covenant of Civil and Political Rights, reiterating that they contribute to the creation of an atmosphere of impunity that can undermine upon the democratic order and bring about other serious human rights violations.

...

209. Also in the universal forum, in another branch of international law – that is international criminal law, amnesties or similar norms have been considered inadmissible. The International Criminal Tribunal for the former Yugoslavia, in a case related to torture, considered that it would not make sense to sustain on the one hand the statute of limitations on the serious human rights violations, and on the other hand to authorize State measures that authorize or condone, or amnesty laws that absolve its perpetrators. Similarly, the Special Court for Sierra Leone considered that the amnesty laws of said country were not applicable to serious international crimes. 254 This universal tendency has been consolidated through the incorporation of the mentioned standard in the development of the statutes of the special tribunals recently created within the United Nations. In this sense, both the United Nations Agreement with the Republic of Lebanon and the Kingdom of Cambodia, as well as the Statutes that create the Special Tribunal for Lebanon, the Special Court for Sierra Leone, and the Extraordinary Chambers of the Courts of Cambodia, have included in their texts, clauses that indicate that the amnesties that are conceded shall not constitute an impediment to the processing of those responsible for crimes that are within the scope of the jurisdiction of said tribunals.

210. Likewise, in an interpretation of Article 6-5 of the Protocol II Additional to the Geneva Convention on International Humanitarian Law, the ICRC stated that amnesties cannot protect perpetrators of war crimes:

[w]hen it adopted paragraph 5 of Article 6 of Additional Protocol II, the USSR declared, in the reasoning of its opinion, that it could not be interpreted in such a way that it allow war criminals or other persons guilty of crimes against humanity to escape severe punishment. The ICRC agrees with this interpretation. An amnesty would also be inconsistent with the rule requiring States to investigate and prosecute those suspected of committing war crimes in non-international armed conflicts (...).

211. This norm of International Humanitarian Law and interpretation of Article 6-5 of the Protocol has been adopted by the Inter-American Commission on Human Rights and the Human Rights Committee of the United Nations.

212. The illegality of the amnesties related to serious violations of human rights vis-à-vis international law have been affirmed by the courts and organs of all the regional systems for the protection of human rights.

213. In the European System, the European Court of Human Rights considered that it is of the highest importance, in what pertains to an effective remedy, that the criminal procedures which refer to crimes, such as torture, that imply serious violations of human rights, not be obstructed by statute of limitations or allow amnesties or pardons in this regard. In other cases, it highlighted that when an agent of the State is accused of crimes violating the rights of Article 3 in the European Convention (Right to life), the criminal proceedings and judgment should not be obstructed, and the granting of amnesty is not permitted.

214. The African Commission on Human and Peoples' Rights considered that amnesty laws cannot protect the State that adopts them from complying with their international obligations, and noted, in addition, that in prohibiting the prosecution of perpetrators of serious human rights violations via the granting of amnesty, the States not only promote impunity, but also close off the possibility that said abuses be investigated and that the victims of said crimes have an effective remedy in order to obtain reparation.

...

F. Amnesty laws and the Jurisprudence of this Court.

225. This Court has established that 'amnesty provisions, the statute of limitation provisions, and the establishment of exclusions of responsibility that are intended to prevent the investigation and punish those responsible for serious violations to human rights such as torture, summary, extrajudicial, or arbitrary executions, and enforced disappearance are not admissible, all of which are prohibited for contravening irrevocable rights recognized by International Law of Human Rights.'

226. In this sense, amnesty laws are, in cases of serious violations of human rights, expressly incompatible with the letter and spirit of the Pact of San José, given that they violate the provisions of Articles 1(1) and 2, that is, in that they impede the investigation and punishment of those responsible for serious human rights violations and, consequently, impede access to victims and their families to the truth of what happened and to the corresponding reparation, thereby hindering the full, timely, and effective rule of justice in the relevant cases. This, in turn, favors impunity and arbitrariness and also seriously affects the rule of law, reason for which, in light of International Law, they have been declared to have no legal effect.

227. In particular, amnesty laws affect the international obligation of the State in regard to the investigation and punishment of serious human rights violations because they prevent the next of kin from being heard before a judge, pursuant to that indicated in Article 8(1) of the American Convention, thereby violating the right to judicial protection enshrined in Article 25 of the Convention precisely for the failure to investigate, persecute, capture, prosecute, and punish those responsible for the facts, thereby failing to comply with Article 1(1) of the Convention.

228. Under the general obligations enshrined in Article 1(1) and 2 of the American Convention, the States Parties have the obligation to take measures of all kinds to assure that no one is taken from the judicial protection and the exercise of their right

to a simple and effective remedy, in the terms of Articles 8 and 25 of the Convention, and once the American Convention has been ratified, it corresponds to the State to adopt all the measures to revoke the legal provisions that may contradict said treaty as established in Article 2 thereof, such as those that prevent the investigation of serious human rights violations given that it leads to the defenselessness of victims and the perpetuation of impunity and prevents the next of kin from knowing the truth regarding the facts.

229. The incompatibility with the Convention includes amnesties of serious human rights violations and is not limited to those which are denominated, 'self-amnesties,' and the Court, more than the adoption process and the authority which issued the Amnesty Law, heads to its *ratio legis*: to leave unpunished serious violations committed in international law. The incompatibility of the amnesty laws with the American Convention in cases of serious violations of human rights does not stem from a formal question, such as its origin, but rather from the material aspect in what regards the rights enshrined in Articles 8 and 25, in relation to Articles 1(1) and 2 of the Convention.

G. The investigation of the facts and the Uruguayan Expiry Law.

...

240. ... in applying the provisions of the Expiry Law (which, for all intensive purposes constitutes an amnesty law) and thereby impeding the investigation of the facts and the identification, prosecution, and possible punishment of the possible perpetrators of continued and permanent injuries such as those caused by enforced disappearance, the State fails to comply with its obligation to adapt its domestic law enshrined in Article 2 of the Convention."

65. In the case of *Gomes Lund et al ("Guerrilha do Araguaia") v. Brazil* (judgment of 24 November 2010, Preliminary Objections, Merits, Reparations and Costs) the Inter-American Court again strongly opposed the granting of amnesties for grave breaches of fundamental human rights. After relying on the same international law standard as in the above-cited Gelman case, it held, in so far as relevant, as follows:

"171. As is evident from the content of the preceding paragraphs, all of the international organs for the protection of human rights and several high courts of the region that have had the opportunity to rule on the scope of amnesty laws regarding serious human rights violations and their compatibility with international obligations of States that issue them, have noted that these amnesty laws impact the international obligation of the State to investigate and punish said violations.

172. This Court has previously ruled on the matter and has not found legal basis to part from its constant jurisprudence that, moreover, coincides with that which is unanimously established in international law and the precedent of the organs of the universal and regional systems of protection of human rights. In this sense, regarding the present case, the Court reiterates that 'amnesty provisions, the statute of limitation provisions, and the establishment of exclusions of responsibility that are intended to prevent the investigation and punishment of those responsible for serious violations to human rights such as torture, summary, extrajudicial, or arbitrary executions, and enforced disappearance are not admissible, all of which are prohibited for contravening irrevocable rights recognized by International Law of Human Rights.'

...

175. In regard to the that argued by the parties regarding whether the case deals with an amnesty, self-amnesty, or 'political agreement,' the Court notes, as is evident from the criteria stated in the present case (*supra* para. 171), that the non-compatibility with the Convention includes amnesties of serious human rights violations and is not limited to those which are denominated, 'self-amnesties.' Likewise, as has been stated prior, the Court, more than the adoption process and the authority which issued the Amnesty Law, heads to its *ratio legis*: to leave unpunished serious violations in international law committed by the military regime. The non-compatibility of the amnesty laws with the American Convention in cases of serious violations of human rights does not stem from a formal question, such as its origin, but rather from the material aspect as they breach the rights enshrined in Articles 8 and 25, in relation to Articles 1(1) and 2 of the Convention.

176. This Court has established in its jurisprudence that it is conscious that the domestic authorities are subject to the rule of law, and as such, are obligated to apply the provisions in force of the legal code. However, when a State is a Party to an international treaty such as the American Convention, all of its organs, including its judges, are also subject to it, wherein they are obligated to ensure that the effects of the provisions of the Convention are not reduced by the application of norms that are contrary to the purpose and end goal and that from the onset lack legal effect. The Judicial Power, in this sense, is internationally obligated to exercise 'control of conventionality' *ex officio* between the domestic norms and the American Convention, evidently in the framework of its respective jurisdiction and the appropriate procedural regulations. In this task, the Judicial Power must take into account not only the treaty, but also the interpretation that the Inter-American Court, as the final interpreter of the American Convention, has given it."

66. More recently, in the case of *The Massacres of El Mozote and Nearby Places v. El Salvador*, judgment of 25 October 2012, the Inter-American Court, in so far as relevant for the present case, held as follows (footnotes omitted):

*"*283. In the cases of *Gomes Lund v. Brazil* and *Gelman v. Uruguay*, decided by this Court within the sphere of its jurisdictional competence, the Court has already described and developed at length how this Court, the Inter-American Commission on Human Rights, the organs of the United Nations, other regional organizations for the protection of human rights, and other courts of international criminal law have ruled on the incompatibility of amnesty laws in relation to grave human rights violations with international law and the international obligations of States. This is because amnesties or similar mechanisms have been one of the obstacles cited by States in order not to comply with their obligation to investigate, prosecute and punish, as appropriate, those responsible for grave human rights violations. Also, several States Parties of the Organization of American States, through their highest courts of justice, have incorporated the said standards, observing their international obligations in good faith. Consequently, for purposes of this case, the Court reiterates the inadmissibility of 'amnesty provisions, provisions on prescription, and the establishment of exclusions of responsibility that seek to prevent the investigation and punishment of those responsible for grave human rights violations such as torture, summary, extrajudicial or arbitrary execution, and forced disappearance, all of which are prohibited because they violate non-derogable rights recognized by international human rights law.'

284. However, contrary to the cases examined previously by this Court, the instant case deals with a general amnesty law that relates to acts committed in the context of

an internal armed conflict. Therefore, the Court finds it pertinent, when analyzing the compatibility of the Law of General Amnesty for the Consolidation of Peace with the international obligations arising from the American Convention and its application to the case of the Massacres of El Mozote and Nearby Places, to do so also in light of the provisions of Protocol II Additional to the 1949 Geneva Conventions, as well as of the specific terms in which it was agreed to end hostilities, which put an end to the conflict in El Salvador and, in particular, of Chapter I ('Armed Forces'), section 5 ('End to impunity'), of the Peace Accord of January 16, 1992.

285. According to the international humanitarian law applicable to these situations, the enactment of amnesty laws on the conclusion of hostilities in non-international armed conflicts are sometimes justified to pave the way to a return to peace. In fact, article 6(5) of Protocol II Additional to the 1949 Geneva Conventions establishes that:

> At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.

286. However, this norm is not absolute, because, under international humanitarian law, States also have an obligation to investigate and prosecute war crimes. Consequently, 'persons suspected or accused of having committed war crimes, or who have been convicted of this' cannot be covered by an amnesty. Consequently, it may be understood that article 6(5) of Additional Protocol II refers to extensive amnesties in relation to those who have taken part in the non-international armed conflict or who are deprived of liberty for reasons related to the armed conflict, provided that this does not involve facts, such as those of the instant case, that can be categorized as war crimes, and even crimes against humanity."

R. Extraordinary Chambers in the Courts of Cambodia

67. The Extraordinary Chambers in the Courts of Cambodia, in the Decision on Ieng Sary's Appeal against the Closing Order (case no. 002/19 09-2007-ECCC/OCIJ (PTC75) of 11 April 2011), discussing the effects of the amnesty on prosecution, stated:

"199. The crimes charged in the Closing Order, namely genocide, crimes against humanity, grave breaches of the Geneva Conventions, and homicide, torture and religious persecution as national crimes, are not criminalised under the 1994 Law and would therefore continue to be prosecuted under existing law, be it domestic or international criminal law, even if perpetrated by alleged members of the Democratic Kampuchea group.

...

201. The interpretation of the Decree proposed by the Co-Lawyers for Ieng Sary, which would grant Ieng Sary an amnesty for all crimes committed during the Khmer Rouge era, including all crimes charged in the Closing Order, not only departs from the text of the Decree, read in conjunction with the 1994 Law, but is also inconsistent with the international obligations of Cambodia. Insofar as genocide, torture and grave breaches of the Geneva Conventions are concerned, the grant of an amnesty, without any prosecution and punishment, would infringe upon Cambodia's treaty obligations to prosecute and punish the authors of such crimes, as set out in the Genocide Convention, the Convention Against Torture and the Geneva Conventions. Cambodia,

which has ratified the ICCPR, also had and continues to have an obligation to ensure that victims of crimes against humanity which, by definition, cause serious violations of human rights, were and are afforded an effective remedy. This obligation would generally require the State to prosecute and punish the authors of violations. The grant of an amnesty, which implies abolition and forgetfulness of the offence for crimes against humanity, would not have conformed with Cambodia's obligation under the ICCPR to prosecute and punish authors of serious violations of human rights or otherwise provide an effective remedy to the victims. As there is no indication that the King (and others involved) intended not to respect the international obligations of Cambodia when adopting the Decree, the interpretation of this document proposed by the Co-Lawyers is found to be without merit."

S. Special Court for Sierra Leone

68. On 13 March 2004 the Appeals Chamber of the Special Court for Sierra Leone, in Cases Nos. SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), adopted its Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, in which it observed the following:

"82. The submission by the Prosecution that there is a 'crystallising international norm that a government cannot grant amnesty for serious violations of crimes under international law' is amply supported by materials placed before this Court. The opinion of both *amici curiae* that it has crystallised may not be entirely correct, but that is no reason why this court in forming its own opinion should ignore the strength of their argument and the weight of materials they place before the Court. It is accepted that such a norm is developing under international law. Counsel for Kallon submitted that there is, as yet, no universal acceptance that amnesties are unlawful under international law, but, as amply pointed out by Professor Orentlicher, there are several treaties requiring prosecution for such crimes. These include the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the four Geneva conventions. There are also quite a number of resolutions of the UN General Assembly and the Security Council reaffirming a state obligation to prosecute or bring to justice. Redress has appended to its written submissions materials which include relevant conclusions of the Committee against torture, findings of the Human Rights Commission, and relevant judgments of the Inter-American Court.

...

84. Even if the opinion is held that Sierra Leone may not have breached customary law in granting an amnesty, this court is entitled in the exercise of its discretionary power, to attribute little or no weight to the grant of such amnesty which is contrary to the direction in which customary international law is developing and which is contrary to the obligations in certain treaties and conventions the purpose of which is to protect humanity."

THE LAW

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

69. The applicant complained that the same judge had participated both in the proceedings terminated in 1997 and in those in which he had been found guilty in 2007. He further complained that he had been deprived of the right to give his closing arguments. He relied on Article 6 §§ 1 and 3 of the Convention, the relevant parts of which read as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal ...
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> ..."

A. The Chamber's conclusions

70. The Chamber observed that in both sets of criminal proceedings at issue judge M.K. had taken part at the first-instance stage. In the first set of proceedings the facts of the case had not been assessed, nor had the question of the applicant's guilt been examined, and judge M.K. had not expressed an opinion on any aspect of the merits of the case.

71. Therefore, in the Chamber's view, there was no indication of any lack of impartiality on the part of judge M.K.

72. As to the removal of the applicant from the courtroom, the Chamber held that, given that he had twice been warned not to interrupt the closing arguments presented by the prosecution and that his defence lawyer had remained in the courtroom and presented his closing arguments, the applicant's removal had not violated his right to defend himself in person.

B. The parties' submissions to the Grand Chamber

1. The applicant

73. The applicant argued that judge M.K., who had first adopted a ruling terminating the criminal proceedings against him on the basis of the General Amnesty Act and had then also participated in the criminal proceedings in

which the applicant had been convicted of some of the same acts, could not be seen as impartial.

74. The applicant argued that after the hearing held on 19 March 2007 had been going on for several hours he had, owing to his mental illness and diabetes, been unable to control his reactions. However, there had been no physician present at the hearing to monitor his condition. While the State Attorney was presenting his closing arguments the applicant had said something incomprehensible, but had not insulted or interrupted the State Attorney. Contrary to the Government's contention, he had not been warned twice by the presiding judge before being removed from the courtroom. He had not been asked back to the courtroom when his turn to present his closing arguments had come. The fact that his defence counsel had been able to present his closing arguments could not remedy the fact that the applicant himself had not been able to do so. The accused in criminal proceedings might confess or show remorse, which could be judged as mitigating factors, and a defence lawyer could not replace the accused in that respect. The trial court should have had the opportunity to hear his closing arguments from him in person.

2. The Government

75. The Government agreed that judge M.K. had participated in both sets of criminal proceedings against the applicant. As to the issue of subjective impartiality, the Government contended that the applicant had not adduced any evidence capable of rebutting the presumption of impartiality in respect of judge M.K.

76. As to the objective test of impartiality, the Government submitted that in the first set of proceedings neither the facts of the case nor the merits of the murder charges against the applicant had been assessed. Thus, judge M.K. had not in those proceedings expressed any opinion as to the applicant's actions which could have prejudged his conduct in the second set of proceedings. Furthermore, the first set of proceedings had ended favourably for the applicant. Only in the second set of proceedings had a judgment been adopted on the merits involving an assessment of the facts of the case and the applicant's guilt. In both sets of proceedings judge M.K. had participated only at first instance, and he had had no input regarding the examination of either of the cases at the appeal stage.

77. The Government submitted that the applicant had been informed of the charges and evidence against him. He had been represented by a legal-aid defence lawyer throughout the proceedings, and whenever he had objected to the manner in which a lawyer was approaching the case the lawyer had been changed. The applicant and his lawyer had had ample opportunity to prepare his defence and to communicate confidentially. They had both been present at all the hearings and had had every opportunity to respond to the prosecution arguments.

78. As to the concluding hearing, the Government submitted that the applicant and his defence counsel had both been present at the beginning of the hearing. However, during the hearing the applicant had continually cursed and shouted. The presiding judge had warned him twice, and only when that had yielded no results had he ordered that the applicant be removed from the courtroom.

79. The removal of the applicant from the courtroom had thus been a measure of last resort by the presiding judge, designed to preserve order in the courtroom.

80. Had the applicant wanted to confess or show remorse, he had had ample opportunity to do so during the trial.

81. By the time the applicant had been removed from the courtroom all the evidence had already been presented.

82. Lastly, the applicant's defence counsel had remained in the courtroom and had presented his closing arguments.

83. Against the above background, the Government argued that the applicant's right to defend himself in person and through legal assistance had not been impaired.

C. The Grand Chamber's assessment

1. Impartiality of judge M.K.

84. The Chamber's assessment, in so far as relevant, reads as follows:

> "43.The Court reiterates that there are two tests for assessing whether a tribunal is impartial within the meaning of Article 6 § 1: the first consists in seeking to determine the personal conviction of a particular judge in a given case and the second in ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (see, among other authorities, *Gautrin and Others v. France*, § 58, 20 May 1998, *Reports of Judgments and Decisions* 1998-III).
>
> 44. As regards the subjective test, the Court first notes that the personal impartiality of a judge must be presumed until there is proof to the contrary (see *Wettstein v. Switzerland*, no. 33958/96, § 43, ECHR 2000-XII). In the instant case, the Court is not convinced that there is sufficient evidence to establish that any personal bias was shown by judge M.K. when he sat as a member of the Osijek County Court which found the applicant guilty of war crimes against the civilian population and sentenced him to fourteen years' imprisonment.
>
> 45. As regards the objective test, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise justified doubts as to his or her impartiality. This implies that, in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the person concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (see *Ferrantelli and Santangelo v. Italy*, 7 August 1996, § 58, *Reports* 1996-III; *Wettstein*, cited above, § 44; and *Micallef v. Malta*, no. 17056/06, § 74, 15 January 2008). In this respect even appearances may be of a certain importance or, in other words, 'justice must not only be done, it must also be seen to be done' (see *De Cubber v. Belgium*, 26 October 1984, § 26, Series A

no. 86; *Mežnarić v. Croatia*, no. 71615/01, § 32, 15 July 2005; and *Micallef*, cited above, § 75).

46. As to the present case, the Court notes that judge M.K. indeed participated both in the criminal proceedings conducted before the Osijek County Court under case number K-4/97 and in the criminal proceedings conducted against the applicant before the same court under case number K-33/06. The charges against the applicant in these two sets of proceedings overlapped to a certain extent (see § 66 below).

47. The Court further notes that both sets of proceedings were conducted at first instance, that is to say, at the trial stage. The first set of proceedings was terminated on the basis of the General Amnesty Act, since the trial court found that the charges against the applicant fell within the scope of the general amnesty. In those proceedings the facts of the case were not assessed, nor was the question of the applicant's guilt examined. Thus, judge M.K. did not express an opinion on any aspect of the merits of the case."

85. The mere fact that a trial judge has made previous decisions concerning the same offence cannot be held as in itself justifying fears as to his impartiality (see *Hauschildt v. Denmark*, 24 May 1989, § 50, Series A no. 154, and *Romero Martin v. Spain* (dec.), no. 32045/03, 12 June 2006 concerning pre-trial decisions; *Ringeisen v. Austria*, 16 July 1971, Series A no. 13, § 97; *Diennet v. France*, 26 September 1995, Series A no. 325-A, § 38; and *Vaillant v. France*, no. 30609/04, §§ 29-35, 18 December 2008, concerning the situation of judges to whom a case was remitted after a decision had been set aside or quashed by a higher court; *Thomann v. Switzerland*, 10 June 1996, §§ 35-36, *Reports of Judgments and Decisions* 1996-III, concerning the retrial of an accused convicted *in absentia*; and *Craxi III v. Italy* (dec.), no. 63226/00, 14 June 2001, and *Ferrantelli and Santangelo v. Italy*, 7 August 1996, § 59, *Reports* 1996-III, concerning the situation of judges having participated in proceedings against co-offenders).

86. No ground for legitimate suspicion of a lack of impartiality can be discerned in the fact that the same judge participates in adopting a decision at first instance and then in fresh proceedings when that decision is quashed and the case is returned to the same judge for re-consideration. It cannot be stated as a general rule resulting from the obligation to be impartial that a superior court which sets aside a judicial decision is bound to send the case back to a differently composed panel (see *Ringeisen*, cited above, § 97).

87. In the present case the first decision was not set aside and the case remitted for retrial following an ordinary appeal; instead, a fresh indictment was brought against the applicant on some of the same charges. However, the Court considers that the principles set out in paragraph 85 are equally valid with regard to the situation which arose in the applicant's case. The mere fact that judge M.K. participated both in the criminal proceedings conducted before the Osijek County Court under case number K-4/97 and in the criminal proceedings conducted against the applicant before the same court under case number K-33/06 should not in itself be seen as

incompatible with the requirement of impartiality under Article 6 of the Convention. What is more, in the present case judge M.K. did not adopt a judgment in the first set of proceedings finding the applicant guilty or innocent and no evidence relevant for the determination of these issues was ever assessed (see paragraph 17 above). Judge M.K. was solely concerned with ascertaining whether the conditions for the application of the General Amnesty Act obtained in the applicant's case.

88. The Court considers that in these circumstances there were no ascertainable facts which could give rise to any justified doubt as to M.K.'s impartiality, nor did the applicant have any legitimate reason to fear this.

89. The foregoing considerations are sufficient to enable the Court to conclude that there has been no violation of Article 6 § 1 of the Convention as regards the question of the impartiality of judge M.K.

2. Removal of the applicant from the courtroom

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

> "50. The Court firstly observes that its task is not to resolve the dispute between the parties as to whether the Osijek County Court acted in accordance with the relevant provisions of the Croatian Code of Criminal Procedure when it removed the applicant from the courtroom during the concluding hearing. The Court's task is rather to make an assessment as to whether, from the Convention point of view, the applicant's defence rights were respected to a degree which satisfies the guarantees of a fair trial under Article 6 of the Convention. In this connection the Court reiterates at the outset that the requirements of paragraph 3 of Article 6 are to be seen as particular aspects of the right to a fair trial guaranteed by paragraph 1 (see, among other authorities, *Balliu v. Albania*, no. 74727/01, § 25, 16 June 2005). On the whole, the Court is called upon to examine whether the criminal proceedings against the applicant, in their entirety, were fair (see, among other authorities, *Imbrioscia v. Switzerland*, 24 November 1993, Series A no. 275, § 38; *S.N. v. Sweden*, no. 34209/96, § 43, ECHR 2002-V; and *Vanyan v. Russia*, no. 53203/99, § 63-68, 15 December 2005).
>
> 51. The Court accepts that the closing arguments are an important stage of the trial, where the parties have their only opportunity to orally present their view of the entire case and all the evidence presented at trial and to give their assessment of the result of the trial. However, where the accused disturbs order in the courtroom the trial court cannot be expected to remain passive and to allow such behaviour. It is a normal duty of the trial panel to maintain order in the courtroom and the rules envisaged for that purpose apply equally to all present, including the accused.
>
> 52. In the present case the applicant was twice warned not to interrupt the closing arguments presented by the Osijek County Deputy State Attorney. Only afterwards, since he failed to comply, he was removed from the courtroom. However, his defence lawyer remained in the courtroom and presented his closing arguments. Therefore, the applicant was not prevented from making use of the opportunity to have the final view of the case given by his defence. In that connection the Court also notes that the applicant, who was legally represented throughout the proceedings, had ample opportunity to develop his defence strategy and to discuss with his defence lawyer the points for the closing arguments in advance of the concluding hearing.

53. Against this background, and viewing the proceedings as a whole, the Court considers that the removal of the applicant from the courtroom during the final hearing did not prejudice the applicant's defence rights to a degree incompatible with the requirements of a fair trial.

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

91. The Grand Chamber endorses the Chamber's reasons and finds that there has been no violation of Article 6 §§ 1 and 3 (c) of the Convention as regards the applicant's removal from the courtroom.

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

92. The applicant complained that the criminal offences which had been the subject of the proceedings terminated in 1997 and those of which he had been found guilty in 2007 were the same. He relied on Article 4 of Protocol No. 7 to the Convention, which reads as follows:

"1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this Article shall be made under Article 15 of the Convention."

A. Compatibility *ratione temporis*

1. The Chamber's conclusions

93. In its judgment of 13 November 2012 the Chamber found that the complaint under Article 4 of Protocol No. 7 to the Convention was compatible *ratione temporis* with the Convention. It held as follows:

"58. The Court notes that the first set of criminal proceedings against the applicant did indeed end prior to the entry into force of the Convention in respect of Croatia. However, the second set of criminal proceedings in which the applicant was found guilty of war crimes against the civilian population was conducted and concluded after 5 November 1997, when Croatia ratified the Convention. The right not to be tried or punished twice cannot be excluded in respect of proceedings conducted before ratification where the person concerned was convicted of the same offence after ratification of the Convention. The mere fact that the first set of proceedings was concluded prior to that date cannot therefore preclude the Court from having temporal jurisdiction in the present case."

2. The parties' submissions to the Grand Chamber

94. The Government submitted that the ruling granting the applicant amnesty had been adopted on 24 June 1997 and had been served on him on 2 July 1997, whereas the Convention had entered into force in respect of Croatia on 5 November 1997. Therefore, the ruling in question lay outside the Court's temporal jurisdiction.

95. The applicant made no submissions in that regard.

3. The Grand Chamber's assessment

96. The ruling granting the applicant amnesty was adopted on 24 June 1997, whereas the Convention entered into force in respect of Croatia on 5 November 1997 and Protocol No. 7 on 1 February 1998. Therefore, the issue of the Court's competence *ratione temporis* has to be addressed.

97. The Grand Chamber endorses the findings of the Chamber as to the compatibility *ratione temporis* with the Convention of the applicant's complaint under Article 4 of Protocol No. 7. It further points to the Commission's reasoning in the case of *Gradinger v. Austria* (19 May 1994, opinion of the Commission, §§ 67-69, Series A, no. 328-C):

> "67. The Commission recalls that, in accordance with the generally recognised rules of international law, the Convention and its Protocols are binding on the Contracting Parties only in respect of facts occurring after the entry into force of the Convention or the Protocol in respect of that party.
>
> 68. It is the nature of the right enunciated in Article 4 of Protocol No. 7 that two sets of proceedings must have taken place: a first set, in which the person concerned was 'finally acquitted or convicted', and thereafter a further set, in which a person was 'liable to be tried or convicted again' within the same jurisdiction.
>
> 69. The Commission further recalls that, in determining the fairness of proceedings, it is entitled to look at events prior to the entry into force of the Convention in respect of a State where the findings of those earlier events are incorporated in a judgment which is given after such entry into force (cf. No. 9453/81, Dec. 13.12.82, D.R. 31 p. 204, 209). The essential element in Article 4 of Protocol No. 7 is the liability to be tried or punished 'again'. The first set of proceedings merely provides the background against which the second set is to be determined. In the present case, the Commission finds that, provided the final decision in the second set of proceedings falls after the entry into force of Protocol No. 7, it may deal with the complaint *ratione temporis*. As Protocol No. 7 entered into force on 1 November 1988 and on 30 June 1989 Austria made a declaration under Article 7 para. 2 of that Protocol which did not exclude retroactive effect (cf. No. 9587/81, Dec. 13.12.82, D.R. 29 p. 228, 238), and the final decision of the Administrative Court is dated 29 March 1989, the Commission finds that it is not prevented *ratione temporis* from examining this aspect of the case."

98. Accordingly, the Grand Chamber sees no reason to depart from the Chamber's conclusion that the Government's plea of inadmissibility on the ground of lack of jurisdiction *ratione temporis* must be dismissed.

B. Applicability of Article 4 of Protocol No. 7

1. The Chamber's conclusions

99. The Chamber firstly concluded that the offences for which the applicant had been tried in the first and second set of proceedings had been the same. It left open the question whether the ruling granting the applicant amnesty could be seen as a final conviction or acquittal for the purposes of Article 4 of Protocol No. 7 and proceeded to examine the complaint on the merits under the exceptions contained in paragraph 2 of Article 4 of Protocol No. 7. The Chamber agreed with the conclusions of the Supreme Court to the effect that the General Amnesty Act had been erroneously applied in the applicant's case and found that the granting of amnesty in respect of acts that amounted to war crimes committed by the applicant represented a "fundamental defect" in those proceedings, which made it permissible for the applicant to be retried.

2. The parties' submissions to the Grand Chamber

(a) The applicant

100. The applicant argued that the offences in the two sets of criminal proceedings against him had been factually the same and that the classification of the offences as war crimes in the second set of proceedings could not alter the fact that the charges were substantively identical.

101. He further contended that a ruling granting amnesty to the accused was a final decision which precluded a retrial.

(b) The Government

102. In their written observations the Government argued that in the first set of proceedings the Osijek County Court had applied the General Amnesty Act without establishing the facts of the case and without deciding on the applicant's guilt. The ruling thus adopted had never given an answer to the question whether the applicant had committed the crimes he had been charged with, nor had it examined the charges in the indictment. Therefore, that ruling did not have the quality of *res judicata* (see paragraph 33 of the Government's observations). However, they went on to state that it did fulfil all the requirements of *res judicata* and could be considered as a final acquittal or conviction within the meaning of Article 4 of Protocol No. 7. (see the Government's observations, paragraph 37).

103. The Government further contended, relying extensively on the Chamber's findings, that no amnesty could be granted in respect of war crimes and that the granting of an amnesty had amounted to a fundamental defect in the proceedings.

104. After the first set of proceedings had been discontinued new facts had emerged, namely that the victims had been arrested and tortured before

being killed. These new elements had been sufficient for the acts at issue to be classified as war crimes against the civilian population and not as "ordinary" murders.

105. The General Amnesty Act had been enacted with the purpose of meeting Croatia's international commitments arising from the Agreement on Normalisation of Relations between the Republic of Croatia and the Republic of Yugoslavia, and its primary aim had been to promote reconciliation in Croatian society at a time of ongoing war. It explicitly excluded its application to war crimes.

106. In the applicant's case the General Amnesty Act had been applied contrary to its purpose as well as contrary to Croatia's international obligations, including those under Articles 2 and 3 of the Convention.

107. As to the procedures followed by the national authorities, the Government maintained that the proceedings against the applicant had been fair, without advancing any arguments as to whether the procedures were in accordance with the provisions of the Code of Criminal Procedure.

(c) The third-party interveners

108. The group of academic experts maintained that no multilateral treaty expressly prohibited the granting of amnesties for international crimes. The interpretation of the International Committee of the Red Cross (the "ICRC") of Article 6 § 5 of the second Additional Protocol to the Geneva Conventions suggested that States might not grant amnesty to persons suspected of, accused of or sentenced for war crimes. However, an analysis of the *travaux préparatoires* of that Article showed that the only States which had referred to the question of perpetrators of international crimes, the former USSR and some of its satellite States, had linked that issue to that of foreign mercenaries. It was curious that the ICRC had interpreted Article 6 § 5 as excluding only war criminals and not perpetrators of other international crimes from its ambit, since the former USSR statements on which it relied had specifically provided for the prosecution of perpetrators of crimes against humanity and crimes against peace. It was difficult to see what arguments would justify the exclusion of war criminals but not of perpetrators of genocide and crimes against humanity from the potential scope of application of an amnesty. Furthermore, the ICRC referred to instances of non-international conflicts such as those in South Africa, Afghanistan, Sudan and Tajikistan. However, the amnesties associated with those conflicts had all included at least one international crime.

109. The interveners pointed to the difficulties in negotiating treaty clauses dealing with amnesty (they referred to the 1998 Rome conference on the establishment of the International Criminal Court (the "ICC"); the negotiations of the International Convention on Enforced Disappearance; and the 2012 Declaration of the High-Level Meeting of the General

Assembly on the Rule of Law at the National and International Levels). The difficulties confirmed the lack of any consensus among States on that issue.

110. The interveners relied on a line of legal doctrine on amnesties[6] which argued that since the Second World War States had increasingly relied on amnesty laws. Although the number of new amnesty laws excluding international crimes had increased, so too had the number of amnesties including such crimes. Amnesties were the most frequently used form of transitional justice. The use of amnesties within peace accords between 1980 and 2006 had remained relatively stable.

111. Even though several international and regional courts had adopted the view that amnesties granted for international crimes were prohibited by international law, their authority was weakened by inconsistencies in those judicial pronouncements as to the extent of the prohibition and the crimes it covered. For example, while the Inter-American Court of Human Rights had adopted the position in the *Barrios Altos* case of 2001 that all amnesty provisions were inadmissible because they were intended to prevent the investigation and punishment of those responsible for human rights violations, the President of that court and four other judges, in the case of *The Massacres of El Mozote v. El Salvador*, had nuanced that position by accepting that even where gross violations of human rights were in issue, the requirement to prosecute was not absolute and had to be balanced against the requirements of peace and reconciliation in post-war situations.

112. Furthermore, a number of national supreme courts had upheld their countries' amnesty laws because such laws contributed to the achievement of peace, democracy and reconciliation. The interveners cited the following examples: the finding of the Spanish Supreme Court in the trial of Judge Garzón in February 2012; the ruling of the Ugandan Constitutional Court upholding the constitutionality of the 2000 Amnesty Act; the Brazilian Supreme Court's ruling of April 2010 refusing to revoke the 1979 Amnesty Law; and the ruling of the South African Constitutional Court in the AZPO case upholding the constitutionality of the Promotion of National Unity and Reconciliation Act of 1995 which provided for a broad application of amnesty.

113. The interveners accepted that the granting of amnesties might in certain instances lead to impunity for those responsible for the violation of

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[6] The interveners relied on the following sources: Louise Mallinder, *Amnesty, Human Rights and Political Transitions, Bridging the Peace and Justice Divide* (Hart Publishing 2008); Louise Mallinder, "Amnesties' Challenge to the Global Accountability Norm? Interpreting Regional and International Trends in Amnesty Enactment", in Francesca Lessa and Leigh A. Payne, *Amnesty in the Age of Human Rights Accountability* (CUP 2012); Tricia D. Olsen, Leigh A. Payne and Andrew G. Reiter, *Transitional Justice in Balance, Comparing Processes, Weighing Efficacy* (United States Institute of Peace Press 2010); Leslie Vinjamuri and Aaron P. Boesnecker, *Accountability and Peace Agreements, Mapping trends from 1998 to 2006* (September 2007), Center for Humanitarian Dialogue, 9.

fundamental human rights and thus undermine attempts to safeguard such rights. However, strong policy reasons supported acknowledging the possibility of the granting of amnesties where they represented the only way out of violent dictatorships and interminable conflicts. The interveners pleaded against a total ban on amnesties and for a more nuanced approach in addressing the issue of granting amnesties.

3. The Grand Chamber's assessment

(a) Whether the offences for which the applicant was prosecuted were the same

114. In the case of *Zolotukhin*, the Court took the view that Article 4 of Protocol No. 7 had to be understood as prohibiting the prosecution or trial of a second "offence" in so far as it arose from identical facts or facts which were substantially the same (see *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, § 82, ECHR 2009).

115. In the present case the applicant was accused in both sets of proceedings of the following:

- killing S.B. and V.B. and seriously wounding Sl.B. on 20 November 1991;

- killing N.V. and Ne.V. on 10 December 1991.

116. Therefore, in so far as both sets of proceedings concerned the above charges, the applicant was prosecuted twice for the same offences.

(b) The nature of the decisions adopted in the first set of proceedings

117. There are two distinct situations as regards the charges brought against the applicant in the first set of proceedings which were also preferred against him in the second set of proceedings.

118. Firstly, on 25 January 1996 the prosecutor withdrew the charges concerning the alleged killing of N.V. and Ne.V. on 10 December 1991 (see paragraphs 120 and 121 below).

119. Secondly, the proceedings in respect of the alleged killing of S.B. and V.B. and the serious wounding of Sl.B. on 20 November 1991 were terminated by a ruling adopted by the Osijek County Court on 24 June 1997 on the basis of the General Amnesty Act (see paragraphs 122 et seq. below).

(i) The withdrawal of charges by the prosecutor

120. The Court has already held that the discontinuance of criminal proceedings by a public prosecutor does not amount to either a conviction or an acquittal, and that therefore Article 4 of Protocol No. 7 finds no application in that situation (see *Smirnova and Smirnova v. Russia* (dec.), nos. 46133/99 and 48183/99, 3 October 2002, and *Harutyunyan v. Armenia* (dec.), no. 34334/04, 7 December 2006).

121. Thus, the discontinuance of the proceedings by the prosecutor concerning the killing of N.V. and Ne.V. does not fall under Article 4 of Protocol No. 7 to the Convention. It follows that this part of the complaint is incompatible *ratione materiae*.

(ii) The discontinuance of the proceedings under the General Amnesty Act

122. As regards the remaining charges (the killing of V.B. and S.B. and the serious wounding of Sl.B.), the first set of criminal proceedings against the applicant was terminated on the basis of the General Amnesty Act.

123. The Court shall start its assessment as regards the ruling of 24 June 1997 by establishing whether Article 4 of Protocol No. 7 applies at all in the specific circumstances of the present case, where the applicant was granted unconditional amnesty in respect of acts which amounted to grave breaches of fundamental human rights.

(α) The position under the Convention

124. The Court notes that the allegations in the criminal proceedings against the applicant included the killing and serious wounding of civilians and thus involved their right to life protected under Article 2 of the Convention and, arguably, their rights under Article 3 of the Convention. In this connection the Court reiterates that Articles 2 and 3 rank as the most fundamental provisions in the Convention. They enshrine some of the basic values of the democratic societies making up the Council of Europe (see, among many other authorities, *Andronicou and Constantinou v. Cyprus*, 9 October 1997, § 171, *Reports* 1997-VI, and *Solomou and Others v. Turkey*, no. 36832/97, § 63, 24 June 2008).

125. The obligations to protect the right to life under Article 2 of the Convention and to ensure protection against ill-treatment under Article 3 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", also require by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see, *mutatis mutandis*, *McCann and Others v. the United Kingdom*, 27 September 1995, § 161, Series A no. 324, and *Kaya v. Turkey*, 19 February 1998, § 86, *Reports* 1998-I) or ill-treated (see, for example, *El Masri v. "the former Yugoslav Republic of Macedonia"* [GC], no. 39630/09, § 182, ECHR 2012). The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and to ensure the accountability of the perpetrators.

126. The Court has already held that, where a State agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance that criminal proceedings and sentencing are not time-barred

and that the granting of an amnesty or pardon should not be permissible (see *Abdülsamet Yaman v. Turkey*, no. 32446/96, § 55, 2 November 2004; *Okkalı v. Turkey*, no 52067/99, § 76, 17 October 2006; and *Yeşil and Sevim v. Turkey*, no. 34738/04, § 38, 5 June 2007). It has considered in particular that the national authorities should not give the impression that they are willing to allow such treatment to go unpunished (see *Egmez v. Cyprus*, no. 30873/96, § 71, ECHR 2000-XII, and *Turan Cakir v. Belgium*, no. 44256/06, § 69, 10 March 2009). In its decision in the case of *Ould Dah v. France* ((dec.), no. 13113/03, ECHR 2009) the Court held, referring also to the United Nations Human Rights Committee and the ICTY, that an amnesty was generally incompatible with the duty incumbent on States to investigate acts such as torture and that the obligation to prosecute criminals should not therefore be undermined by granting impunity to the perpetrator in the form of an amnesty law that might be considered contrary to international law.

127. The obligation of States to prosecute acts such as torture and intentional killings is thus well established in the Court's case-law. The Court's case-law affirms that granting amnesty in respect of the killing and ill-treatment of civilians would run contrary to the State's obligations under Articles 2 and 3 of the Convention since it would hamper the investigation of such acts and necessarily lead to impunity for those responsible. Such a result would diminish the purpose of the protection guaranteed by under Articles 2 and 3 of the Convention and render illusory the guarantees in respect of an individual's right to life and the right not to be ill-treated. The object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective (see *McCann and Others*, cited above, § 146).

128. While the present case does not concern alleged violations of Articles 2 and 3 of the Convention, but of Article 4 of Protocol No. 7, the Court reiterates that the Convention and its Protocols must be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between their various provisions (see *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 48, ECHR 2005-X, and *Austin and Others v. the United Kingdom* [GC], nos. 39692/09, 40713/09 and 41008/09, § 54, ECHR 2012). Therefore, the guarantees under Article 4 of Protocol No. 7 and States' obligations under Articles 2 and 3 of the Convention should be regarded as parts of a whole.

(ß) The position under international law

129. The Court should take into account developments in international law in this area. The Convention and its Protocols cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law of which they form part. Account should be taken, as

indicated in Article 31 § 3 (c) of the 1969 Vienna Convention on the Law of Treaties, of "any relevant rules of international law applicable in the relations between the parties", and in particular the rules concerning the international protection of human rights (see *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI; *Demir and Baykara v. Turkey* [GC], no. 34503/97, § 67, ECHR 2008; *Saadi v. the United Kingdom* [GC], no. 13229/03, § 62, ECHR 2008; *Rantsev v. Cyprus and Russia*, no. 25965/04, §§ 273-74, ECHR 2010 (extracts); and *Nada v. Switzerland* [GC], no. 10593/08, § 169, ECHR 2012).

130. The Court notes the Chamber's observations to the effect that "[g]ranting amnesty in respect of 'international crimes' – which include crimes against humanity, war crimes and genocide – is increasingly considered to be prohibited by international law" and that "[t]his understanding is drawn from customary rules of international humanitarian law, human rights treaties, as well as the decisions of international and regional courts and developing State practice, as there has been a growing tendency for international, regional and national courts to overturn general amnesties enacted by Governments.".

131. It should be observed that so far no international treaty explicitly prohibits the granting of amnesty in respect of grave breaches of fundamental human rights. While Article 6 § 5 of the second Additional Protocol to the Geneva Conventions, relating to the protection of victims of non-international conflicts, provides that "[a]t the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict ...", the interpretation of the Inter-American Court of Human Rights of that provision excludes its application in respect of the perpetrators of war crimes and crimes against humanity (see above, paragraph 66, judgment in the case of *The Massacres of El Mozote and Nearby Places v. El Salvador*, § 286). The basis for such a conclusion, according to the Inter-American Court of Human Rights, is found in the obligations of the States under international law to investigate and prosecute war crimes. The Inter-American Court found that therefore "persons suspected or accused of having committed war crimes cannot be covered by an amnesty." The same obligation to investigate and prosecute exists as regards grave breaches of fundamental human rights and therefore the amnesties envisaged under Article 6 § 5 of the second Additional Protocol to the Geneva Conventions are likewise not applicable to such acts.

132. The possibility for a State to grant an amnesty in respect of grave breaches of human rights may be circumscribed by treaties to which the State is a party. There are several international conventions that provide for a duty to prosecute crimes defined therein (see the Geneva Conventions of 1949 for the Protection of Victims of Armed Conflicts and their Additional Protocols, in particular common Article 3 of the Geneva Conventions,

Articles 49 and 50 of the Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Articles 50 and 51 of the Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Articles 129 and 130 of the Convention (III) relative to the Treatment of Prisoners of War, and Articles 146 and 147 of the Convention (IV) relative to the Protection of Civilian Persons in Time of War; see also the Additional Protocol (II) to the Geneva Conventions from 1977, relating to the Protection of Victims of Non-International Armed Conflicts, Articles 4 and 13; the Convention on the Prevention and Punishment of the Crime of Genocide, Article V; and the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment).

133. The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity proscribes statutory limitations in respect of crimes against humanity and war crimes.

134. Various international bodies have issued resolutions, recommendations and comments concerning impunity and the granting of amnesty in respect of grave breaches of human rights, generally agreeing that amnesties should not be granted to those who have committed such violations of human rights and international humanitarian law (see paragraphs 45, 47-49, 51-53 and 56-58 above).

135. In their judgments, several international courts have held that amnesties are inadmissible when they are intended to prevent the investigation and punishment of those responsible for grave human rights violations or acts constituting crimes under international law (see paragraphs 54 and 59-68 above).

136. Although the wording of Article 4 of Protocol No. 7 restricts its application to the national level, it should be noted that the scope of some international instruments extends to retrial in a second State or before an international tribunal. For instance, the Statute of the International Criminal Court contains an explicit exception to the *ne bis in idem* principle as it allows for prosecution where a person has already been acquitted in respect of the crime of genocide, crimes against humanity or war crimes if the purpose of the proceedings before the other court was to shield the person concerned from criminal responsibility for crimes within the jurisdiction of the International Criminal Court (Article 20).

137. The Court notes the interveners' argument that there is no agreement among States at the international level when it comes to a ban on granting amnesties without exception for grave breaches of fundamental human rights, including those covered by Articles 2 and 3 of the Convention. The view was expressed that the granting of amnesties as a tool in ending prolonged conflicts may lead to positive outcomes (see the interveners' submissions summarised in paragraphs 108-113 above).

138. The Court also notes the jurisprudence of the Inter-American Court of Human Rights, notably the above-cited cases of *Barrios Altos v. Peru*, *Gomes Lund et al v. Brazil*, *Gelman v. Uruguay* and *The Massacres of El Mozote and Nearby Places v. El Salvador*, where that court took a firmer stance and, relying on its previous findings as well as those of the Inter-American Commission on Human Rights, the organs of the United Nations and other universal and regional organs for the protection of human rights, found that no amnesties were acceptable in connection with grave breaches of fundamental human rights since any such amnesty would seriously undermine the States' duty to investigate and punish the perpetrators of such acts (see the above-cited judgments of the Inter-American Court of Human Rights in the cases of *Gelman v. Uruguay*, § 195, and *Gomes Lund et al v. Brazil*, § 171). It emphasised that such amnesties contravene irrevocable rights recognised by international human rights law (see *Gomes Lund et al*, § 172).

(γ) The Court's conclusion

139. In the present case the applicant was granted amnesty for acts which amounted to grave breaches of fundamental human rights such as the intentional killing of civilians and inflicting grave bodily injury on a child, and the County Court's reasoning referred to the applicant's merits as a military officer. A growing tendency in international law is to see such amnesties as unacceptable because they are incompatible with the unanimously recognised obligation of States to prosecute and punish grave breaches of fundamental human rights. Even if it were to be accepted that amnesties are possible where there are some particular circumstances, such as a reconciliation process and/or a form of compensation to the victims, the amnesty granted to the applicant in the instant case would still not be acceptable since there is nothing to indicate that there were any such circumstances.

140. The Court considers that by bringing a fresh indictment against the applicant and convicting him of war crimes against the civilian population, the Croatian authorities acted in compliance with the requirements of Articles 2 and 3 of the Convention and in a manner consistent with the requirements and recommendations of the above-mentioned international mechanisms and instruments.

141. Against the above background, the Court concludes that Article 4 of Protocol No. 7 to the Convention is not applicable in the circumstances of the present case.

FOR THESE REASONS, THE COURT

1. *Declares* inadmissible, unanimously, the complaint under Article 4 of Protocol No. 7 to the Convention regarding the applicant's right not to be tried or punished twice in respect of the charges concerning the killing of N.V. and Ne.V. which were discontinued by the prosecutor on 25 January 1996;

2. *Holds*, unanimously, that there has been no violation of Article 6 of the Convention;

3. *Holds*, by sixteen votes to one, that Article 4 of Protocol No. 7 to the Convention is not applicable in respect of the charges relating to the killing of S.B. and V.B. and the serious wounding of Sl.B.

Done in English and French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 27 May 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early	Dean Spielmann
Jurisconsult	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) joint concurring opinion of Judges Spielmann, Power-Forde and Nußberger;

(b) joint concurring opinion of Judges Ziemele, Berro-Lefèvre and Karakaş;

(c) joint concurring opinion of Judges Šikuta, Wojtyczek and Vehabović;

(d) concurring opinion of Judge Vučinić;

(e) partly dissenting opinion of Judge Dedov.

D.S.
T.L.E.

JOINT CONCURRING OPINION OF JUDGES SPIELMANN, POWER-FORDE AND NUSSBERGER

(Translation)

1. Like the majority, we consider that Article 4 of Protocol No. 7 is not applicable in the present case. However, contrary to the view expressed by the majority, we are convinced that this outcome can be inferred directly from the text of Article 4 of Protocol No. 7. As we see it, that provision is not applicable because, quite simply, there was no final acquittal.

2. In so far as the text (which is clear) requires any interpretation, the Grand Chamber could have taken the opportunity to construe the meaning of the expression "finally acquitted or convicted". In our view, the ruling granting the applicant an unconditional amnesty cannot be regarded as a final acquittal within the meaning of Article 4 of Protocol No. 7. We will set out below the reasoning which leads us to this conclusion.

3. We propose to begin by reiterating, in so far as necessary, firstly, the criteria to be satisfied in order for Article 4 of Protocol No. 7 to apply (I), and, secondly, the specific characteristics of amnesties (II). We will then proceed to apply the results of this methodological approach to the present case (III).

I. Criteria for application of Article 4 of Protocol No. 7

4. The criteria that must be satisfied in order for Article 4 of Protocol No. 7 to be applicable are the existence of criminal proceedings concluded by a final decision (i), the existence of a second set of proceedings (ii) and the existence of a final acquittal or conviction (iii).

(i) Proceedings concluded by a final decision

5. The aim of Article 4 of Protocol No. 7 is to prohibit the repetition of criminal proceedings that have been concluded by a final decision (see *Franz Fischer v. Austria*, no. 37950/97, § 22, 29 May 2001, and *Gradinger v. Austria*, 23 October 1995, § 53, Series A no. 328-C). According to the Explanatory Report on Protocol No. 7, which itself refers back to the European Convention on the International Validity of Criminal Judgments, "a decision is final 'if, according to the traditional expression, it has acquired the force of *res judicata*. This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them'". This approach is well

established in the Court's case-law (see *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, § 107, ECHR 2009).

(ii) Second set of proceedings

6. The *ne bis in idem* principle relates to the second set of proceedings, those which are instituted after a defendant has been finally convicted or acquitted. This position finds support in the Explanatory Report on Protocol No. 7, which, as regards Article 4, states that "[t]he principle established in this provision applies only after the person has been finally acquitted or convicted in accordance with the law and penal procedure of the State concerned".

(iii) Final acquittal or conviction

7. It is this last criterion which, in our view, is problematic. For Article 4 of Protocol No. 7 to apply, the defendant must first have been acquitted or convicted by a final ruling. For a ruling to be regarded as *res judicata* for the purposes of Article 4 of Protocol No. 7, it is not sufficient for it to be a final ruling which is not subject to appeal: it must constitute a final conviction or acquittal.

8. In accordance with the rule of international law stated in Article 31 of the Vienna Convention, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The protection afforded by Article 4 of Protocol No. 7 is thus limited to the extent that this provision prohibits a second prosecution or punishment only in the case of persons who have already been "finally acquitted or convicted" (in French: "*acquitté ou condamné par un jugement définitif*"). The deliberate choice of words implies that an assessment has been made of the circumstances of the case and that the guilt or innocence of the defendant has been established. An amnesty does not correspond to either of these situations.

II. Specific characteristics of amnesties

9. An amnesty consists in erasing from legal memory some aspect of criminal conduct by an offender. It may be granted by various means, not always taking the form of a judicial decision. Hence, such a measure does not necessarily presuppose the holding of a trial in the course of which evidence is produced for and against the accused and an assessment of his or her guilt is made. Defining the legal characteristics of amnesty, H. Donnedieu de Vabres wrote as follows:

> "[T]he term amnesty implies the notion of something being *forgotten* (ἀμνηστία, from α meaning 'without', and μνάομαι, meaning 'I remember'). Amnesty is an act of sovereign authority whose purpose and outcome is to allow certain offences to be forgotten: it puts an end to past and future proceedings and to the convictions handed down in connection with those offences.
>
> An amnesty can be applied in two sets of circumstances: either immediately after commission of the offence, in which case it terminates the proceedings, or following the person's conviction, which is thereby erased" (*Traité de droit criminel et de législation pénale comparée*, third edition, Paris, Sirey, 1947, p. 550, no. 977).

10. The exact scope of amnesty, thus defined, allows a distinction to be made between those cases where the protection of Article 4 of Protocol No. 7 can be invoked and those that do not fall within the scope of that protection. Naturally, account must also be taken of the additional limits to this protection that are defined by paragraph 2 of Article 4 of Protocol No. 7. The thinking behind the Convention is in fact based on the protection of the rights of persons who have already been finally acquitted or convicted, and thus is without prejudice to the protection of rights guaranteed under the procedural aspect of Articles 2 and 3; legal certainty must also continue to be ensured. Of course it is important to stress that the Court's consistent case-law requires, by implication, that there should be an effective official investigation capable of leading to the identification and punishment of those responsible when individuals have been killed or seriously ill-treated in breach of the law as a result of the use of force (see *Assenov and Others v. Bulgaria*, 28 October 1998, § 102, *Reports of Judgments and Decisions* 1998-VIII). If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would be ineffective in practice. But any reference to Articles 2 and 3 of the Convention appears to us to be unnecessary in the present case, given that it is clear from the text of Article 4 of Protocol No. 7 itself that the latter provision is not applicable. Moreover, the applicability of the procedural obligation stemming from Articles 2 and 3 of the Convention seems far from obvious to us in this case, in the light of the principles established in *Janowiec and Others v. Russia* ([GC], nos. 55508/07 and 29520/09, ECHR 2013).

III. Application of the principles in the present case

11. In the present case, the ruling of 24 June 1997 terminated the criminal proceedings against the applicant on the basis of the General Amnesty Act. As to whether that ruling was final or not, it should be borne in mind that the applicant did not appeal and that the prosecutor did not have any right of appeal. The ruling, therefore, became final. This finding is in no way altered by the fact that the prosecution lodged a request for the protection of legality as this constituted an extraordinary remedy.

12. As regards the issue whether the ruling granting the applicant amnesty constituted a conviction, it is clear to us that this was not the case, given the absence of any decision by a domestic court finding the applicant guilty of the acts of which he stood accused.

13. As to whether it constituted an acquittal, reference should be made to the nature of the amnesty ruling, which did not presuppose any investigation into the accusations against the applicant and was not based on any factual findings of relevance to the determination of his guilt or innocence. The ruling contained no assessment as to whether the applicant should be held responsible for any crime, which would normally be a prerequisite for an acquittal.

14. In view of the foregoing, we conclude that the ruling granting amnesty to the applicant was neither a conviction nor an acquittal for the purposes of Article 4 of Protocol No. 7 to the Convention.

It is for that reason, and that reason alone, that we believe this provision to be inapplicable in the present case.

JOINT CONCURRING OPINION OF JUDGES ZIEMELE, BERRO-LEFEVRE AND KARAKAŞ

1. We voted with the majority in this case since as a matter of principle we agree that the *ne bis in idem* rule should not be invoked to justify impunity for gross human rights violations. There are indeed several important international law developments (see the "Relevant International Law Materials" part, and in particular section K) which point in the direction that gross human rights violations and serious violations of international humanitarian law should not end in amnesty, pardon or prescription. It is in this context that, on the basis of the general approach adopted by the majority, we joined them in finding that Article 4 of Protocol No. 7 is not applicable.

2. However, we would like to clarify that we would have preferred to declare that the Article in question is in principle applicable and to find on the merits of the present case that there was no violation. We have several reasons for this preference. We consider that the Court does not examine the facts of the case in the requisite detail and confines its reasoning to a very general level. In terms of the reasoning we find it disconcerting that the case is turned instead into an Articles 2 and 3 case (see paragraphs 124 et seq. of the judgment). While the principle stated by the Court is indeed fundamental and it is for that reason that we joined the majority, we wonder whether the Court should not have examined the case in its usual manner.

3. For example, it is not disputed that both sets of criminal proceedings conducted against the applicant at the national level concerned the killing of V.B. and S.B. and the serious wounding of Sl.B (see paragraph 99 and contrast with paragraph 122). It is in that connection that a preliminary question of double jeopardy may arise, and the Court should have addressed the question of the applicability of paragraph 1 of Article 4 of Protocol No. 7 in detail. Furthermore, it is noteworthy that, while the Supreme Court found that the granting of amnesty to the applicant breached the General Amnesty Act, it tested itself the first and second sets of proceedings against the requirements of the *ne bis in idem* rule. In the first set of proceedings the applicant was *de facto* granted amnesty for war crimes against the civilian population, and in granting him amnesty the national courts relied on his merits as a military commander. The Supreme Court held that such application of the General Amnesty Act was wrong and contrary to its purpose. Moreover, under that Act it was not lawful to grant amnesty in respect of war crimes. However, neither the prosecuting authorities nor the County Court in the first set of proceedings made any assessment as to whether the factual background to the charges against the applicant amounted to a war crime and thus fell within the scope of this exception.

4. These facts of the case invite an examination of what exactly happened, the nature of the amnesty granted and its compliance with

domestic law, interpreted in the light of the relevant international obligations. In this respect we would point out that the words "finally convicted or acquitted" may be understood in their technical sense. In the sphere of criminal law these terms concern final acquittal or final conviction after assessment of the facts of a given case and establishment of the accused's guilt or innocence. In this sense a conviction is to be understood as a verdict of guilty and an acquittal as a verdict of not guilty. But it cannot be excluded that the words "finally acquitted or convicted" could be interpreted in a broader sense. After all, there are many jurisdictions and State practices. It is worthwhile referring to the Pinochet case heard in Spain. The Spanish courts, for example, interpreted the Chilean amnesty as the equivalent of a "standard acquittal for reasons of political convenience" and declared that the domestic amnesty laws (the 1978 amnesty law passed by the Pinochet regime) could not bind them.

There are decisions which might be seen as having the same legal effect as final acquittals even though they do not presuppose an assessment of the accused's guilt or innocence. Amnesty is an act of erasing from legal memory some aspect of criminal conduct by an offender, often before prosecution has occurred and sometimes at later stages. One feature which is common to acquittal in the ordinary sense and amnesty is that they both amount to absolution from criminal responsibility. Compared with the discontinuance of criminal proceedings by a prosecutor (which is not in conflict with the *ne bis in idem* principle), amnesty may nevertheless appear to demonstrate a higher degree of presumption of guilt. We would point out in this regard that during the drafting of the Statute of the International Criminal Court, the proposal was made to state clearly that acts of amnesty and pardon exclude the application of the *ne bis in idem* rule (see the Report of the Preparatory Committee on the Establishment of an International Criminal Court, vol. 1, Proceedings of the Preparatory Committee during March-April and August, 1996, U.N. GAOR, 51st Sess., Supp. (No. 22), paragraph 174, at 40, U.N. Doc. A/51/22; compare the Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute & Draft Final Act, Article 19, U.N. Doc. A/CONF/183/2/Add.1 (1998) (unadopted draft article providing that *ne bis in idem* would not apply in cases of pardons and other measures suspending legal enforcement). While the Statute did not adopt this broad approach, it nevertheless confirms our position that the legal character of amnesty depends to a large extent on the context and the circumstances in which it is applied and that the domestic or international authorities might be confronted with questions relevant to the *ne bis in idem* defence. The Court decided not to engage with this issue in the present case.

5. The practice of the Inter-American Court in the cases of *Almonacid-Arellano et al v. Chile* and *La Cantuta v. Peru* is also instructive. In these cases it was found that the *ne bis in idem* principle was not

applicable where the dismissal of a case was designed to shield the accused from criminal responsibility or the proceedings were not conducted independently or impartially, or where there was no real intent to bring those responsible to justice. A domestic judgment rendered in such circumstances produced an "apparent" or "fraudulent" *res judicata* case, according to the Inter-American Court. The Statute of the International Criminal Court contains an explicit exception to the *ne bis in idem* principle as it allows for prosecution where a person has already been acquitted in respect of the crime of genocide, crimes against humanity or war crimes if the purpose of the proceedings before the other court was to shield the person concerned from criminal responsibility for crimes falling within the jurisdiction of the International Criminal Court (Article 20). One could sum up by saying that today, under international law, amnesty may still be considered legitimate and therefore used so long as it is not designed to shield the individual concerned from accountability for gross human rights violations or serious violations of international humanitarian law. The next step might be an absolute prohibition of amnesty in relation to such violations. The Court's decision in the case at hand may be read as already taking the approach proposed during the drafting of the ICC Statute, to the effect that where proceedings concerning gross human rights violations result in an amnesty and are followed by a second set of proceedings culminating in a conviction, the *ne bis in idem* issue as such does not arise.

6. Coming back to the facts of the case, the Supreme Court concluded that in the applicant's case the General Amnesty Act had been applied wrongly and contrary to its purpose. On the facts of the instant case and in view of the relevant international discourse (see points 4 and 5 above) we would have preferred to say that, even assuming that the ruling granting amnesty to the applicant might in any sense be seen as a final conviction or acquittal for the purposes of Article 4 of Protocol No. 7, it was not "in accordance with the law" of the State concerned, which is the second criterion under Article 4, paragraph 1. In fact there are grounds to believe that the amnesty which was applied in the first set of proceedings indeed shielded the applicant from responsibility. Against this background and given the importance of combating any perception of impunity for grave breaches of human rights or for war crimes, we would have preferred to say that the *ne bis in idem* principle contained in Article 4 of Protocol No. 7 should not operate as a barrier to bringing individuals to justice where those individuals have been granted amnesty shielding them from responsibility, rather than closing the door by finding the provision inapplicable altogether. In our view, the Court could have contributed to a better understanding of the scope of Article 4 of Protocol No. 7 by stressing that the relevant domestic law should set out the circumstances which may preclude the application of the principle of *ne bis in idem* and that the notion of "in accordance with the law and penal procedure" of the State concerned under

Article 4 of Protocol No. 7 should be interpreted in a manner consistent with the provisions of international law (see, *mutatis mutandis*, *Storck v. Germany*, no. 61603/00, §§ 93, 99 and 148, ECHR 2005-V).

JOINT CONCURRING OPINION OF JUDGES ŠIKUTA, WOJTYCZEK AND VEHABOVIĆ

(Translation)

1. We are in full agreement with the majority in finding that Article 4 of Protocol No. 7 is not applicable in the circumstances of the present case and that, accordingly, it could not have been breached. However, we cannot accept the reasoning adopted by the majority to justify the judgment given.

2. It should be noted at the outset that the remit of the European Court of Human Rights is defined by Article 19 of the Convention. The object is to ensure the observance of the engagements stemming from the Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto. In fulfilling this remit, the European Court of Human Rights determines whether or not the actions and omissions attributable to the States Parties and criticised by the applicants are compatible with the Convention and its Protocols. The aim is therefore to assess, from the standpoint of the Convention and its Protocols, facts which occurred in the past, either at a particular juncture or over a specific period. It is clear that those facts must be assessed in the light of the law in force at the time of their occurrence. A State cannot be held responsible for breaches of international rules that were not in force in respect of that State at the time of the facts imputed to it.

It should be stressed that the remit of the European Court of Human Rights differs from that of a number of other international courts which may be called upon to determine not just inter-State cases concerning facts occurring in the past, but also disputes arising out of factual situations that are ongoing while the case is being examined. In the latter situation, if there are no specific rules limiting its jurisdiction *ratione temporis* or *ratione materiae*, it may fall to the international court in question to assess the continuing situation from the viewpoint of the international law applicable at the time the judgment is delivered and to give a ruling on the basis of all the relevant international rules in force at that time.

3. Articles 31 to 33 of the 1969 Vienna Convention on the Law of Treaties codify the customary rules for the interpretation of treaties. The first rule of interpretation of international treaties is codified in Article 31 § 1 of the Vienna Convention, which reads as follows: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". According to these rules, the starting point for interpretation in each case is an analysis of the text of the provision being interpreted. The interpretation process must begin with an attempt to establish the ordinary meaning of the terms used. The person interpreting the treaty must also take into account all the authentic versions thereof.

The text of the treaty, in all its authentic versions, must be read with reference to the "internal" context and in the light of the object and purpose of the treaty. The "internal" context encompasses not only the full text, including the preamble and the annexes, but also any agreements entered into by all the parties relating to the treaty and any instruments drawn up by one or more of the parties, and accepted by the other parties, at the time of its conclusion.

The interpreter must also take account of the "external" context, which encompasses subsequent agreements regarding the interpretation or application of the treaty, subsequent practice and any relevant rule of international law applicable in relations between the parties. Lastly, as a subsidiary point, recourse may be had to supplementary means of interpretation such as the preparatory materials and the circumstances in which the treaty was concluded.

While the Vienna Convention on the Law of Treaties gives no indication as to the point in time that should be identified for the purposes of establishing the "external" rules of international law to be taken into consideration, it is clear that, in examining past events from the standpoint of the version of the treaty in force at the time of their occurrence, the external context comprises the relevant rules of international law in force at the time of the events. Hence, in addressing the question whether past actions or omissions imputable to a State are compatible with the Convention, the latter must be considered in the context of the relevant rules of international law applicable at the time when the actions or omissions occurred.

4. Nowadays, the interpretation of a treaty in the context of the relevant rules of international law throws up major issues stemming from the dynamic nature of international law. Not only is international law evolving very rapidly; in many spheres, that evolution is also constantly gathering pace. Actions and omissions of the State authorities which would have fully complied with international law in the past may now be in breach of that law. This ontological characteristic of international law gives rise to a fundamental epistemological difficulty: establishing the rules of international law applicable in the past at a particular juncture or over a specific period may create problems which even the most eminent specialists in international law struggle to overcome.

In such a situation, the interpretation and application of the Convention in the context of the relevant rules of international law represent a formidable challenge for the European Court of Human Rights. Given the increasing pace at which international law, which forms the external context for the Convention, is evolving, the interpretation of this international instrument, and especially the way in which the Convention is applied, may also be subject to rapid change. Hence, the actions carried out by a State at a particular juncture in the past may have been compatible with the

Convention interpreted in the light of the international law in force at that time, whereas similar actions carried out a number of years later may be deemed contrary to the Convention, interpreted in the light of the rules of international law at that later point in time.

5. It should be noted that in the present case the Court was called upon to assess facts that had occurred a number of years previously. An amnesty law was enacted in Croatia in 1996 and applied to the applicant on 24 June 1997. A new set of proceedings was instituted in 2006 and the applicant was given a final conviction in 2007.

The applicant challenged the compatibility with the Convention and its Protocols of the Croatian authorities' actions between 2006 and 2007. The Convention violation alleged by the applicant took place in 2006-2007 with the resumption of the criminal proceedings and the applicant's conviction. In view of the specific nature of the complaint, it must be assessed in the light of the ruling of the Osijek County Court of 24 June 1997 applying the Amnesty Act enacted in 1996. Hence, the Court had to examine a series of events taking place over a period of more than ten years. It should also be borne in mind that the Convention entered into force in respect of Croatia on 5 November 1997 and that Protocol No. 7 entered into force in respect of that State on 1 February 1998. The Amnesty Act was enacted and entered into force prior to both those dates, and the alleged breach of the Convention occurred subsequently.

6. We note that, in the present case, the majority did not endeavour to analyse the meaning of the text of Article 4 of Protocol No. 7 or to define its scope as determined by the choice of terms used by the High Contracting Parties. On the other hand, it directly highlighted the internal context by analysing the content of the obligations arising out of Articles 2 and 3 of the Convention, and the external context consisting of a substantial package of international treaties concerning human rights and humanitarian law and of the decisions of the bodies responsible for applying those treaties.

The majority's analysis of this external context prompted it to assert that there was a growing tendency in international law to regard amnesties for acts amounting to grave breaches of human rights as unacceptable. It concluded that Article 4 of Protocol No. 7 did not act as a bar to proceedings brought on the basis of the obligations under Articles 2 and 3 of the Convention and the requirements of other international instruments. The line of argument followed suggests that the judicial ruling applying the 1996 Amnesty Act fell within the scope of Article 4 of Protocol No. 7, but that the obligation to prosecute deriving from other provisions of the Convention rendered that Article inapplicable in the present case. According to this logic the Convention, interpreted in the light of the relevant international law, required Croatia to prosecute the applicant for war crimes notwithstanding the court ruling given in his case on 24 June 1997, and Article 4 of Protocol No. 7 did not stand in the way of his prosecution. The

majority's reasoning implies that, in the case under consideration, there was a conflict between the obligation to prosecute and the obligations arising out of Article 4 of Protocol No. 7, and that the former took precedence over the latter.

7. The approach taken by the majority raises two fundamental methodological objections. Firstly, it omits any attempt to establish the meaning of the terms used. This method of interpretation disregards the applicable rules set out below.

Secondly, the majority examined the state of international law in 2014 and assessed events which occurred in 1996-97 and in 2006-2007 in the light of the law applicable at the time of delivery of the judgment, without examining how the law had evolved over that period. However, in undertaking an examination of the relevant rules of international law concerning amnesty it is necessary to consider the evolution of those rules over the relevant period (1996-2007) and the principles governing the temporal scope of those rules.

While the question whether international law in 2014 prohibits amnesties in cases of grave breaches of human rights is an important one as regards the protection of those rights, it remains irrelevant to the present case. However, if, as suggested by the majority, the crux of the issue lies in the external context of the treaty, two questions need to be answered in establishing that context:

(1) Was the 1996 Amnesty Act contrary to international law as it applied to Croatia in 1996?

(2) Did any rule of international law applicable to Croatia exist in 2006 and 2007 requiring that State to annul retroactively the effects of the 1996 Amnesty Act?

In seeking to answer these questions, it should be borne in mind that most of the decisions by international courts or other international bodies cited in the judgment were issued after 1997 and, in many cases, after 2007. Only three of the documents relied on pre-date 1997: the report of the Inter-American Commission on Human Rights of 24 September 1992 in Case 10. 827 (*El Salvador*), the report of the same Commission dated 1 June 1994 on the situation of human rights in El Salvador (Doc. OEA/Ser.L/II.85) and General Comment No. 20 of the UN Human Rights Committee on Article 7 of the International Covenant on Civil and Political Rights.

It should also be noted that the first two of these documents were prepared in the context of the inter-American human rights protection system, which has a number of distinctive features. The solutions adopted under that system are not necessarily transposable to other regional human rights protection systems. The Human Rights Committee, for its part, declined in 1992 to adopt a categorical position, simply stating the view that amnesties were *generally incompatible* with the duty of States to investigate

acts of torture. Furthermore, none of the international materials cited clearly articulates a rule of international law requiring States unconditionally to annul retroactively the effects of amnesty laws enacted and applied in the past.

At the time the Amnesty Act was enacted in 1996, Croatia was not bound by the Convention. The question whether the Amnesty Act was compatible with the Convention is therefore devoid of purpose. Furthermore, while various conventions to which Croatia is a party require certain types of grave breaches of human rights to be prosecuted, it has not been demonstrated that they completely preclude amnesty. As the majority itself recognised, no treaty explicitly prohibits the granting of amnesty in respect of grave breaches of fundamental human rights.

Furthermore, while international law does not exclude retroactive convention-based or customary rules, these are the exception. Article 28 of the Vienna Convention on the Law of Treaties states that, unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party. Likewise, a customary rule may have retroactive effect if its content is clear on that point. No element of relevance for the interpretation of the Convention suggests that Articles 2 and 3 require the retroactive setting-aside of final judicial decisions which applied amnesty laws and were handed down prior to ratification of this treaty by the State Party concerned. Nor has it been demonstrated that in 2006-2007 any other rule of international law applicable to Croatia required that State to annul retroactively the effects of final judicial rulings applying the 1996 Amnesty Act.

In sum, the Croatian 1996 Amnesty Act could not have been in breach of the Convention, which Croatia ratified subsequently. The Convention, interpreted in the light of the relevant rules of international law, did not require the retroactive annulment of the effects of final judicial rulings applying the 1996 Amnesty Act. Against this background, if – as argued by the majority – the answer to the question whether Article 4 of Protocol No. 7 is applicable depends on the external and internal context of that provision, the logical conclusion is that the provision in question is indeed applicable in the present case and that the other rules stemming from the Convention or other international instruments do not provide grounds for setting aside the ruling issued by the Osijek County Court on 24 June 1997 in the applicant's case. If we follow the approach taken by the majority, we should conclude that there has been a violation of Article 4 of Protocol No. 7.

8. We should point out at this juncture that the state of international law in 1997 was summarised in a letter from the Head of the Legal Division of the International Committee of the Red Cross as follows:

> "The 'travaux préparatoires' of Article 6(5) [of the 1977 Additional Protocol II] indicate that this provision aims at encouraging amnesty, i.e., a sort of release at the end of hostilities. It does not aim at an amnesty for those having violated international humanitarian law ... Anyway States did not accept any rule in Protocol II obliging them to criminalize its violations ... Conversely, one cannot either affirm that international humanitarian law absolutely excludes any amnesty including persons having committed violations of international humanitarian law, as long as the principle that those having committed grave breaches have to be either prosecuted or extradited is not voided of its substance." (ICRC, Letter from the Head of the ICRC Legal Division to the Department of Law at the University of California and the Prosecutor of the International Criminal Tribunal for the former Yugoslavia, 15 April 1997, http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule159).

It should further be noted that international law commentators are divided on the issue of amnesties. While many authors adopt a stance in favour of recognising a blanket ban on amnesties for grave breaches of human rights, a significant number of reputable authors defend the opposite point of view.

There is no doubt that international law is evolving rapidly and imposes ever tighter regulations on States' freedom with regard to amnesties. States have considerably less freedom of manoeuvre nowadays (in 2014) than in 2006 and, *a fortiori*, 1996. At the same time, stating that international law in 2014 completely prohibits amnesties in cases of grave breaches of human rights does not reflect the current state of international law. A study of the international instruments, decisions and documents referred to by the majority demonstrates that the view expressed by the Head of the ICRC Legal Division in the letter cited above has retained its relevance in 2014.

9. We share fully the majority's concern to ensure the highest possible standard of human rights protection, and agree that violations of human rights must not go unpunished. We are equally aware of the potentially perverse effects of amnesty laws that are passed in order to guarantee impunity to the perpetrators of such violations. Nevertheless, we also note that world history teaches us the need to observe the utmost caution and humility in this sphere. Different countries have devised widely varying approaches enabling them to put grave human rights violations behind them and restore democracy and the rule of law.

The adoption of international rules imposing a blanket ban on amnesties in cases of grave violations of human rights is liable, in some circumstances, to reduce the effectiveness of human rights protection. The third-party interveners submitted solid arguments against recognising the existence of a rule of international law prohibiting amnesties completely in cases of human rights violations. We must acknowledge that in certain circumstances there may be practical arguments in favour of an amnesty

that encompasses some grave human rights violations. We cannot rule out the possibility that such an amnesty might in some instances serve as a tool enabling an armed conflict or a political regime that violates human rights to be brought to an end more swiftly, thereby preventing further violations in the future. In any event, as we see it, the concern to ensure effective protection of human rights points in favour of allowing the States concerned a certain margin of manoeuvre in this sphere, in order to allow the different parties to conflicts engendering grave human rights violations to find the most appropriate solutions.

10. As stated above, the starting point for any interpretation is an analysis of the meaning of the terms used. It should be stressed in this regard that the scope of Article 4 of Protocol No. 7 is defined in the following terms: "*acquitté ou condamné par un jugement definitif*" in the French version and "finally acquitted or convicted" in English. This provision is applicable only in the case of a conviction or acquittal. The scope of the provision being interpreted is quite narrow, as it excludes all other judicial decisions which terminate the criminal proceedings by one means or another.

In establishing the ordinary meaning to be given to the terms used, their meaning in everyday language needs to be examined, even if it is not always easy to delineate them precisely for the purposes of applying the Convention. There are no grounds for finding that the various terms used in the Convention and its Protocols in relation to States' domestic legal arrangements are to be understood in the technical sense attributed to them in the legal systems of the French and English-speaking countries. On the contrary, such an interpretation would not only lend undue importance to certain legal systems but could also create insoluble problems.

According to the Petit Robert dictionary, the French word "*acquitter*", used in the context of criminal proceedings, means "*déclarer par arrêt (un accusé) non coupable*" (Petit Robert, Paris 2012, p. 27). The New Oxford Dictionary of English explains the meaning of the English word "acquittal" as follows: "a judgment or verdict that a person is not guilty of the crime of which they have been charged" (New Oxford Dictionary of English, London 1998, p. 16). In both languages, therefore, the concept of acquittal refers to a decision on the merits determining the issue of the accused's guilt. All final judicial decisions which terminate the proceedings without finding the accused guilty or not guilty therefore remain outside the scope of the provision being interpreted.

Amnesty laws in the various legal systems may differ very widely in terms of their content and the arrangements for implementation. It is not unthinkable for an amnesty law to be enacted whose application is predicated on a prior finding of guilt in respect of the persons granted amnesty. That was not the thrust of the 1996 Act in Croatia. It is clear that the ruling given by the Osijek County Court on 24 June 1997 in the

applicant's case did not find him innocent. That ruling does not correspond to any of the categories of judicial decisions covered by the provision under consideration. It is beyond doubt that Article 4 of Protocol No. 7 is not applicable in the present case.

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

11. Although judicial decisions terminating criminal proceedings without ruling on the person's guilt do not come within the scope of Article 4 of Protocol No. 7, the decision to overrule or set aside a decision applying an amnesty law may nevertheless raise significant issues in terms of human rights protection.

A State based on the rule of law must comply with a certain number of substantive standards. These include the right to a court and legal certainty. The right to a court encompasses the right to a final judicial decision given within a reasonable time and also presupposes the stability of the various decisions terminating criminal proceedings even if they do not fall within the scope of Article 4 of Protocol No. 7. Article 6 of the Convention secures to any person facing criminal charges the right to obtain a final judicial decision on his or her case within a reasonable time, and protects the stability of final decisions while allowing some exceptions in this sphere. In any event, a person who has obtained a final judicial decision terminating criminal proceedings can legitimately expect the stability of that decision to be respected unless there are compelling reasons for it to be set aside or for the proceedings to be reopened.

In the present case the applicant had obtained a final judicial ruling applying the Amnesty Act. He therefore had a legitimate expectation that this ruling would remain in force and be complied with. Moreover, the resumption of the proceedings came about in 2006, that is to say, almost nine years after the date of the ruling applying the Amnesty Act. Hence, the entire proceedings were drawn out to the point of raising doubts from the perspective of the right to a final judgment within a reasonable time.

However, it should be noted that the applicant's legitimate expectation was not unconditional. An individual who has obtained a judicial ruling that is contrary to the law in force must be prepared for it to be rectified by means of an extraordinary remedy. In such a situation, the standards of the rule of law require that the various competing values be weighed against each other, in particular legal certainty on the one hand and respect for lawfulness and justice on the other. Furthermore, the need to uphold the law and justice may require proceedings to be resumed or reopened even where a relatively long period of time has elapsed since the first final ruling. In the specific circumstances of the case under consideration, and particularly in view of the nature and seriousness of the crimes committed, there is no

doubt that all the criteria for re-activating the proceedings against the applicant were met and that the Croatian authorities did not breach the requirements laid down by the Convention and the additional Protocols.

12. The present case raises a particularly important issue in terms of human rights protection. The significance of the issue called for an unfailingly rigorous methodological approach. We regret that the majority did not see fit to proceed in this manner.

CONCURRING OPINION OF JUDGE VUČINIĆ

I voted with the majority in finding that Article 4 of Protocol No. 7 to the Convention is not applicable in the particular circumstances of the case. The applicant was granted amnesty for acts which amounted to grave breaches of fundamental human rights. The grant of amnesty was contrary to the increasing tendency in contemporary international law in this area as well as to Contracting States' obligations under Articles 2 and 3 of the Convention. The grant of amnesty to the applicant also amounted to a fundamental defect in the first set of proceedings within the meaning of paragraph 2 of Article 4 of Protocol No. 7.

I am not however fully satisfied with the reasoning of the judgment. This case is more complicated and more important from the legal point of view than might appear at first sight. In my opinion, there were several consecutive fundamental defects in the first set of proceedings which should be seen as interconnected and interdependent. In the final analysis, these defects, for me, inevitably lead to the conclusion that Article 4 of Protocol No. 7 cannot be considered applicable.

The first and most fundamental defect in this case, one which was at the origin of all other defects, was the decision of the Osijek Military Prosecutor to regard obvious war crimes committed by a member of the Croatian Army against the civilian population during the armed conflict in Croatia in 1991, "as ordinary killings". Such a legal qualification of the offences in question was regrettably accepted by the Osijek County Court in 1993. This qualification and its acceptance were wrong in law. At the material time there was a general and widely accepted political belief in Croatia that considerations related to the legitimate self-defence of the State in the face of foreign aggression could not justify the commission by members of its armed forces of war crimes or crimes against humanity. This political attitude was then transformed into a judicial practice whereby obvious war crimes committed by members of the Croatian armed forces were wrongly qualified in law as "ordinary killings".

The General Amnesty Act was subsequently applied in respect of such "legal qualifications" of obvious war crimes against the civilian population notwithstanding the very clear provision in the Act that it was not to be applied to any acts which amounted to grave breaches of humanitarian law or to war crimes.

Finally, as a consequence of the two previous defects the first set of criminal proceedings against the applicant (no. K-4/97) was terminated in the form of a "discontinuance of criminal proceedings", and not in the form

of a "final acquittal or conviction" within the meaning of paragraph 2 of Article 4 of Protocol No. 7. It is quite clear that the Croatian authorities were responsible for several fundamental defects in the previous proceedings, contrary to national, international and Convention law. In my view, this resulted in the absolute inapplicability of Article 4 of Protocol No. 7 in this case.

Against that background, the retrial and final conviction of the applicant have to be understood as a legal and legitimate effort on the part of the Croatian authorities to correct the previously mentioned defects in the domestic proceedings. This, I believe, is fully in accordance with the letter and spirit of Article 4 of Protocol No.7. That provision cannot in any case be interpreted or applied to thwart or to act as a bar to the punishment of war crimes and crimes against humanity and a Contracting State's obligations under Articles 2 and 3 of the Convention.

PARTLY DISSENTING OPINION OF JUDGE DEDOV

1. In the present case the Court has rigorously applied the principles of international humanitarian law to an amnesty granted for acts which amounted to war crimes, and has found "such amnesties [to be] unacceptable because they are incompatible with the unanimously recognised obligation of States to prosecute and punish grave breaches of fundamental human rights" (see paragraph 139 of the judgment). Accordingly, such amnesty cannot serve as a barrier to the above-mentioned obligation. I completely agree with the above position of the majority of judges, as this assessment is based on the Convention (see paragraphs 124-128) and on international law (see paragraphs 129-138).

However, I regret that I cannot share the conclusion reached by the majority in paragraph 141 of the judgment, according to which "Article 4 of Protocol No. 7 to the Convention ... is not applicable in the circumstances of the present case". This conclusion is not self-evident, as the Court did not assess whether Article 4 of Protocol No. 7 was applicable to the circumstances of the present case. From the standpoint of legal certainty and the quality of judgments, however, the assessment of the circumstances is a precondition for any conclusion regarding the applicability of Article 4 of Protocol No. 7.

The Court cannot ignore the following circumstances of the present case. The Osijek County Court established all the facts (see paragraph 17 of the judgment) and applied the national amnesty law, and its ruling became final; the applicant's case was subsequently reopened, he was tried twice for the same offences (see paragraph 116) and was punished. Paragraph 1 of Article 4 of Protocol No. 7 provides that "[n]o one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State". Its wording demonstrates beyond doubt that Article 4 of Protocol No. 7 should apply in the above-mentioned circumstances. I would make my position even stronger: the Court should have applied Article 4 of Protocol No. 7 even if there were some doubts as to its applicability. I shall explain why.

It should be noted that in paragraph 128 of the judgment the Court concludes that "the guarantees under Article 4 of Protocol No. 7 and States' obligations under Articles 2 and 3 of the Convention should be regarded as parts of a whole" and "interpreted in such a way as to promote internal consistency and harmony between their various provisions". If these Articles are integral components of the Convention protection system, none of them may be withdrawn from the system as a whole. The Court's principal findings refer to the "obligation of States to prosecute and punish grave breaches of fundamental human rights", which ranks equally with the obligations under Articles 2 and 3 referred to in paragraphs 124-140.

Whereas Articles 2 and 3 establish what kind of substantive rights should be protected under the Convention, Article 4 of Protocol No. 7 contains procedural guarantees (*ne bis in idem*) against arbitrariness, including those provided for by Article 6 of the Convention. Article 4 of Protocol No. 7 has its own dimension which is independent from Articles 2 and 3 and is governed by the rule of law and legal certainty. That is why the applicant sought protection under Article 4 of Protocol No. 7.

As regards any doubts there may be, they are not decisive. Firstly, if this Article provides safeguards against being tried and punished a second time, then its scope cannot be formally limited to acquittal or conviction, thereby excluding amnesty granted by a court whose judgment is final. This is because both acquittal and amnesty amount to absolution from criminal responsibility. Secondly, when determining a request for the protection of legality under Article 422 of the Code of Criminal Procedure, the Supreme Court can merely establish that there has been a violation of the law (see paragraph 27 of the judgment). However, the absence of a national criminal procedure allowing the case to be reopened cannot itself serve as a barrier to rectifying the fundamental defect in accordance with paragraph 2 of Article 4 of Protocol No. 7.

Therefore, Article 4 of Protocol No. 7 is applicable in the present case.

2. Was there a violation of Article 4 of Protocol No. 7 by the respondent State? Although there are strong safeguards against being tried and convicted a second time, an exception to the enjoyment of such guarantees (where there has been a fundamental defect) is provided for by paragraph 2 of this Article. In my view, the Chamber's approach was rightly influenced by this exception (see paragraph 79 of the Chamber judgment), although it left the general principle applicable under Article 4 of Protocol No. 7 unclarified.

The application of the *ne bis in idem* guarantee was assessed by the "old" Court from the standpoint of an alleged violation of the right to a fair trial under Article 6 § 1 of the Convention (see *X. v The Netherlands*, no. 9433/81, Commission decision of 11 December, 1981, Decisions and Reports 27, p. 233, and *S. v. the Federal Republic of Germany*, no. 8945/80, decision of 13 December 1983, D.R. 39, p. 43). Furthermore, according to the "new" Court's well-established case-law in terms of Article 6 § 1, only exceptional circumstances (that is, a "fundamental defect") warrant the quashing of a final judicial decision by way of supervisory review (see, among many other authorities, *Ryabykh v. Russia*, no. 52854/99, ECHR 2003-X; *Brumărescu v. Romania* [GC], no. 28342/95, ECHR 1999-VII; and *Kot v. Russia*, no. 20887/03, 18 January 2007).

Considering that the "fundamental defect" concept is applicable under the head of Article 6 § 1 for the same purpose (reopening of the case), it is easy to come to the conclusion that Article 4 of Protocol No. 7 regulates a

specific aspect of the following fundamental principle enshrined in Article 6 § 1 and stated, for instance, in *Kot*, cited above:

> "The Court reiterates that the right to a fair hearing before a tribunal as guaranteed by Article 6 § 1 of the Convention must be interpreted in the light of the Preamble to the Convention, which declares, in its relevant part, the rule of law to be part of the common heritage of the Contracting States. One of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, among other things, that where the courts have finally determined an issue, their ruling should not be called into question (see *Brumărescu v. Romania*, judgment of 28 October 1999, *Reports of Judgments and Decisions* 1999-VII, § 61).
>
> ...This principle insists that no party is entitled to seek re-opening of the proceedings merely for the purpose of a rehearing and a fresh decision of the case. Higher courts' power to quash or alter binding and enforceable judicial decisions should be exercised for correction of fundamental defects. The mere possibility of two views on the subject is not a ground for re-examination. Departures from that principle are justified only when made necessary by circumstances of a substantial and compelling character (see, *mutatis mutandis*, *Ryabykh v. Russia*, no. 52854/99, § 52, ECHR 2003-X; and *Pravednaya v. Russia*, no. 69529/01, § 25, 18 November 2004)."

The proceedings in the present case were reopened on account of the application of the General Amnesty Act in contradiction with the principles of international law and with the respondent State's obligations under the Convention. Obviously, these are "circumstances of a substantial and compelling character" and, therefore, the reopening of the proceedings was justified to rectify a fundamental defect.

Against the above background, I believe that Article 4 of Protocol No. 7 is applicable and that there was no violation of that Article in the circumstances of the present case.