CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

COURT (PLENARY)

CASE OF BROZICEK v. ITALY

(Application no. 10964/84)

JUDGMENT

STRASBOURG

19 December 1989

In the Brozicek case*,

The European Court of Human Rights, taking its decision in plenary session pursuant to Rule 50 of the Rules of Court and composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr J. CREMONA,
Mr Thór VILHJÁLMSSON,
Mrs D. BINDSCHEDLER-ROBERT,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr J. PINHEIRO FARINHA,
Mr L.-E. PETTITI,
Mr B. WALSH,
Sir Vincent EVANS,
Mr R. MACDONALD,
Mr C. RUSSO,
Mr R. BERNHARDT,
Mr A. SPIELMANN,
Mr J. DE MEYER,
Mr J.A. CARRILLO SALCEDO,
Mr N. VALTICOS,
Mr S.K. MARTENS,
Mrs E. PALM,
Mr I. FOIGHEL,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 28 September and 22 November 1989,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 11 May 1988, within the three-month period laid down by Article 32 § 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms

* Note by the registry. The case is numbered 7/1988/151/205. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

("the Convention"). It originated in an application (no. 10964/84) against the Italian Republic lodged with the Commission under Article 25 (art. 25) by Mr Georg Brozicek, a German national, on 7 May 1984.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Italy recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of certain of its obligations under Article 6 §§ 3 (a) and 1 (art. 6-3-a, art. 6-1).

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings. He was given leave to present his own case (Rule 30 § 1, second sentence).

3. The Chamber to be constituted included ex officio Mr C. Russo, the elected judge of Italian nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 § 3 (b)). On 30 May 1988, in the presence of the Registrar, the President drew by lot the names of the other five members, namely Mr F. Matscher, Mr L.-E. Pettiti, Mr J. Gersing, Mr A. Spielmann and Mr J. De Meyer (Article 43 in fine of the Convention and Rule 21 § 4) (art. 43). Subsequently, Mr Thór Vilhjálmsson, substitute judge, replaced Mr Gersing, who had died (Rules 22 § 1 and 24 § 1).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 § 5) and, through the Registrar, consulted the Agent of the Italian Government ("the Government"), the Delegate of the Commission and the applicant on the need for a written procedure (Rule 37 § 1). In accordance with the orders made in consequence, the registry received the applicant's memorial on 29 September 1988 and the Government's memorial on 2 November 1988.

In a letter which reached the registry on 10 January 1989, the Deputy Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

5. At the Government's request, the Court decided, on 23 February 1989, to hear five witnesses on a specific point and to order an opinion by a handwriting expert (Rule 40 § 1, first sub-paragraph).

6. The applicant for his part requested that other persons be called and the President agreed to this pursuant to Rule 40 § 1, second sub-paragraph, on the understanding that the evidence adduced should remain within the terms of reference already laid down by the Chamber.

7. The Chamber appointed Judges Matscher and Pettiti who took evidence from the various witnesses at a hearing held on 28 April 1989, in the presence of the participants in the proceedings before the Court.

They authorised one of the witnesses, who had a legitimate reason for being unable to come to Strasbourg, to submit a written statement which

would be assessed by the Court as to its admissibility and relevance. Written statements by two other persons, which the applicant had sent to the registry on 24 April, were dealt with in the same way.

8. On 5 May 1989 the President received the opinion of Mrs A.-M. Jacquin-Keller, a handwriting expert at the Colmar Court of Appeal and approved by the French Court of Cassation, on the task which had been assigned to her by the Chamber (see paragraph 5 above).

The Court had previously obtained from the Commission, for the purposes of the investigative measure in question, various documents from the national proceedings and specimens of the applicant's handwriting.

9. On the same day, having consulted, through the Registrar, those who would be appearing before the Court, the President directed that the oral proceedings should open on 22 May 1989 (Rule 38).

10. The hearing took place in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting immediately beforehand.

There appeared before the Court:

- for the Government

Mr L. FERRARI BRAVO, Head of the Diplomatic Legal Service of the Ministry of Foreign Affairs, *Agent*,
Mr G. GRASSO, avvocato,
Mr G. RAIMONDI, magistrato, *Counsel*;

- for the Commission

Mr G. BATLINER, *Delegate*.

On the day of the hearing the applicant informed the Court that he was unable to attend because of an illness. He agreed to the hearing's being conducted in his absence. On 20 May he had supplied the text of his address.

The Court heard addresses by Mr Ferrari Bravo for the Government and Mr Batliner for the Commission as well as their replies to its questions.

11. On various dates between 22 May and 9 October, the participants in the proceedings before the Court sent to the registry observations, communications and documents, on their own initiative or at the Court's request, as the case may be.

12. On 26 May, after having deliberated, the Chamber relinquished jurisdiction forthwith in favour of the plenary Court (Rule 50).

13. Having taken note of the Government's agreement and the concurring opinions of the Commission and the applicant, the Court decided, on 28 September 1989, to proceed to judgment without holding a further hearing (Rule 26).

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

14. Mr Georg Brozicek was born in Czechoslovakia and now resides at Steinalben in the Federal Republic of Germany, of which country he is a national.

15. On 13 August 1975 the municipal police of Pietra Ligure (Savona) detained him on the public highway shortly after he had torn down some small ornamental flags erected in connection with a fête organised by a political party. The police, who had intervened at the request of one of the organisers, took him to the police station because he did not have any identity papers with him and, according to their version of events, because he had to be protected against the hostility of the participants. On this occasion he wounded one of the police officers.

On 14 August the carabinieri, who had also intervened on the previous day, submitted a report on the incident to the Savona Public Prosecutor's Office. On the same day Mr Brozicek sent a letter, in French, to the Police Chief (questore) of Savona, which was subsequently transmitted to the Public Prosecutor, who ordered its translation into Italian on 31 January 1976.

16. The Public Prosecutor's Office opened an investigation and on 23 February 1976 sent to the applicant - by registered letter requiring acknowledgment of receipt and bearing the address of the applicant's then residence in Nuremberg - a "judicial notification" (comunicazione giudiziaria; see paragraphs 24-25 below). It informed him that proceedings had been instituted against him for the offences of resisting the police and assault and wounding (Articles 337 and 582 of the Criminal Code). In addition, it invited him to appoint a defence lawyer of his choice and informed him that if he failed to do so Mr T. S., avvocato, would be appointed by the authorities.

On 1 March 1976 Mr Brozicek returned the document to the Public Prosecutor's Office with the following note (translation from the German):

> "I return the enclosed document to the sender as I find it difficult to understand. In lodging my detailed complaint of 14 August - on which no action has yet been taken even though the facts complained of could have far-reaching consequences - and in all correspondence to date with the Italian authorities, I have always expressly requested that either the mother tongue of the persons concerned or one of the international official languages of the United Nations be used, in order to avoid from the outset any risk of misunderstanding."

The Public Prosecutor's Office received this letter on 3 March 1976. It did not send any reply and did not have the letter translated.

17. On 17 November 1978 the Public Prosecutor's Office sent to the applicant by registered letter requiring acknowledgment of receipt a second "judicial notification". In addition to the information contained in the first notification, it asked the applicant to provide an address for service in Italy (Article 177 bis of the Code of Criminal Procedure).

On 5 December 1978 the German postal authorities returned the letter to the sender marked "unclaimed".

The acknowledgment of receipt bore the name "Brozicek", in a different space to that provided for the addressee's signature. The Government maintained that it was the applicant's signature but he has always denied this; he claimed that he had not received the communication because he had just moved house. The expert opinion ordered by the Court (see paragraphs 5 and 8 above) did not resolve this question.

18. By an order (decreto) of 13 December 1978 the Public Prosecutor stated that it had not been possible to notify the applicant and that "further enquiries at the place of birth and place of last residence" had not produced any result. He appointed a defence lawyer and directed that all the documents for notification to the accused during the investigation should thereafter be lodged at the secretariat of the Public Prosecutor's Office.

At the hearing before the European Court on 22 May 1989, the Government affirmed that the reference to further enquiries was probably an oversight. They maintained that the provision applied to the applicant was the second part of the second paragraph of Article 177 bis of the Code of Criminal Procedure (concerning an accused who has given no address for service, see paragraph 26 below), which does not require such enquiries.

The Public Prosecutor summonsed Mr Brozicek to appear for examination on 30 December 1978, but to no avail, and, on that day, he asked the President of the Savona Regional Court to commit the applicant for trial.

19. The trial was set down for 3 November 1980 but when the time came the proceedings had to be adjourned because the date of the hearing had not been notified to the accused.

On 11 March 1981 the President of the Savona Court decided that any notification would be lodged with the court registry because the accused had not provided an address for service in Italy (Articles 170 and 177 bis of the Code of Criminal Procedure, see paragraph 26 below). He also appointed a lawyer to represent the accused.

After an adjournment for reasons extraneous to the proceedings, the trial took place on 1 July 1981.

On that date the applicant was convicted in absentia, sentenced to five months' imprisonment and ordered to pay the costs. The sentence was, however, suspended and no reference to the conviction was to be included in criminal-record certificates issued at the request of private individuals.

20. This decision too was notified to the applicant by being lodged at the court registry because, still pursuant to Article 177 bis of the Code of Criminal Procedure, the president of the court had again noted, on 2 July, that Mr Brozicek had not provided an address for service in Italy.

As there was no appeal, the judgment became final on 7 July 1981.

21. On 5 May 1984 the applicant received a letter from the Principal Public Prosecutor at the German Federal Court of Justice (Bundesgerichtshof). The letter informed him of his conviction by judgment of the Savona court of 1 July 1981, which had become final on 7 July 1981, and that the conviction had been entered in the German criminal records (Article 52 of the Criminal Records Act, Bundeszentralregistergesetz).

22. On 7 May Mr Brozicek lodged an application with the Commission, stating, inter alia, that "the possibilities for appealing [were] manifestly time-barred under Italian law ...". On the same day he also wrote to the German Ministry of Foreign Affairs and the Italian Ministry of Justice.

In his letter to the German Ministry he requested its assistance in securing, as soon as possible, the rectification or the annulment of the Savona judgment.

In his letter to the Italian Ministry he claimed that he had not received any information in his own language on the trial and had been unable to defend himself because neither the indictment nor the judgment had been notified to him. He asked what possibilities of appealing against the decision were open to him.

On 5 October the Italian Ministry replied that he could lodge an appeal against the judgment outside the normal time-limits (hereinafter referred to as a "late appeal"; see paragraph 26 below), if the notification to him had not been lawfully made, and seek a retrial.

The applicant did not avail himself of either of these possibilities.

23. The German Ministry of Foreign Affairs instructed the Consulate General of the Federal Republic of Germany at Genoa to determine whether there was any possibility of appealing against the judgment of 1 July 1981. As the first result of its communications with the Savona court, the Consulate forwarded to the applicant, on 10 July 1989, a photocopy of the Italian text of the judgment, which was for the most part handwritten. Mr Brozicek acknowledged receipt of this text by a letter dated 18 July 1984.

II. DOMESTIC LAW

A. Judicial notification

24. A judicial notification is the document by which the judicial authorities inform the person suspected of having committed an offence that an investigation has been opened and invite him to appoint a defence lawyer

of his choice and to provide an address for service. It must specify the legal provisions infringed and the date of the alleged offence.

25. The investigating judge, in the event of a "formal" investigation, or the public prosecutor, where the investigation is "summary", must send the notification at the very beginning of their investigation (Articles 304 and 390 of the Code of Criminal Procedure).

The notification must be sent by registered letter requiring acknowledgment of receipt. If the letter is not delivered because the addressee is untraceable (irreperibile), a bailiff must serve the notification in accordance with the normal procedure (Articles 168-175 of the Code of Criminal Procedure).

B. Notifications, trial in absentia (contumacia) and "late appeal" (appello apparentemente tardivo)

26. In its Foti and Others judgment of 10 December 1982 and its Colozza judgment of 12 February 1985 (Series A no. 56, p. 12, §§ 33-36, and Series A no. 89, p. 11, §§ 18-19, and pp. 12-13, §§ 21-23) the Court gave a brief description of the Italian legislation then in force as regards the notification to a person or an accused who is "untraceable", trial in absentia (contumacia) and "late appeal" (appello apparentemente tardivo).

In this regard Article 177 bis of the Code of Criminal Procedure provides as follows (translation from the Italian):

> "Where there is precise information in the documents in the proceedings as to the place where the accused resides abroad, the Public Prosecutor or trial judge (pretore) shall send him by registered letter notification of the proceedings against him with an invitation to declare or otherwise give notice of an address for service in the place where the proceedings are conducted. This formality shall neither suspend nor delay the proceedings.
>
> Where the accused's address abroad is unknown or where he has not declared or otherwise given notice of an address for service or if the information provided by him is insufficient or inadequate, the judge or the public prosecutor shall make the order (decreto) provided for in Article 170.
>
> The above provisions shall not apply where the issue of an arrest warrant is mandatory."

The second sub-paragraph of Article 170 states that (translation from the Italian):

> "The judge or the public prosecutor ... shall take a decision appointing a defence lawyer to act for the accused where he does not yet have one in the place where the proceedings are conducted and ordering that notification which has proved or proves impossible to carry out be effected by means of lodging the relevant documents at the registry of the judicial organ before which the proceedings are pending. The defence lawyer shall be informed without delay of any such notification."

The possibility of lodging a "late appeal" was at the time derived from judicial interpretation of Articles 500 and 199 of the Code of Criminal Procedure, according to which (translation from the Italian):

Article 500

"In the case of in absentia proceedings, an extract of the decision or judgment shall be notified to the accused who may lodge against it any appeal that would have been open to him in respect of a judgment delivered in adversarial proceedings, subject to the provisions of the third paragraph of Article 199."

Article 199

"...

For the decisions or judgments referred to in Article 500, the period within which the accused may appeal shall begin to run from the notification of the decision or judgment.

..."

On the basis of these provisions the courts had consistently held that if the notification of an extract of a decision or judgment delivered in absentia was not lawful because it had been wrongly assumed that the accused did not intend to participate in the proceedings, the person concerned could, within three days, contest such notification and challenge the finality of the decision in question. If he was successful in so doing, he was accorded a new time-limit within which to appeal against the said decision.

The new Code of Criminal Procedure, which came into force on 24 October 1989, now makes express provision for this possibility of "re-establishing the time-limit".

PROCEEDINGS BEFORE THE COMMISSION

27. Mr Brozicek lodged his application with the Commission on 7 May 1984 (no. 10964/84). He alleged a breach of Article 6 § 3 (a) (art. 6-3-a) of the Convention inasmuch as he had not been informed in a language which he understood of the nature and the cause of the accusation against him. He also complained of a violation of Article 6 § 1 (art. 6-1) on the ground that, since he had been tried in absentia without having any opportunity to defend himself, he had not had a fair trial.

28. The Commission declared the application admissible on 11 March 1987. In its report of 22 March 1988 (Article 31) (art. 31), it expressed the opinion that there had been a violation of Article 6 § 3 (a) (art. 6-3-a) (by eleven votes to one, with two abstentions) and of Article 6 § 1 (art. 6-1) (by

thirteen votes, with one abstention). The full text of its opinion and of the two separate opinions accompanying it is reproduced as an annex to this judgment*.

AS TO THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

29. According to the Government, Mr Brozicek had three domestic remedies available to him which he failed to exhaust. These were: the right to lodge a "late appeal"; the right to apply for a review of the compatibility of Articles 170 and 177 bis of the Code of Criminal Procedure with Articles 10 and 24 of the Constitution; and the possibility, with regard to the complaint concerning the use of language, of pleading, at the stage of the proceedings brought before the Savona Regional Court and thereafter, the nullity of the judicial notification and of other documents relating to the investigation.

A. Admissibility

30. In accordance with its established case-law, the Court has jurisdiction to examine preliminary objections of this kind. However, amongst other conditions, the State in question must have raised them before it not later than the expiry of the time-limit laid down for the filing of its memorial (Rule 47 § 1 of the Rules of Court).

The second limb of the Government's submission does not satisfy this requirement as regards the possibility of relying on Article 10 of the Constitution. To this extent, it must therefore be dismissed as out of time (see, inter alia, the Barberà, Messegué and Jabardo judgment of 8 December 1988, Series A no. 146, p. 27, § 56).

B. The merits of the remainder of the objection

1. A "late appeal"

31. In the Government's view, the applicant could have entered a "late appeal" in order to contest the lawfulness of the notification to him of an

* Note by the Registrar. For practical reasons this annex will appear only with the printed version of the judgment (volume 167 of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

extract of the judgment of 1 July 1981 by lodgement with the court registry and, consequently, to challenge the finality of the decision in question. This would have made it possible for him first to raise the question of the application in his case of the rules concerning accused persons residing abroad whose whereabouts are known and who have no address for service in the place where the proceedings are conducted (second possibility envisaged under the second paragraph of Article 177 bis of the Code of Criminal Procedure, see paragraph 26 above), and then to appeal against his conviction.

The Commission considered nevertheless that the shortness of the time-limit to be complied with - three days from the notification of the judgment, or from the date on which the person concerned had adequate knowledge thereof - made the exercise of such a remedy purely theoretical in the present case.

32. The only remedies that Article 26 (art. 26) of the Convention requires to be exhausted are those that are available and sufficient and relate to the breaches alleged. It falls to the respondent State to establish that these various conditions are satisfied (see, inter alia, the Ciulla judgment of 22 February 1989, Series A no. 148, p. 15, § 31).

In the circumstances of the case, the Court does not consider that the appeal in question was sufficiently available. At the time, the possibility of bringing such an appeal was not expressly provided for in the legislation, but was based only on judicial interpretation of Articles 500 and 199 of the Code of Criminal Procedure in the version then in force (see paragraph 26 above). In addition, in view of the fact that the judgment of 1 July 1981 was not notified to Mr Brozicek in person,the point of time at which the three-day period for lodging notice of intention to appeal began to run was open to doubt. This was acknowledged to some extent by the Government inasmuch as they stated that it was "probable" that the dies a quo was not 5 May 1984 but a date in July 1984, when the applicant received a copy of the judgment (see paragraph 23 above).

To avoid all risk, the applicant would have had to lodge notice of his intention to appeal within the three days following 5 May, which he would have been able to do only if, within this time, he had consulted a lawyer, or some other person, conversant with Italian criminal procedural law. In the Court's view, he could not reasonably have been required to do so, especially since when he learned of his conviction the judgment had been final for a number of years.

33. Nor does the "late appeal" appear capable of remedying in this case the violations alleged.

The appeal court would have had to have declared it admissible before it was competent to review the conviction. To this end, it would have been necessary for the applicant to satisfy the appeal court that the Savona

Regional Court had been wrong to conclude that he had not wanted to give an address for service in that town.

Moreover, the case-law cited by the Government does not establish that the remedy in question could have been effective in Mr Brozicek's case. In this respect, the Court refers to its Colozza judgment of 12 February 1985 (Series A no. 81, p. 16, § 31).

2. Application for review of the compatibility of Articles 170 and 177 bis of the Code of Criminal Procedure with Article 24 of the Constitution

34. In the Government's submission, the applicant could at any time have requested a review of the compatibility of Articles 170 and 177 bis of the Code of Criminal Procedure with Article 24 of the Constitution. By so doing he would have "reactivated the proceedings".

The Court would observe that in the Italian legal system an individual is not entitled to apply directly to the Constitutional Court for a review of the constitutionality of a law. Only a court which is hearing the merits of a case has the possibility of making a reference to the Constitutional Court, at the request of a party or of its own motion. Accordingly, such an application cannot be a remedy whose exhaustion is required under Article 26 (art. 26) of the Convention.

Furthermore, the application would in practice have had to be attached to a "late appeal", which the Court has found not to be sufficiently available and effective in this case (see paragraphs 32-33 above).

3. The possibility of pleading the nullity of the judicial notification and other documents relating to the investigation

35. According to the Government, the applicant could have pursued in the domestic courts his complaint concerning the use of Italian in the judicial notification or in the notice prescribed in Article 177 bis of the Code of Criminal Procedure.

The Court has difficulty in seeing how he could have formulated such a complaint in the Savona Regional Court since he maintains that he was not duly informed of the proceedings instituted against him. As regards the possibility of raising the question in connection with a "late appeal", the Court refers to the last sub-paragraph of the preceding paragraph.

4. Conclusion

36. It follows from the foregoing that the preliminary objection is in part out of time and for the rest unfounded.

II. THE ALLEGED VIOLATIONS OF ARTICLE 6 (art. 6)

37. Mr Brozicek alleged the violation of paragraphs 1 and 3 (a) of Article 6 (art. 6-1, art. 6-3-a), which are worded as follows:

> "In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing by [a] tribunal ... .
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> ... ."

It is in the Court's view appropriate to examine in the first place the arguments based on paragraph 3 (a) (art. 6-3-a).

A. Paragraph 3 (a) (art. 6-3-a)

38. The applicant claimed that he had not been informed, "in a language which he [understood]", of the institution of criminal proceedings against him. In addition, the judicial notification of 23 February 1976 (see paragraph 16 above) did not in his opinion contain "information in detail" of the "nature and cause of the accusation".

The Court notes that this document constituted an "accusation" within the meaning of Article 6 (art. 6) (see the Corigliano judgment of 10 December 1982, Series A no. 57, p. 14, § 35).

39. After having received the judicial notification of 23 February 1976, the applicant wrote to the Savona Public Prosecutor's Office, telling them that he had difficulty in understanding the contents of this communication for linguistic reasons. He requested it to use his mother tongue or one of the official languages of the United Nations (see paragraph 16 above).

The judicial authorities did not reply to him. They continued to draw up the documents intended for Mr Brozicek only in Italian. They made no reference whatsoever to the language problem, except in the judgment of 1 July 1981, in which the Savona Regional Court attributed to the accused a fair knowledge (discreta padronanza) of Italian.

40. According to the Commission, the authorities did not take steps to verify that the applicant understood Italian, but merely presumed that he understood the substance of the judicial notification. The Government disputed this interpretation of the facts. They contended that it was absolutely clear from the documents in the case that Mr Brozicek had had an adequate knowledge of Italian.

41. In the Court's opinion, it is necessary to proceed on the basis of the following facts. The applicant was not of Italian origin and did not reside in Italy. He informed the relevant Italian judicial authorities in an unequivocal manner that because of his lack of knowledge of Italian he had difficulty in understanding the contents of their communication. He asked them to send it to him either in his mother tongue or in one of the official languages of the United Nations.

On receipt of this request, the Italian judicial authorities should have taken steps to comply with it so as to ensure observance of the requirements of Article 6 § 3 (a) (art. 6-3-a), unless they were in a position to establish that the applicant in fact had sufficient knowledge of Italian to understand from the notification the purport of the letter notifying him of the charges brought against him.

No such evidence appears from the documents in the file or the statements of the witnesses heard on 23 April 1989 (see paragraphs 5-7 above). On this point there has therefore been a violation of Article 6 § 3 (a) (art. 6-3-a).

42. On the other hand, the Court considers the allegation that the judicial notification of 23 February 1976 did not identify "in detail ... the nature and cause of the accusation" to be unfounded. This communication was intended to inform Mr Brozicek of the institution of proceedings against him; it sufficiently listed the offences of which he was accused, stated the place and the date thereof, referred to the relevant Articles of the Criminal Code and mentioned the name of the victim.

B. Paragraph 1 (art. 6-1)

43. The applicant also relied on paragraph 1 of Article 6 (art. 6-1), claiming that he had not been given the possibility of participating in the trial in order to defend himself against the charges brought against him. He had therefore not received a fair hearing of his case.

44. The Commission shared this view. The Government, however, contested it. They maintained that the applicant had been informed of the existence of criminal proceedings by the notification of 23 February 1976 (see paragraph 16 above) and then by the communication, which he had not accepted, of 17 November 1978 (see paragraph 17 above). Accordingly, in their view, he had deliberately refused to answer for his actions in court and to exercise his rights.

45. The evidence does not establish that Mr Brozicek intended to waive his right to participate in the trial, a right "not expressly mentioned in paragraph 1 of Article 6 (art. 6-1)" but whose existence is shown by the "object and purpose of the Article (art. 6) taken as a whole" (see the Colozza judgment, cited above, Series A no. 89, p. 14, § 27). The present judgment has already found that the judicial notification of 23 February

1976 did not satisfy one of the requirements of Article 6 § 3 (a) (art. 6-3-a) of the Convention. As regards that of 17 November 1978, the Court is not satisfied that that Mr Brozicek was aware of it. It was returned to the secretariat of the Savona Public Prosecutor's Office as unclaimed (see paragraph 17 above), in circumstances which remain uncertain. Furthermore, the expert consulted at the Government's request concluded that the acknowledgment of receipt did not bear the applicant's signature (see paragraphs 5, 8 and 17 above).

Again, the President of the Savona Regional Court did not seek to notify Mr Brozicek in person of the summons to appear before his court. In accordance with Italian law, he ordered that it be lodged with the court registry (see paragraph 19 above), so that Mr Brozicek was deemed to have been informed of each document relating to the proceedings and was judged in absentia.

46. Accordingly, the trial was not fair within the meaning of Article 6 § 1 (art. 6-1).

III. APPLICATION OF ARTICLE 50 (art. 50)

47. Under Article 50 (art. 50),

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

Mr Brozicek first requested the Court to declare the judgment of 1 July 1981 void and to order that it be struck out of his record. However, the Court is not so empowered under the Convention (see, inter alia, the Hauschildt judgment of 24 May 1989, Series A no. 154, p. 23, § 54).

The applicant also sought compensation for damage and the reimbursement of costs and expenses.

A. Damage

48. In the first place, he maintained that he had sustained pecuniary damage which he assessed at 1,300,000 Swiss francs. His claim in this respect is however based on circumstances unrelated to the violations found, and cannot therefore be entertained by the Court.

He also claimed 200,000 Swiss francs for non-pecuniary damage. The Court recognises that the violations found must have caused him some degree of damage of this nature, but the finding of infringements of Article 6 (art. 6) constitutes in this case sufficient just satisfaction in this respect.

B. Costs and expenses

49. Mr Brozicek sought, in addition, the reimbursement of the costs and expenses incurred by him before the Commission and subsequently the Court, in so far as they were not covered by the legal aid accorded to him.

According to the Government, the fact that he had received legal aid meant that this claim had to be dismissed. In any event the applicant had not shown that his defence had necessitated the expenses indicated by him.

50. During the proceedings before the Commission, Mr Brozicek took the initiative of having two examinations carried out by handwriting experts. They cost him 1,027.27 Deutschmarks, which should be reimbursed to him, because in this case they constituted a normal means of obtaining evidence.

The Court also admits the fee - 1,900 Swiss francs - paid to a Swiss lawyer instructed by the applicant, after the case had been referred to the Court, to secure a friendly settlement with the respondent Government.

Finally, Mr Brozicek listed a number of expenses relating to travel, in particular to Strasbourg, photocopies, printing, telephone communications, postal charges, translation and the purchase of material. He calculated such expenses at a total of 5,260 Deutschmarks. In the Court's view, however, certain of these items were not genuinely necessary. Making an equitable assessment in accordance with Article 50 (art. 50), it awards the applicant 3,000 Deutschmarks under this head.

51. It follows from the foregoing that the respondent State is to pay to the applicant a total of 4,027.27 Deutschmarks and 1,900 Swiss francs.

FOR THESE REASONS, THE COURT

1. Dismisses by fifteen votes to five the objection of non-exhaustion of domestic remedies as regards the possibility of a "late appeal";

2. Dismisses unanimously the remainder of the said objection;

3. Holds by fifteen votes to five that there has been a violation of paragraphs 3 (a) and 1 of Article 6 (art. 6-3-a, art. 6-1) of the Convention;

4. Holds unanimously, as regards the non-pecuniary damage sustained by the applicant, that the present judgment constitutes in itself adequate just satisfaction for the purposes of Article 50 (art. 50);

5. Holds unanimously that the respondent State is to pay to the applicant in respect of costs and expenses 4,027.27 Deutschmarks (four thousand

and twenty-seven marks and twenty-seven pfennigs) and 1,900 (one thousand nine hundred) Swiss francs;

6. Dismisses unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 19 December 1989.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 § 2 (art. 51-2) of the Convention and Rule 52 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- joint dissenting opinion of Mr Thór Vilhjálmsson, Mr Pettiti, Mr Russo, Mr De Meyer and Mr Valticos;

- separate opinion of Mr Martens.

R.R.
M.-A.E.

JOINT DISSENTING OPINION OF JUDGES THÓR VILHJÁLMSSON, PETTITI, RUSSO, DE MEYER AND VALTICOS

(Translation)

We consider that the domestic remedies were not exhausted in this case.

The applicant could have appealed against the judgment convicting him delivered in Savona[1]. He did not do so.

He chose to apply to the Commission as early as 7 May 1984[2], barely two days after having learnt, on 5 May 1984, of the existence of the judgment[3] and more than two months before the earliest point at which the period prescribed for filing an appeal could have begun to run, since he did not in fact receive a copy of the judgment until between 10 and 18 July 1984[4].

If he was able to set in motion the Convention machinery so quickly, he could equally have taken the necessary steps to institute proceedings in the Italian appeal court in good time.

His conduct is all the more difficult to understand because he has himself a certain amount of legal knowledge, since he was, as he has stated, a Doctor of Laws and former lawyer[5]. It was for him to obtain information and advice concerning the remedies available to him and he had ample time to do so. He had known, since 1976, that criminal proceedings had been instituted against him in Italy[6] and did not have to contact the Ministry of Justice[7] to obtain such information and advice. Moreover, it appears clearly from the facts of the case that the applicant never gave an address for service and never had the intention of so doing[8]. Contrary to the view which the majority seems to take in this respect[9], there could therefore be very little doubt as to the admissibility of the appeal.

* * *

As the applicant did not give the respondent State the opportunity to remedy, in its domestic legal system, the violation of his rights, in so far as there was a violation, we consider, for this very reason, that it is not possible to find such a violation.

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[1] Paragraph 26 of the judgment.
[2] Paragraph 1 of the judgment.
[3] Paragraph 21 of the judgment.
[4] Paragraph 23 of the judgment.
[5] See his letter of 8 July 1988, requesting leave to present his own case before the Court.
[6] Paragraph 16 of the judgment.
[7] Paragraph 22 of the judgment.
[8] Paragraphs 17 to 20 of the judgment.
[9] Paragraph 33 of the judgment.

SEPARATE OPINION OF JUDGE MARTENS

1. The present case is a striking example of the practical consequences of the doctrine which was adopted by the Court in 1971 in its De Wilde, Ooms and Versyp judgment[1].

In that judgment the Court held that it had jurisdiction to examine preliminary objections as to admissibility, such as one based on non-exhaustion of local remedies, in so far as those objections had first been raised before the Commission. This doctrine has since been refined[2] and regularly applied[3].

The present case is rather simple as to its merits, but the preliminary objections which the respondent State reiterated before the Court raised difficult questions, both of interpretation of Article 26 (art. 26) of the Convention and of Italian law, and required, moreover, delicate factual assessments. Consequently the Chamber, after deliberations which occupied eleven judges for at least half a day, relinquished jurisdiction in favour of the plenary Court, whereupon twenty judges had to devote some further five hours to deliberations on these questions. This experience made me ask whether, under present conditions, the Court should abide by its aforementioned doctrine or should overrule its De Wilde, Ooms and Versyp judgment[4].

* * *

2. A court that is considering whether it should overrule its own case-law will have to ponder various aspects of that question. I will mention three. It will, firstly, have to assess whether the arguments invoked for the new ruling are definitely more convincing than those on which its existing case-law was based, for one should overrule only if one is convinced that the new doctrine is clearly the better law. Secondly, there is the policy side of the question to be looked into. Lastly, the court will have to consider how serious a blow overruling would be to legal certainty.

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[1] Judgment of 18 June 1971, Series A no. 12, pp. 29-31, §§ 47-55.

[2] See the Artico judgment of 13 May 1980, Series A no. 37, p. 12, § 24, and the Van Oosterwijck judgment of 6 November 1980, Series A no. 40, p. 13, § 25: "insofar as the respondent State may have first raised them before the Commission, in principle at the stage of the initial examination of admissibility, to the extent that their character and the circumstances permitted."

[3] See, for example, the Klass and Others judgment of 6 September 1978, Series A no. 28, p. 17, § 32, and, as the most recent instance, the Bricmont judgment of 7 July 1989, Series A no. 158, p. 27, § 73.

[4] As far as I am aware, there are no examples of explicit overruling in the Court's case-law. That does not mean, of course, that the Court would hold that it lacks power to overrule its own precedents; it did so implicitly in paragraph 78 of its above-mentioned De Wilde, Ooms and Versyp judgment where it in fact retracted what it had said in paragraph 24 of its Neumeister judgment of 27 June 1968 (Series A no. 8, p. 44). (I owe this reference to the kind help of our Registrar.)

I will make some remarks on each of these aspects.

* * *

3.1 In my opinion the arguments against the Court's aforementioned doctrine are definitely more convincing than those on which that doctrine was based.

3.2 The Court has based its doctrine mainly on the broad wording of Articles 45 and 46 (art. 45, art. 46) of the Convention and has inferred therefrom that "once a case is duly referred to it, ... the Court is endowed with full jurisdiction and may thus take cognisance of all questions of fact and of law which may arise in the course of the consideration of the case"[5] (my italics).

The various dissenters in the De Wilde, Ooms and Versyp case have already shown that this interpretation of the term "cases" ("affaires") in Article 45 (art. 45) is hardly compatible with the wording of Articles 31, 32 and 48 (art. 31, art. 32, art. 48) which rather seems to suggest that the term "case" ("affaire") means - as Judge Bilge put it - "the question whether there has or has not been a violation of the Convention"[6]. As those dissenters did not fail to stress, the economy of the Convention supports this construction of the term "case" ("affaire"): the system of the Convention would appear to be that it is for the Commission (exercising a judicial function) to make a final decision on admissibility and (exercising an advisory function) to express an opinion "as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention" (Article 31) (art. 31), whereupon the question "whether there has been a violation of the Convention" (Article 32) (art. 32) shall be finally decided either by the Committee of Ministers or by the Court. The Court's later case-law enhances this argument based on the system of the Convention by admitting that it is the Commission's decision on admissibility which "determines the object of the case brought before the Court" and by considerably qualifying its above-quoted ruling on the extent of its jurisdiction by the words "it is only within the framework so traced that the Court ... may take cognisance of all questions of fact or of law ..."[7] (my italics). But neither this acknowledgement nor the repeated stressing that the "framework" or "compass" of the case is decisively "delimited by the Commission's admissibility decision"[8] has induced the Court to abandon the aforementioned doctrine. Yet it would seem clear that this doctrine is hard

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[5] See the above-mentioned De Wilde, Ooms and Versyp judgment, p. 29, § 49.

[6] See the above-mentioned De Wilde, Ooms and Versyp judgment, p. 52; see to the same effect Judge Wold at p. 57.

[7] See the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 63, § 157. See also the Winterwerp judgment of 24 October 1979, Series A no. 33, p. 27, § 71.

[8] See the Johnston and Others judgment of 18 December 1986, Series A no. 112, p. 23, § 48.

to reconcile with the delimitative force of the Commission's decision on admissibility!

3.3 One can look at this argument based on the system of the Convention from yet another angle. The Court is not to act as a court of appeal from the Commission and has not been empowered to quash its decisions. It does not fit in with this system that (as is possible under the Court's doctrine) in one and the same case the Commission should reject the preliminary objection, accept the petition and express the opinion that there has been a violation, while the Court should find that objection well-founded and therefore hold that it is unable to take cognisance of the merits of the case. It is not to be assumed that the Convention makes it possible for a case to end with two contradictory decisions.

3.4 In its De Wilde, Ooms and Versyp judgment the Court also relied especially on the importance of the exhaustion rule which "delimits the area within which the Contracting States have agreed to answer for wrongs alleged against them before the organs of the Convention"[9]. It even went so far as to suggest that the observance of this rule was as important to States as the observance of the rights and freedoms guaranteed in the Convention was to individuals; it implied thereby that just as the question whether the latter rights had been respected is examined by both the Commission and the Court, so too the question whether local remedies have been exhausted should be examined by both Convention organs.

I cannot accept this equation. In my opinion there is a marked difference in kind between the fundamental rights and freedoms of individuals guaranteed in the Convention and the traditional privilege of States of being dispensed "from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system"[10]. The implied argument for a double control is therefore not only totally unconvincing for me, but rather militates against the Court's doctrine: that doctrine is apt to create the wrong impression that the rules of Article 26 (art. 26), rules that are mainly procedural devices for sifting purposes, are equal in status and importance to the rights and freedoms under the Convention.

3.5 There is a further - and in my eyes rather weighty - argument against the aforementioned doctrine of the Court: that doctrine creates a disparity between the parties, because when the Commission accepts a preliminary objection as to admissibility based on non-exhaustion of domestic remedies, the applicant (who, ex hypothesi, is a victim of a violation)[11] cannot attack that decision before the Court, but in the reverse case the supposedly wrong-

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[9] See p. 29, § 50.
[10] Quotation from the above-mentioned De Wilde, Ooms and Versyp judgment, p. 29, § 50.
[11] I refer to the working hypothesis mentioned in paragraph 27 of the aforementioned Van Oosterwijck judgment (cited in note 2).

doing State can. Under a convention which stresses that one of the basic principles of fair trial is equality of arms, that seems at least odd.

3.6 To round off I would draw attention to the fact that the aforementioned doctrine of the Court has also been criticised, sometimes rather severely, by quite a number of learned writers[12]. In my opinion this too is an aspect to be taken into account when considering whether or not the Court should overrule its De Wilde, Ooms and Versyp judgment.

* * *

4.1 Coming now to the policy side of the problem, I propose to consider various practical arguments pro and contra the doctrine under discussion.

4.2 The first practical argument that comes to mind is decidedly contra: it is very undesirable that an applicant, who after some years of battling has won his case before the Commission, should find himself, after a further rather long period of stress, denied a judgment on the merits.

4.3 A second practical argument is pro: it will be clear that the main rationale of Article 26 (art. 26) is to provide means for the task of sifting which Article 27 (art. 27) assigns to the Commission; it will also be clear that for the case-load of the Court it is not immaterial how the Commission interprets and applies the rules of Article 26 (art. 26). Therefore, there is a certain interest for the Court in being able to control the Commission in this respect.

It must be noted, however, that this argument is of a purely theoretical character. It is true that in 1971, when the De Wilde, Ooms and Versyp judgment was rendered, the Court may have felt some uncertainty as to whether or not the Commission held the same views as the Court with regard to the interpretation and the application of the principle of prior exhaustion of domestic remedies. But at that time the case-load of the Court was nearly non-existent[13], so that for practical purposes it would have been without any importance if the Commission were to have interpreted and applied Article 26 (art. 26) more leniently than the Court deemed fit. And now, nearly twenty years later - when the proper functioning of the Court would, having regard to its present case-load, be seriously endangered by such interpretation and application -, experience has taught that in this respect there do not exist serious differences of opinion between the

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[12] See, for example: Jacobs, The European Convention on Human Rights (1975), pp. 263/264; Pelloux, Annuaire français de droit international, 1972, pp. 444-445 (who rightly points out that the most likely interpretation of Article 45 (art. 45) is to assume that it refers to the conditions set out in Articles 46, 47 and 48 art. 46, art. 47, art. 48)); Trechsel, Zeitschrift für Schweizerisches Recht, 1975, pp. 422-423; A.A. Cançado Trindade, Human Rights Journal, 1977, pp. 149 et seq.; G. Cohen Jonathan, Cahiers de droit européen, 1979, p. 480; D. Sulliger, L'épuisement des voies de recours internes en droit international général et dans la Convention européenne des droits de l'homme (1979), pp. 152-154; Van Dijk and Van Hoof, Theory and practice of the European Convention on Human Rights (1984), pp. 123-128; Frowein-Peukert, Europäische Menschenrechtskonvention, p. 448.

[13] Since 1959 only 10 cases had been brought before the Court.

Commission and the Court: in all those years the Court has only twice come to a conclusion that differed from that of the Commission[14]!

4.4 A third, and in my view decisive, practical argument is contra. I refer again to the continuing and rather alarming increase in the Court's case-load which, were the Commission to become a semi-permanent body, would only become worse. This increase should, in my opinion, prompt re-thinking of accepted doctrines. Abandonment of the doctrine under discussion would result in a considerable saving of time and energy. This is because preliminary objections are argued before the Court in many cases and quite often raise difficult and therefore time-consuming questions: firstly it may be necessary to go very carefully over the files of the Commission to ascertain whether or not the objection has already been raised - in substance (!) - before the Commission; then, questions may arise as to the interpretation of the many subtly connected rules that we conveniently, but with some over-simplification, designate as the exhaustion rule; and, lastly, it may be necessary to go into intricate questions of domestic law and to make difficult factual assessments. Moreover, most of these questions will already have been answered by the other Convention organ, which has far more practice and therefore experience in this field than the Court. The time and energy spent on these questions could and should be devoted to the Court's specific task of ensuring the observance of the rights and freedoms guaranteed in the Convention.

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5. I then come to legal certainty. Of course it may be said that every overruling affects legal certainty, but there are differences of degree. A court should not overrule an interpretation of a rule of civil law on which society has based its contracts. But it would seem to me that the rules we are concerned with here do not enter into that very special category where overruling is almost unthinkable.

It may be true that without the rule of exhaustion some, or perhaps even many, Contracting States would hardly have been willing to accept the system of "the international machinery of collective enforcement established by the Convention"[15]. But one cannot seriously maintain that they accepted that machinery in the expectation that the observance of that rule would be tested twice. And even if somewhere reliance was placed on such an expectation, it would not seem to deserve protection: at least I cannot see that real State interests which are seriously worthy of protection would be harmed if the Court were to decide that, once the case is brought

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[14] See the Van Oosterwijck judgment, referred to in note 2, and the Barberà, Messegué and Jabardo judgment of 6 December 1988, Series A no. 146, pp. 28-29, § 59.

[15] Quotation from the Court's judgment of 23 July 1968 in the case "relating to certain aspects of the laws on the use of languages in education in Belgium", Series A no. 6, p. 35, § 10.

before it, respondent States would no longer be afforded an opportunity to escape from having to answer as to the merits.

* * *

6. Having considered these various aspects of the question whether, under present conditions, the Court should overrule its De Wilde, Ooms and Versyp judgment of 1971, I have come to the conclusion that it should be answered in the affirmative. For the sake of completeness I would like to add that it should, of course, not be inferred from the above considerations that in those - presumably rare - cases in which the non-exhaustion issue cannot be separated from the merits the Court would lack jurisdiction to take cognisance of that issue as well.

7. For these reasons I have voted in favour of rejecting the Italian Government's objections as to admissibility only under the proviso that in my opinion the Court ought to refuse to take cognisance of them.