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

COURT (PLENARY)

CASE OF DROZD AND JANOUSEK v. FRANCE AND SPAIN

(Application no. 12747/87)

JUDGMENT

STRASBOURG

26 June 1992

In the case of Drozd and Janousek v. France and Spain*,

The European Court of Human Rights, taking its decision in plenary session pursuant to Rule 51 of the Rules of Court and composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr J. CREMONA,
Mr Thór VILHJÁLMSSON,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr L.-E. PETTITI,
Mr B. WALSH,
Mr R. MACDONALD,
Mr C. RUSSO,
Mr R. BERNHARDT,
Mr A. SPIELMANN,
Mr J. DE MEYER,
Mr N. VALTICOS,
Mr S.K. MARTENS,
Mrs E. PALM,
Mr R. PEKKANEN,
Mr A.N. LOIZOU,
Mr F. BIGI,
Sir John FREELAND,
Mr A.B. BAKA,
Mr M.A. LOPES ROCHA,
Mr L. WILDHABER,
Mr J.A. CARRILLO SALCEDO, *ad hoc judge*,

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

Having deliberated in private on 23 January and 27 May 1992,

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

* Note by the Registrar: The case is numbered 21/1991/273/344. 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.

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 8 March 1991, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 12747/87) against the French Republic and the Kingdom of Spain lodged with the Commission under Article 25 (art. 25) on 26 November 1986 by Mr Jordi Drozd, a Spanish citizen, and Mr Pavel Janousek, a Czechoslovak citizen.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and the declarations whereby France and Spain recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether or not the facts of the case disclosed a breach by France of its obligations under Articles 5 and 6 (art. 5, art. 6) and by Spain of its obligations under Article 6 (art. 6).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicants stated that they wished to take part in the proceedings and designated the lawyer who would represent them (Rule 30).

3. Subject to the following, the Chamber to be constituted included ex officio Mr L.-E. Pettiti, the elected judge of French nationality, Mr J.M. Morenilla, the elected judge of Spanish nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). In a letter to the President of 18 March 1991 Mr Morenilla stated that he wished to withdraw pursuant to Rule 24 para. 2, as he had previously acted as the Agent of the Spanish Government before the Commission.

On 21 March the Registrar, on the President's instructions, asked the Agents of the French and Spanish Governments to inform him whether they considered that France and Spain had a "common interest" within the meaning of Rule 25 para. 1. They answered in the negative, on 4 and 5 April respectively.

Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and on 23 April, in the presence of the Registrar, drew by lot the names of six members of the Chamber, namely Mrs D. Bindschedler-Robert, Mr C. Russo, Mr A. Spielmann, Mr J. De Meyer, Mrs E. Palm and Mr R. Pekkanen (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). On 10 May the Agent of the Spanish Government informed the Registrar that Mr J.A. Carrillo Salcedo, professor at the University of Seville, had been appointed an ad hoc judge (Article 43 of the Convention and Rule 23) (art. 43).

4. Mr Ryssdal, through the Registrar, consulted the Agents of the French and Spanish Governments, the Delegate of the Commission and the lawyer

for the applicants on the organisation of the procedure (Rule 37 para. 1 and Rule 38). In accordance with the orders made in consequence, they filed their memorials on 4 November, 28 October, 21 November and 10 December 1991 respectively.

5. In letters received at the registry on 19 and 25 April and 17 June 1991, Mr F. Ruhlmann, a lawyer practising in Strasbourg, submitted applications on behalf of the Executive Council of the Principality of Andorra under Rules 37 para. 2 and 41 para. 1. On 25 September Mr J. Cremona, the Vice-President of the Court, replacing Mr Ryssdal, who was unable to attend, decided to grant him leave to submit written observations on the opinions expressed in the Commission's report of 11 December 1990; however, also on that day, the Chamber decided that as things stood it was not necessary to call him at the hearing.

The Registrar received the said observations on 29 November.

6. On 25 September the Chamber decided to relinquish jurisdiction forthwith in favour of the plenary Court (Rule 51). Mr L. Wildhaber, who took up his duties before the hearing, replaced Mrs Bindschedler-Robert, who had resigned from the Court (Rule 2 para. 3).

7. Mr Drozd (22 March 1991 and 2 January 1992), Mr Janousek (27 March and 6 December 1991) and the Agent of the French Government (3 January 1992) wrote to the Registrar with reference to whether it would be possible for the applicants to appear in person at the hearing despite the fact that they were in prison. The said Government stated that they waived reliance in the instant case on the declaration contained in their instrument of ratification, whose intention was to exclude persons in prison from the benefit of Article 4 para. 1 (a) of the European Agreement of 6 May 1969 relating to Persons Participating in Proceedings before the European Commission and Court of Human Rights.

8. On 14 January 1992 counsel for the applicants submitted a claim for just satisfaction.

9. As directed by the President, the hearing took place in public in the Human Rights Building, Strasbourg, on 21 January 1992. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the French Government

Mr J.-P. PUISSOCHET, Director of Legal Affairs,
Ministry of Foreign Affairs, *Agent*,
Mrs M.-R. D'HAUSSY, special adviser
to the Department of Legal Affairs, Ministry of Foreign *Affairs*,
Miss M. PICARD, magistrat
on secondment to the Department of Legal Affairs,
Ministry of Foreign Affairs,
Mr P. DARBEDA, magistrat

on secondment to the Department of Prison Affairs, Ministry of Justice,
Mrs C. COSSON, magistrat
on secondment to the Department of European and International Affairs, Ministry of Justice,
Mr J.-C. SACOTTE, magistrat, *Counsel*;
- for the Spanish Government
Mr J. BORREGO BORREGO, Head
of the Legal Department of Human Rights, Ministry of Justice, *Agent*,
Mr J.A. PASTOR RIDRUEJO, Head
of the International Legal Affairs Department, Ministry of Foreign Affairs, *Counsel*;
- for the Commission
Mr H. DANELIUS, *Delegate*;
- for the applicants
Mr M. BLOCH, avocat, *Counsel*,
Mrs Y. JUNIENT, avocate, *Adviser*.

The Court heard addresses by Mr Puissochet for the French Government, Mr Pastor Ridruejo for the Spanish Government, Mr Danelius for the Commission and Mr Bloch for the applicants, as well as their replies to its questions.

Mr Janousek was present in person at the hearing.

10. The Agent of the French Government produced various documents at the hearing and on 30 January.

On 24 February the Agent of the Spanish Government gave written answers to certain of the Court's questions.

AS TO THE FACTS

11. Mr Jordi Drozd, a Spanish citizen, and Mr Pavel Janousek, a citizen of Czechoslovakia, are serving a term of fourteen years' imprisonment in France, following their conviction by a court of the Principality of Andorra for an armed robbery committed in Andorra la Vella. Mr Drozd is in prison at Muret (Haute-Garonne), Mr Janousek at Yzeure (Allier).

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

12. On 6 March 1986 R., a representative of the jewellery firm of F. in Barcelona, was staying in a hotel in Andorra la Vella. While he was in his room he was attacked by two persons who he stated stole from him jewels worth 65,000,000 pesetas and 33,000 pesetas in cash.

A. Facts not in dispute

13. There are a number of facts which are not in dispute between the respondent Governments and the applicants.

1. The investigation

14. Following the criminal complaint brought by R. against persons unknown for armed robbery, the police arrested Mr Drozd and Mr Janousek on 7 March.

15. An investigation was then opened by one of the episcopal batlles (see paragraph 49 below).

The police arranged a first "identification test" at the police station, which was apparently unsuccessful, followed by a second test in the course of which R. identified the applicants as the persons who had committed the robbery. However, the defence criticised the conditions in which the "tests" in question had taken place.

2. The trial

16. The applicants were sent for trial and appeared before the Tribunal de Corts (see paragraph 51 below) on 26 March 1986. The court was composed of the Judge of Appeals, H.P., an honorary judge at the Toulouse Court of Appeal, nominated by the French Co-Prince, and two assessors, N.T., taking the place of the French veguer, by whom he had been appointed, an honorary judge at the Montpellier Court of Appeal, and F.B., the episcopal veguer, a Spanish jurist appointed by the Bishop of Urgel (see paragraph 52 below).

17. The court gave judgment on the same day, in Catalan, at a public hearing. The applicants were served with the Spanish text on the following day.

The court found both defendants guilty, sentenced them to fourteen years' imprisonment, and ordered them to be expelled from the territory of the Principality.

18. Mr Drozd and Mr Janousek lodged the only appeal which was then open to them, an appeal to the same judges to reconsider their ruling. This was dismissed by the Tribunal de Corts on 3 July 1986.

19. Both applicants chose to serve their sentences in France rather than Spain (see paragraph 56 below), and were presumably given by the French veguer's office a French translation of the judgment convicting them, this being the usual practice.

20. They did not bring an appeal (recurs de suplicació) to the Tribunal Superior de Corts, a new appeal procedure introduced by the decree of 13 July 1990 (see paragraph 54 below) and used, successfully on occasion, by other convicted defendants, including another client of their counsel. This decree, the text of which was not communicated to Mr Drozd and Mr

Janousek or their counsel, was published in the Butlletí Oficial del Principat d'Andorra on 21 July.

B. Contested facts

21. The respondent Governments and the applicants submitted differing versions of certain facts.

1. The presence of an episcopal battle at the court's deliberations

22. While conceding that they were unable to prove this, as they had obviously not been present, the applicants claimed that the episcopal batlle in charge of the investigation had been present at the deliberations of the Tribunal de Corts.

23. According to the respondent Governments, that was not the case, nor could it have been.

2. The inadequate linguistic knowledge of one of the members of the court

24. The applicants maintained that the French assessor had not had an adequate command of Spanish, still less of Catalan, the language in which the hearing was conducted, which deprived him of any real possibility of taking part in the proceedings.

25. The French Government stated that a knowledge of Catalan and at least an understanding of Spanish were among the criteria for the appointment of French judges called upon to carry out judicial functions in Andorra. The Government added that in the present case all three members of the court had been of Catalan origin, spoke and understood Catalan perfectly, and had made oral interventions during the hearing.

The Spanish Government noted that it was the practice of the Tribunal de Corts to put questions and receive answers in French or Spanish, if a defendant understood one of those languages (in this case both applicants understood Spanish) and did not ask for the assistance of an interpreter (it did not appear from the record of the hearing that they had so asked). At no time had Mr Drozd and Mr Janousek been questioned in Catalan.

3. The failure to "isolate" the witnesses and the victim before giving evidence

26. The applicants maintained that the witnesses had not been "isolated" before giving their evidence, and that the alleged victim had heard the statements of the defendants before he gave evidence.

27. The Government considered these claims to be incorrect, having regard to the provisions of Article 161 of the Andorran Code of Criminal Procedure in the version in force at the time.

4. The lack of assistance of an interpreter

28. Mr Janousek claimed that he had not had the benefit of the assistance of an interpreter during the investigative stage; the interprÉtation provided at the trial had been incomplete, and this had prevented him from taking an active part in the hearing and in particular from commenting on the witnesses' evidence.

29. According to the information given to the Commission by the Governments, an interpreter appointed by the Spanish authorities had been on duty during the entire proceedings, and there were no reasons for considering that the oral translations done by him had been inaccurate.

Before the Court, the Spanish Government produced documents showing that a German-speaking interpreter, and later another interpreter, had acted during the investigation. They conceded, however, that the record of the trial was silent on this point.

5. The lack of assistance of a lawyer

30. Finally, Mr Janousek complained that he had not had the assistance of a lawyer during the investigation.

31. The Governments stated that the applicants had been informed when they were charged of their right to nominate a lawyer of their choice to defend their interests, and that they had made use of this right.

II. THE ANDORRAN LEGAL SYSTEM

32. Andorran public law derives from two pareatges or arbitral awards of 1278 and 1288. These asserted the principle of equality of rights between the feudal overlords, namely the Count of Foix (whose rights were subsequently transferred to the King of France and later to the President of the French Republic) and the Bishop of Urgel. On the basis of these pareatges the overlords in the course of time granted privileges to the people of Andorra and issued decrees; these decrees were supplemented by customary law relating inter alia to the apportionment of powers among the institutions of the Principality.

33. In civil cases the Andorran courts apply customary law as set out in the Manual digest of 1748 and the Politar of 1767, supplemented by Roman law, Catalan law and canon law. In criminal matters the relevant sources of law are various decrees of the veguers and customary law, which were codified in 1984. Finally, the relevant laws in administrative cases are the provisions issued by the parish councils and the General Council of the Valleys and those decreed by the Permanent Delegates (see paragraphs 40, 42 and 44 below).

A. Institutions

1. The Co-Princes

34. Andorra is ruled by two Co-Princes, the President of the French Republic and the Bishop of Urgel (province of Lleida/Lerida, Spain).

The latter has no public function in Spain, and since the agreement between the Holy See and the Kingdom of Spain of 19 August 1976 his appointment has been the exclusive responsibility of the Pope. Canon law does not impose any conditions as to nationality, and the bishop is very often a Spanish or Andorran citizen. According to the Spanish courts (Audiencia Nacional, judgments of 3 October 1990 and 25 April 1991), he enjoys the privileges and immunities which foreign heads of state have under international law.

The Co-Princes' rights and prerogatives are attached to their offices and are consequently acquired and lost with them.

(a) Their powers

(i) Joint powers

35. According to consistent and constant practice, the Co-Princes exercise their powers jointly. This general rule is based on custom and demonstrates the equality between the Co-Princes; there are only very limited exceptions to it.

(ii) Sole powers

36. Each Co-Prince also has powers which are his own. These are the appointment of a veguer and Permanent Delegate, and of the members of one of the two "Senates" of the Higher Court (see paragraphs 37, 39 and 66 below); the General Council of the Valleys, however, has the right of nomination of the batlles (see paragraph 49 below) and the notaries, which limits the freedom of the episcopal Co-Prince and the French veguer. There is also the right to decide on appeals en queixa - survivals from the feudal right of petition - brought against administrative regulations and decisions or laws passed by the General Council of the Valleys.

(b) Their representatives

(i) The veguers

37. The veguers are the direct representatives of the Co-Princes in Andorra; they reside there and have Andorran nationality during their term of office. They are appointed for an indefinite period, the French veguer (a

diplomat) by the French Co-Prince and the episcopal veguer (generally a Spanish or Andorran jurist) by the episcopal Co-Prince.

38. They have powers of a legislative nature which are exercised by means of decrees and cover a number of fields: the organisation of civil and criminal justice and procedure; immigration; public safety, public order and the protection of morals. They also carry out tasks of an executive nature: command of the Andorran militia, which includes all men aged from sixteen to sixty years, and of the Andorran police; issue or refusal of long-term residence permits to foreigners; validation of Andorran passports; examination of requests for acquisition of nationality. Finally, they have judicial functions: they carry out investigations for decisions of the Co-Princes on appeals en queixa (see paragraph 36 above) and are entitled to sit on the Tribunal de Corts (see paragraph 52 below).

(ii) The Permanent Delegates

39. The Permanent Delegates, an institution set up at the end of the last century, are not resident in Andorra. The French Permanent Delegate is the Prefect of the Department of Pyrénées-Orientales and is assisted in his duties by part of the prefect's office. The office of episcopal Permanent Delegate is traditionally given to the Vicar General of the Diocese of Urgel.

40. The two Delegates have legislative, judicial and administrative powers, which they exercise jointly on behalf of the Co-Princes. In particular, they issue decrees - sometimes very important ones - in the "constitutional" field (for example, the creation of the parish of Les Escaldes Engordany in 1978 and the establishment of the Court of Taxes in 1979) and the "administrative" field other than economic (for example, the Code of Andorran Nationality of 1977).

2. The "popular" representative bodies

41. The Principality also has a number of institutions whose members are elected by universal suffrage.

(a) The parish councils

42. The territory of Andorra is divided into seven parishes, each of which is administered by a council (comu) consisting of ten to fourteen people elected for four years, who choose from among their number a consol major and a consol minor. It manages the parish's affairs and property, and also has power to make regulations. Appeals to the Government can be brought against its decisions.

(b) The quart councils

43. A quart is a village or hamlet and exists in certain parishes only. Its council consists of one member from each household (casa), and the

members appoint a representative (llevador). In some cases it has administrative functions.

(c) The General Council of the Valleys

44. The origin of the General Council of the Valleys goes back to the creation of the Council of the Land in 1419. It was restructured in 1886 and again in 1981 and is now defined as "the political assembly most representative of the Andorran people". It has twenty-eight members (four per parish) who are elected for four years by all Andorrans over the age of eighteen. The members elect a syndic general (President) and a sub-syndic (Vice-President) and work through juntas (committees).

The General Council passes laws, approves the budget of the Principality and exercises oversight over the Government. In practice, the Co-Princes do not intervene in areas where it has competence, except when they are called on to decide an appeal en queixa (see paragraph 36 above).

The General Council chooses, from among its own members or from outside, the Chief Executive, who in turn appoints the other four to six members of the Executive Council. This institution was recently set up by the Co-Princes (decree of 15 July 1981 "on the process of institutional reform"). The Executive Council has a variety of duties: implementation of decisions of the General Council; proposing texts for adoption; preparation and subsequent implementation of the budget; management and supervision of the administration and public services.

The General Council may adopt, by at least nineteen votes, a motion of no confidence in the Executive Council.

(d) The Magna Assembly

45. The Magna Assembly (Assemblea magna) may be convened when decisions of exceptional importance are to be taken. It consists of the General Council, the consols and four other representatives from each parish, who are usually elected at a "meeting of the people".

B. The legal system

46. With the exception of the Court of Visura, which settles disputes between neighbours and is responsible to the General Council, the courts of Andorra have their legal basis in the Co-Princes' historic "right of justice" and are thus directly responsible to the Co-Princes.

The members of the lower courts are always of Andorran nationality, while those of higher courts are often of foreign origin, because of the smallness of the Principality and out of concern for preserving the independence of the judiciary.

47. As a general rule, judges are appointed by the Co-Princes.

The French Co-Prince traditionally selects French judges, either honorary judges or serving judges seconded by the Ministry of Justice, chosen with regard to personal competence, knowledge of Andorran law, knowledge of Catalan and understanding of Spanish.

The episcopal Co-Prince bases his choice on the criteria of competence, independence, lack of personal interests in Andorra and availability for service, judicial office in Spain being incompatible with the position of judge in Andorra, even on a part-time basis and for a fixed term.

1. Criminal justice

48. A decree of the veguers of 30 December 1975 laid the foundations of a new criminal justice system, providing in particular for the intervention of counsel and the establishment of a public prosecutor's office. A decree on criminal procedure followed on 10 April 1976. A Code of Criminal Procedure, based on the veguers' decrees and on customary law, was introduced in 1984 and amended on 16 February 1989.

(a) The institutions

(i) The batlles

49. The batlles are first-instance judges with criminal and civil jurisdiction, and also have other duties. They carry out investigations into crimes which have been committed, supervise the enforcement of court judgments pronounced in Andorra, and sit on the Tribunal de Corts as non-voting assessors (see paragraph 52 below).

Since the veguers' decree of 6 August 1977 they are four in number. The French veguer and the episcopal Co-Prince each appoint two of them, chosen from a list of seven names drawn up by the General Council of the Valleys. The persons appointed must have Andorran nationality.

(ii) The Court of Minor Offences

50. The Court of Minor Offences was established by the Co- Princes in 1988. It has first-instance jurisdiction over minor criminal cases and appeals against its judgments can be brought before the Tribunal de Corts.

(iii) The Tribunal de Corts

51. The Tribunal de Corts was until 15 October 1990 the supreme criminal court. It "judges ... all cases relating to offences committed on the territory of the Valleys, without difference or distinction of persons, and offences committed by Andorrans abroad" (Article 2 of the Andorran Code of Criminal Procedure). It also rules on appeals brought against judgments of the batlles.

52. The court is composed of three members, the Judge of Appeals and the two veguers.

The Judge of Appeals presides over the court, directs the proceedings and acts as the reporting judge who drafts the judgment. He decides alone on appeals concerning detention on remand. He is a French or Spanish judge appointed for five years by each Co-Prince alternately; he must have a knowledge of the law of the Principality and its official language, Catalan.

The veguers (see paragraphs 37-38 above) are entitled to sit but generally do not do so. The French veguer - a diplomat appointed by the French Co-Prince for an indefinite period - has since 1981 been substituted by a French judge, either honorary or seconded by the Ministry of Justice. The episcopal veguer has not sat since 22 April 1988 and now delegates his duties to a Spanish judge (see paragraph 16 above). The veguers or their substitutes need not be Andorran, nor need they be jurists, but they must speak Catalan. They are assisted by two batlles, two notaries who act as clerks of court, an usher and two rahonadors, who are delegated by the General Council of the Valleys, of which they are members.

53. The public prosecutor's office is composed of a fiscal general and an assistant fiscal general, who are appointed for five years by whichever of the Co-Princes has not appointed the Judge of Appeals.

(iv) The Tribunal Superior de Corts

54. By a decree of 12 July 1990, which had been in the course of preparation since 1981, the veguers established a new court, the Tribunal Superior de Corts, which consists of four judges appointed for five years by the Co-Princes and decides on appeals (recursos de suplicació) against judgments of the Tribunal de Corts.

On the following day they issued a further decree dealing with procedure, including the following transitional provisions:

> "1. Convicted persons who before the coming into force of the present decree have to serve or [as in the case of the applicants] are in the course of serving sentences of imprisonment as a result of judgments of the Tribunal de Corts may bring an appeal (recurs de suplicació) against such sentences to the Tribunal Superior within a period of two months from the coming into force of the present decree.
>
> 2. The present decree shall come into force on 15 October 1990."

(b) Enforcement of sentences

55. Article 234 of the Andorran Code of Criminal Procedure provides for two distinct systems of enforcement for sentences of imprisonment passed in Andorra: a convicted person serves his sentence in an Andorran prison if the sentence is less than three months, and in a French or Spanish prison in other cases.

(i) The choice of country of detention

56. In the latter case it is for the convicted person to choose between France and Spain. The choice is definitive and implies the tacit acceptance of the prison regime of the country chosen. This practice originates in customary law as traditionally applied since the twelfth century.

From 1979 to 1989, transfer to France was requested by 32 convicted persons and to Spain by 134. No prisoners from Andorra were admitted to French prisons in 1990 and 1991.

(ii) The French system

57. If a convicted person chooses France, as in the present case, enforcement of the sentence is governed by the provisions of the French Code of Criminal Procedure (circular of the Minister of Justice of 8 February 1983). Like any person convicted in a foreign country and transferred to France, he is entitled (according to the Government) to remission of sentence, prison leave and semi-imprisonment in the same way and subject to the same conditions as prisoners sentenced by a French court (Article D.505 of the Code of Criminal Procedure).

58. The judge responsible for the enforcement of sentences has sole jurisdiction to decide whether to grant the prisoner release on licence or to remit part of his sentence, within the legal limits.

If the term of imprisonment exceeds three years, it is for the Minister of Justice to grant release on licence. The Minister must first obtain the consent of the Tribunal de Corts (Article 253 of the Andorran Code of Criminal Procedure).

59. Under Article 710 of the French Code of Criminal Procedure, disputes relating to the enforcement of sentences are brought before the court which pronounced the sentence, in this case the Andorran court.

(iii) Pardons

60. An individual pardon can only be granted by the two Co-Princes acting jointly.

61. Collective pardons do not apply to prisoners sentenced by Andorran courts who serve their sentences in France, as they were expressly excluded by a decree of the President of the French Republic of 1985. The presidential decrees of 17 June 1988 and 13 June 1989 did authorise pardons to take effect if this was allowed by international agreements ratified by France, but there is no specific arrangement with Andorra on this point.

(iv) Amnesties

62. Only the Andorran authorities have jurisdiction to grant an amnesty. In addition, the Tribunal de Corts can vary its own decision by reducing the

sentence and granting genuine release on licence, which is referred to as "provisional release".

2. Civil justice

63. There are three levels of jurisdiction in civil matters.

64. The batlles (see paragraph 49 above) have first-instance jurisdiction, as in criminal cases.

65. The Judge of Appeals (see paragraph 52 above) hears appeals against the decisions of the batlles.

66. The court of final jurisdiction is the Higher Court of Andorra which consists of two "senates", the Higher Court of Perpignan and the Higher Court of the Mitre.

The former consists of two ex officio members (the President of the Perpignan tribunal de grande instance and the French veguer, who has not sat for many years now) and two members appointed for four years by the French Co-Prince (a lawyer from the Perpignan bar and a person with knowledge of the language and customs of Andorra). It does not apply French law or follow French procedure; in particular, it is not subject to review by the Court of Cassation.

The latter senate consists of a President, a Vice-President and four judges (vocals), appointed by the episcopal Co-Prince.

The two senates have their seats at Perpignan and Urgel respectively, but carry out their functions in Andorra.

III. THE INTERNATIONAL "STATUS" OF ANDORRA

67. The status in public international law of the Principality of Andorra is striking by its originality and ambiguity, so much so that it is often regarded as an entity sui generis.

The practice followed in recent years suggests that there is now agreement between the Co-Princes to regard themselves as equals in the conduct of Andorra’s international relations. Andorra has entered into a number of bilateral and multilateral relations in this field.

A. Bilateral relations

1. Relations with France

68. Relations between Andorra and France do not fit into the pattern of relations between sovereign States. They have never taken the form of international agreements, as the French Co-Prince is the President of the French Republic and the French Government have always refused to recognise the Principality’s statehood. Such relations take a number of

forms: unilateral French acts, such as the establishment of French schools; administrative arrangements, such as those dealing with social security, telephone networks and customs regimes; de facto relationships, sometimes deriving from custom (this is the case with the enforcement of certain sentences outside Andorra - see paragraphs 55-62 above), sometimes based on administrative or judicial practice (decisions of the Andorran courts have the status of res judicata in France and do not require an exequatur for enforcement).

The French Government also place a unit of police (gendarmerie) at the disposal of Andorra.

Finally, France does not have a consulate in the Principality. French nationals in Andorra are dealt with by the prefecture of the Pyrénées-Orientales department.

2. Relations with Spain

69. Relations between Andorra and Spain follow a similar pattern. They feature unilateral Spanish acts, such as the royal decree of 10 October 1922 regulating trade between the Principality and the Kingdom of Spain, and bilateral arrangements such as the agreements of an administrative type relating to social security.

The Spanish Government also make certain facilities available to the Mitre. Thus a unit of the guardia civil is stationed in Andorra: the members of this unit are no longer responsible to their original administrative department and the episcopal veguer can effectively veto their appointment or presence in Andorra; the Spanish authorities are responsible for their pay, while the costs of equipment and operational expenditure in respect of administrative and in particular consular functions are borne by the Andorran budget.

There is no Spanish consulate in Andorra. The episcopal veguer acts as de facto consul for Spanish citizens.

3. Relations with States other than France and Spain

70. Andorra does not maintain diplomatic relations with any other State.

On the other hand, it has entered into consular relations with the following eight countries: Argentina, Belgium, Germany, Italy, Switzerland, the United Kingdom, the United States of America and Venezuela. It does not have its own consular representation, however, and its nationals are protected by the French and Spanish authorities in this respect.

B. Multilateral relations

1. International organisations

71. Andorra is not a member of any intergovernmental international organisation.

On 15-18 October 1990 the Committee of Ministers of the Council of Europe "asked the Secretary General to contact the two Co-Princes to define the areas suitable for co-operation between the Council of Europe and the Principality of Andorra". In so doing it was giving an "interim response" to Recommendation 1127 (1990) on the Principality of Andorra, adopted by the Consultative Assembly of the Council of Europe on 11 May 1990.

2. International agreements

72. Andorra has acceded to two international agreements, the Universal Copyright Convention (Geneva, 1952) and the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 1954).

3. International conferences

73. Since the Universal Copyright Conference (Geneva, 1952) Andorra has regularly taken part in meetings of UNESCO. It has also sent delegations to three conferences: the conference on the protection of cultural property in the event of armed conflict (The Hague, 1954), the conference to revise the Universal Copyright Convention (Paris, 1971), and the conference on the protection of phonographic recordings (Geneva, 1971).

Since 1973, on the order of the Co-Princes, the Principality's representatives at these conferences have been appointed by the veguers jointly. Four members of the General Council of the Valleys now accompany the said representatives; the Head of Government is the spokesman of the delegation.

4. The European Communities

74. For some decades Andorra was not part of the Communities' customs territory.

On 20 March 1989 the Council of the European Communities adopted a directive inviting the (Brussels) Commission to negotiate an agreement with Andorra with a view to creating a customs union for industrial products.

The agreement in question came into being on 28 June 1990 in the form of an exchange of letters, and entered into force on 1 January 1991. The Principality's letter was signed by the representatives of the Co-Princes and by the Head of Government.

IV. THE OUTLOOK FOR CHANGE

75. The development of the institutions and international "status" of the Principality of Andorra has for some time now been the subject of discussions and plans.

76. The French Co-Prince referred to these on 26 November 1991 in a speech made at the Élysée Palace in Paris on the occasion of the presentation of the questia, a symbolic sum of money which is paid to him in odd years:

> "Here we are once more gathered together, in accordance with a custom which, as you know, is several centuries old, in order to give expression to the continuity and strength of the links which unite the people of Andorra with their Co-Prince.
>
> We set great store by this ceremony, which for the sixth time gives me the opportunity to receive here the elected representatives of the Andorran people and to discuss the affairs of the Principality with them personally. I am especially pleased to welcome today those of them whom I have not yet had the pleasure of meeting since their assumption of their high offices.
>
> By coming here for the payment of the questia you demonstrate the depth of your faithfulness to our traditions. This sentiment is not one of nostalgia, or so I presume, for you are at the same time resolutely looking to the future; it is your firm will to play a full part in the progress of the modern world. The remarkable economic progress of the Valleys during recent decades bears witness to this, as does the modernisation of your institutions, which was embarked upon ten years ago and has gained new momentum in the last two years.
>
> Since our last meeting in 1989 a decisive step has been taken for the future of the Principality. This relates to the constitution which the elected representatives of Andorra have wished the Principality to be endowed with. At the last ceremony of the questia I stated my willingness to encourage developments in the internal and international order, where they responded to the legitimate aspirations of the people of Andorra. In this spirit I naturally gave my approval and support to the unanimous request of the General Council of the Valleys to draft a constitution with the agreement of the episcopal Co-Prince and the active support of the Andorran representatives, whose high sense of the public interest I wish to salute here. Agreement was reached on the working method, the objectives and the structure of the draft constitution.
>
> Thus there have already been written into the draft, on which much work has already been done, such fundamental principles as the establishment of a democratic sovereign State under the rule of law, recognition of the sovereignty of the people, respect for the territorial organisation of the parishes which has come down from history, the guarantee of rights and freedoms, the institution of a parliamentary system provided with rules to ensure the authority of the Government and an effective control by the General Council of the Valleys.
>
> You are likewise resolved to simplify and unify the organisation of the legal system, while preserving the greatest respect for its independence, in order better to ensure and guarantee the rights of those subject to the law, taking as your inspiration the

principles and rules defined in the European Convention on Human Rights; no doubt while awaiting the accession of the Principality to that Convention.

I fully agree with these principles and I am delighted at the significant results obtained so far. I congratulate you on them.

I have confidence in your will and your capacity for carrying on the work of drafting the constitution at the speed at which it has progressed until now, thanks to the excellent spirit of co-operation which inspires the joint meetings of your delegation and those of the two Co-Princes. I am indeed convinced that we can bring this task to a successful conclusion with a view to swiftly and democratically putting in place the constitution drawn up jointly by the General Council of the Valleys and the Co-Princes. This method of permanent consultation has demonstrated its effectiveness. The tripartite commission has met nine times since April 1991, at the House of the Valleys in Andorra. Its work, which has invariably been constructive, has made it possible to avoid misunderstandings and overcome all sorts of difficulties.

We do not conceal the facts, however. You are within sight of the goal, but the path to follow to reach it is still difficult. That is inevitable; indeed, it is natural. Every innovative work, especially in the political field, is accompanied by hopes and fears, and arouses the necessary democratic debate, as well as legitimate ambitions and fervent personal commitment.

I do not think that anything will weaken your determination. Mountain-dwellers like you know how to save their breath and measure their step according to the length or difficulty of the ascent. You are experienced men, patient men. You know, and you do not need me to tell you, that once the way to the summit has been decided on by common consent, there is no choice other than to succeed or fail together.

You have very recently provided proof of your sense of your responsibilities by coming together despite your political differences so as the better to overcome the obstacles and attain the goal you have set yourselves.

The ambitious and proud people you represent know the value of effort and of perseverance. I cannot encourage you too much to continue with your task, certain as I am that you will know how to legislate, govern, administer, give justice and in short assume full responsibility for the Principality, which will soon be completely devolved to you.

You will doubtless, at least to start with, have to act with boldness, but also with care to preserve the richness of your traditions and the identity of the parishes which originally joined together to form Andorra.

In this task, on which considerable progress has now been made, I am with you so that social justice may prevail, for without that there can be no true economic progress, and so that the elected representatives of Andorra may exercise fully the internal sovereignty of Andorra, without which there can be no international recognition.

France and no doubt Spain, as your neighbours, will surely be the first to establish relations of friendship and co- operation with the future State of Andorra.

The signing of the association agreement between the EEC and Andorra was the first step towards the integration of the Principality into the European Economic Area. Other steps will follow. The interest shown by you in particular in the regulation of the banking profession and the control of international flows of money demonstrates your concern not to stay apart from the new forms of solidarity which are coming into being so that law and fairness can prevail in the international order.

You will henceforth be fully responsible for the Principality. The new institutions will be the cement, freely consented to, holding your nation together. Your freedom, given expression in elections, will strengthen your traditions and allow your country to join the international community while still affirming the power of its special features, its history and culture.

That, gentlemen, is what I wished to say to you. You will be so kind as to pass the essence of it on to the people of Andorra, so now we have a few moments left in which to stay together and improve our mutual acquaintance, passing some time in the useful, fruitful and friendly way which our relationship demands." (French Ministry of Foreign Affairs, Bulletin d'information of 27 November 1991 (231/91))

PROCEEDINGS BEFORE THE COMMISSION

77. In their application to the Commission (no. 12747/87) of 26 November 1986 Mr Drozd and Mr Janousek put forward two series of complaints.

(a) The first series of complaints, based on Article 6 (art. 6) of the Convention, were directed against France and Spain, who were regarded as responsible at international level for the conduct of the Andorran authorities.

i. Certain complaints were common to both applicants, in reliance on Article 6 paras. 1 and 3 (d) (art. 6-1, art. 6-3-d). These were that they had not had a fair trial before the Tribunal de Corts because:

- two of the judges were the representatives of the Co-Princes in Andorra and the superior officers of the police (see paragraph 16 above);
- the judge in charge of the investigation was present at the court's deliberations in chambers (see paragraph 22 above);
- one of the judges knew little Spanish and less Catalan, Catalan being the language of the proceedings (see paragraph 24 above);
- the witnesses had not been "isolated" before giving evidence and the victim of the theft had heard the defendants' statements before he gave evidence (see paragraph 26 above).

ii. The other complaints were made by Mr Janousek alone, in reliance on sub-paragraphs (b), (d) and (e) of Article 6 para. 3 (art. 6-3-b, art. 6-3-d, art. 6-3-e). He complained that he had not received the assistance of an interpreter or a lawyer during the investigation, nor a complete translation during the trial (see paragraphs 28 and 30 above).

(b) The second group of complaints, based on Article 5 para. 1 (art. 5-1) of the Convention, were directed against France alone. Both applicants considered that their imprisonment in France after being convicted by an Andorran court was "unlawful" as there was no provision of French law relating to the enforcement of such judgments.

78. The Commission declared the application admissible on 12 December 1989. In its report of 11 December 1990 (Article 31) (art. 31) it expressed the opinion that there had not been a violation of Article 6 (art. 6) either by France (ten votes to six) or by Spain (twelve votes to four), nor had there been a violation of Article 5 para. 1 (art. 5-1) by France (eight votes to eight, with the President's casting vote). The complete text of its opinion and of the six separate opinions contained in the report is reproduced as an annex to this judgment*.

FINAL SUBMISSIONS TO THE COURT

79. In their memorial the French Government asked the Court to "declare the application introduced by Mr Jordi Drozd and Mr Pavel Janousek inadmissible and, in the alternative, ill-founded".

80. The Spanish Government for their part made the following submissions:

> "Neither France nor Spain may be considered as States responsible for the actions of the Andorran judicial authorities.
>
> Consequently it is not relevant to examine the question of the alleged violation of Article 6 (art. 6) of the Convention.
>
> In conclusion, there has been no violation by either Spain or France of Article 6 (art. 6) of the Convention."

81. In his written observations, the Delegate of the Commission asked the Court "to dismiss the [French] Government's objection based on Article 26 (art. 26) of the Convention".

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* Note by the Registrar: For practical reasons this annex will appear only with the printed version of the judgment (volume 240 of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

AS TO THE LAW

I. THE COURT'S JURISDICTION TO EXAMINE THE MATTER FROM THE POINT OF VIEW OF ARTICLE 6 (art. 6)

82. Mr Drozd and Mr Janousek complained that they had not had a fair trial before the Tribunal de Corts. Mr Janousek also claimed that he had not had the assistance of an interpreter or a lawyer during the investigative stage, nor a complete translation during the hearing. They relied on Article 6 (art. 6) of the Convention, which reads as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (b) to have adequate time and facilities for the preparation of his defence;
>
> (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;
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

They both regarded France and Spain as responsible at international level for the conduct of the Andorran authorities.

83. In the opinion of the two respondent Governments and the Commission, on the other hand, the conviction of the applicants by a criminal court of the Principality of Andorra did not entail responsibility on the part of France and Spain with respect to Article 6 (art. 6).

The Governments raised several preliminary objections on this point, as they had done before the Commission, while the Commission declared the application admissible but then decided that it did not have jurisdiction to examine the merits of the case from the point of view of the Article (art. 6) in question.

A. The objection of lack of jurisdiction ratione loci

84. The two respondent Governments and the Commission agreed in considering that the Convention did not apply on the territory of Andorra, despite having been ratified by France and Spain.

85. In the opinion of the French Government the President of the French Republic embodied "a duality in his person", to use an expression from an opinion of the French Conseil d'État of 27 January 1953; he exercised his functions as Co-Prince of Andorra on a personal basis (just as the King of France once did) and not in the name of the French State or the French people, and was not their mandatary or representative in this context; the consequence of this autonomy was that France did not exercise any sovereignty over the Valleys and could not enter into commitments on their behalf.

86. The Spanish Government maintained that only a declaration of territorial extension made under Article 63 (art. 63) of the Convention would have been capable of binding Spain with respect to Andorra; however, there would be a legal obstacle to the making of such a declaration, as the international relations of Andorra were the exclusive responsibility of the Co-Princes jointly.

87. The Commission emphasised the complex and unusual nature of the status of the Principality in public international law, and stressed two points: firstly, the entity in question, often described as sui generis, did not form part of either France or Spain, so that the Convention could not be regarded as automatically applicable on its territory; secondly, the practice of recent years appeared to reflect agreement between the Co-Princes to regard themselves as equals in the exercise of the international functions of Andorra, with the effect that neither France nor Spain had jurisdiction of their own to act on behalf of the Principality.

88. The applicants maintained that Andorra formed a "vacuum of sovereignty" which was filled by the French Co-Prince, who was an emanation of French sovereignty; international treaties, such as the Convention, which had been ratified by France were therefore also valid for Andorra.

89. The Court agrees in substance with the arguments of the Governments and the opinion of the Commission. It also takes into consideration certain circumstances which were not mentioned, or only mentioned briefly, by those appearing before it.

To begin with, the Principality is not one of the members of the Council of Europe, and this prevents it being a party to the Convention in its own right (Article 66 para. 1) (art. 66-1). It could no doubt have sought to be admitted as an "associate member" of the organisation under Article 5 of the Statute; if its application had been accepted by the Committee of Ministers,

it would have had the right, as Saarland had in 1950, to sign and ratify the Convention. But it appears never to have taken any steps to do this.
Secondly, the territory of Andorra is not an area which is common to the French Republic and the Kingdom of Spain, nor is it a Franco-Spanish condominium.

Moreover, the relations between the Principality and France and Spain do not follow the normal pattern of relations between sovereign States and do not take the form of international agreements. The Court nevertheless notes that the development of the institutions of Andorra, if continued, might allow Andorra to "join the international community", as the French Co-Prince said on 26 November 1991 (see paragraph 76 above).

In short, the objection of lack of jurisdiction ratione loci is well-founded.

90. This finding does not dispense the Court from examining whether the applicants came under the "jurisdiction" of France or Spain within the meaning of Article 1 (art. 1) of the Convention because of their conviction by an Andorran court.

B. The objection of lack of jurisdiction ratione personae

91. The term "jurisdiction" is not limited to the national territory of the High Contracting Parties; their responsibility can be involved because of acts of their authorities producing effects outside their own territory (see the Commission's decisions on the admissibility of applications no. 1611/62, X v. the Federal Republic of Germany, 25 September 1965, Yearbook, vol. 8, p. 158; no. 6231/73, Hess v. the United Kingdom, 28 May 1975, Decisions and Reports (DR) no. 2, p. 72; nos. 6780/74 and 6950/75, Cyprus v. Turkey, 26 May 1975, DR 2, p. 125; nos. 7289/75 and 7349/76, X and Y v. Switzerland, 14 July 1977, DR 9, p. 57; no. 9348/81, W. v. the United Kingdom, 28 February 1983, DR 32, p. 190).

The question to be decided here is whether the acts complained of by Mr Drozd and Mr Janousek can be attributed to France or Spain or both, even though they were not performed on the territory of those States.

92. According to the respondent Governments and the Commission, the Tribunal de Corts and the other Andorran courts cannot be regarded as French, Spanish or Franco-Spanish, nor even as institutions subject to effective control by France or Spain or both.

93. The French Government did not accept that France could be considered responsible for the judicial acts of Andorra on the grounds that the courts of the Principality included French judges and were under the control of the French courts.

On the first point, they acknowledged that serving or retired French judges did carry out some judicial functions in Andorra. However, they made certain observations with respect to them. They were in a minority, as the batlles were Andorran citizens, and they invariably acquired Andorran

nationality when taking up their office and lost it at the end of their service. If they were still serving judges, the Ministry of Justice placed them at the disposal of the French Co-Prince, who then proceeded to appoint them. More generally, the practice of seconding officials belonged to a long French tradition of judicial cooperation - in particular with Monaco and with African States - and of the independence of the judges in question with respect to their country of origin. Moreover, the Higher Court of Perpignan (see paragraph 66 above) was not a de facto French civil court, as it had a different composition from that of a French court and did not apply French law or follow French procedure.

On the second point, the Government stated that the French courts had no direct or indirect power of supervision over judgments and decisions given in the Principality. They conceded, however, that different views had been taken in the case-law as regards the legal analysis of relations between France and Andorra with respect to jurisdiction. Thus the first civil division of the Court of Cassation had held that the formality of an exequatur was not needed for the enforcement of Andorran judgments in France (decisions of 6 January 1971, Elsen et autre c. Consorts Bouillot and c. Boudet, Bulletin civil [Bull.] 1971, I, no. 2, pp. 1-2; decision of 8 February 1977, Boudet c. compagnie Le Patrimoine et autre, Bull. 1977, I, no. 69, pp. 55-56). This interprÉtation had not been followed by the criminal division (judgment of 10 February 1987, unreported) or the second civil division (judgment of 27 October 1966, Armengol c. Mutualité sociale agricole de l'Hérault, Bull. 1966, II, no. 874, p. 609), and had been rejected by several courts of appeal (Versailles, 10 October 1983, Consorts Courtiol c. Chappard, Gazette du Palais 1984, jurisprudence, pp. 229-231, with comments by Mr Bommart and Mr Gautron; 10 October 1983, Gauvain c. Chabard; Paris, 20 March 1991, Fortuny Soler). The Conseil d'État (decision of 1 December 1933, Société Le Nickel, Recueil Lebon 1933, p. 1132; opinion of 27 January 1953) and the Jurisdiction Disputes Court (Tribunal des Conflits) (decision of 2 February 1950, Radiodiffusion Française c. Société de gérance et de publicité du poste de radiodiffusion Radio Andorre, Recueil Lebon 1950, p. 652) did not accept that Andorran courts and authorities had any French character.

94. The Spanish Government argued that the Tribunal de Corts, in common with the other Andorran courts, represented an emanation of the Co-Princes' historic "right of justice"; it gave its rulings in their name and not on the basis of French and Spanish sovereignty. The episcopal veguer, a member of that court who sat in the present case (see paragraphs 16 and 52 above), was appointed by the episcopal Co-Prince, the Bishop of Urgel; the bishop was a private person, whose appointment had since 1976 been the exclusive responsibility of the Holy See and who might very well not possess Spanish nationality. Neither he nor his representatives in Andorra could thus engage the responsibility of the Kingdom of Spain.

95. The applicants for their part claimed that France at least had responsibility for the administration of justice in Andorra. This was so in particular in their case, as the Tribunal de Corts had included an honorary judge of the Toulouse Court of Appeal, as Judge of Appeals, and an honorary judge of the Montpellier Court of Appeal, sitting as an assessor (see paragraph 16 above). Both had been appointed directly or indirectly by the French Co-Prince, and had permitted various violations of Article 6 (art. 6) of the Convention; in addition, they had tolerated the participation in the proceedings of the episcopal veguer, who also had legislative and executive powers.

96. The Court, like the Commission, accepts the arguments of the Governments. Whilst it is true that judges from France and Spain sit as members of Andorran courts, they do not do so in their capacity as French or Spanish judges. Those courts, in particular the Tribunal de Corts, exercise their functions in an autonomous manner; their judgments are not subject to supervision by the authorities of France or Spain.

Moreover, there is nothing in the case-file which suggests that the French or Spanish authorities attempted to interfere with the applicants' trial.

Finally, it should be recalled that the secondment of judges or their placing at the disposal of foreign countries is also practised between member States of the Council of Europe, as is demonstrated by the presence of Austrian and Swiss jurists in Liechtenstein.

97. In short, the objection of lack of jurisdiction ratione personae must also be upheld.

98. This conclusion means that it is not necessary to examine the other preliminary objections brought by the French and Spanish Governments on this point.

II. ALLEGED VIOLATION OF ARTICLE 5 PARA. 1 (art. 5-1)

99. The applicants claimed that they were victims of a violation of Article 5 para. 1 (art. 5-1) of the Convention, which reads, as far as relevant:

> "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> ..."

They argued that their detention in France was unlawful for want of a legal basis, and was against ordre public (public policy) in the absence of any control by the French courts.

A. The preliminary objection of the French Government

100. The French Government objected, as they had done before the Commission, that the complaint was inadmissible on the grounds of failure to exhaust domestic remedies.

The Court, referring to its consistent case-law (see, as the most recent authority, the B. v. France judgment of 26 March 1992, Series A no. 232-C, p. 45, paras. 34-36), considers that it has jurisdiction to examine the objection, despite the contrary opinion of the Commission.

101. The French Government argued that Mr Drozd and Mr Janousek had neglected two remedies which were available to them before the French courts and would have given them the opportunity to refer to Article 5 (art. 5) of the Convention: bringing criminal proceedings, joining in as civil parties, against the officials or judges who were responsible for their detention; or bringing an action for a flagrantly unlawful act (voie de fait) by the said officials or judges.

102. The applicants admitted that they had not made use of either of these possibilities, but argued that they could not have remedied the situation complained of.

103. The Court, in agreement with the Commission, finds that the aim of the remedies in question is to obtain compensation for damage caused by deprivation of liberty and to impose sanctions on public officials. While they may have the indirect effect of putting an end to a person's detention, they have not hitherto brought about such a result where the detention originates from a decision by an Andorran court. In such cases, as the Government themselves pointed out before the Commission, the French courts do not regard themselves as having jurisdiction to assess the lawfulness of criminal convictions pronounced in the Principality.

The objection must therefore be dismissed.

B. The merits of the complaint

104. The lawfulness of the detention raises two distinct but closely linked questions in this case: firstly, the question of whether there was a sufficient legal basis in French law; and secondly, the question of whether the French courts should have exercised any control in respect of the judgment pronounced in Andorra.

1. The legal basis of the detention in issue

105. The applicants considered that their detention in France was unlawful; it lacked a legal basis, as there was no French statutory provision, nor any international treaty which permitted the enforcement on French territory of criminal convictions pronounced in the Principality of Andorra.

106. The Government did not deny that these elements were absent, but in their opinion an adequate legal basis was provided by international custom and by the French and Andorran domestic law which implemented that custom.

The custom that persons convicted by Andorran courts served their sentences in French or Spanish prisons dated back to the Middle Ages. It had continued without interruption since then, and until the present case had never been challenged. It was indeed of a bilateral and local character, and admittedly linked a State with an entity which did not have legal personality in international law, but it nevertheless constituted a compulsory rule which created reciprocal rights and obligations.

As for French law, it included a law, no. 84-1150 of 21 December 1984, on the transfer to France of persons convicted and imprisoned abroad, and this law had inserted into the Code of Criminal Procedure the new Articles 713-1 to 713-8. Although the only hypothesis mentioned was an "international convention or agreement", it also applied in the case of a custom. It was fleshed out by instructions to prison establishments issued by the Minister of Justice.

Andorran law for its part included a relevant provision, Article 234 of the Code of Criminal Procedure, which had replaced Article 112 of the decree on criminal procedure of 10 April 1976, which had been applicable at the time of the applicants' trial. It offered a convicted person the choice of country (France or Spain) in which to serve his sentence if it exceeded three months' imprisonment.

107. For reasons similar to those set out in paragraphs 89 and 96 above, the Court considers that it does not have jurisdiction to review the observance of Andorran legal procedures, or more generally to review the lawfulness of the applicants' deprivation of liberty in terms of the laws of the Principality. It merely notes that the Tribunal de Corts followed the procedure laid down by Andorran law, not by the French Code of Criminal Procedure, passed sentences provided for in Andorran legislation and not in the French Criminal Code, and pronounced a judgment which could not be appealed against before the French Court of Cassation.

As for compliance with French law, the Court considers this to have been shown. The Franco-Andorran custom referred to above, dating back several centuries, has sufficient stability and legal force to serve as a basis for the detention in issue, notwithstanding the particular status of the Principality in international law. Moreover, there is no reason to doubt that the said detention was in accordance with the procedures prescribed by French law, especially as the applicants did not challenge before the French courts the validity of the custom in question and the corresponding provisions of French law.

2. The necessity of a control by the French courts of the conviction in issue

108. The applicants claimed that their detention was also contrary to French public policy (ordre public), of which the Convention formed part; the French courts had not carried out any review of the judgments of an Andorran court whose composition and procedure had not complied with the requirements of Article 6 (art. 6).

109. The Government argued that a distinction should be drawn between the lawfulness of detention under Article 5 para. 1 (art. 5-1) and the lawfulness of the conviction from the point of view of Article 6 (art. 6); the former could be assessed only by reference to the internal law of the country of detention. If the authorities of that country were obliged to assure themselves of the latter, in the case of a trial which had taken place abroad, the result would be to make the transfer of prisoners extremely difficult, or even impossible. It would also have a paradoxical effect, in that, as it would not be possible to retry the defendant in the receiving country, it would have to be left to the country which had been found responsible for breaching the Convention to enforce the sentence itself. Besides, the Principality would itself have to accommodate the prisoners who are now in France and Spain, and would thus have to provide itself with the appropriate institutions and personnel.

In any event, the French Code of Criminal Procedure did provide for an administrative and - to a certain extent - judicial review of the transfer. This safeguard was more than a mere formality, since if the sentence imposed abroad was more severe in its nature or extent than that provided for in French law, the criminal court would, if the matter were referred to it by the public prosecutor or the convicted person, substitute the corresponding penalty in French law.

Furthermore, the French authorities could refuse a transfer in the case of a serious and flagrant breach of French ordre public or of the fundamental rights of the defence, such as to deprive the judgment of legal validity.

110. The Court, like the Commission, considers that in this case the Tribunal de Corts, which pronounced the conviction of Mr Drozd and Mr Janousek, is the "competent court" referred to in Article 5 para. 1 (a) (art. 5-1-a). As the Convention does not require the Contracting Parties to impose its standards on third States or territories, France was not obliged to verify whether the proceedings which resulted in the conviction were compatible with all the requirements of Article 6 (art. 6) of the Convention. To require such a review of the manner in which a court not bound by the Convention had applied the principles enshrined in Article 6 (art. 6) would also thwart the current trend towards strengthening international cooperation in the administration of justice, a trend which is in principle in the interests of the persons concerned. The Contracting States are, however, obliged to refuse their co-operation if it emerges that the conviction is the result of a flagrant

denial of justice (see, mutatis mutandis, the Soering v. the United Kingdom judgment of 7 July 1989, Series A no. 161, p. 45, para. 113).

The Court takes note of the declaration made by the French Government to the effect that they could and in fact would refuse their customary co-operation if it was a question of enforcing an Andorran judgment which was manifestly contrary to the provisions of Article 6 (art. 6) or the principles embodied therein. It finds confirmation of this assurance in the decisions of some French courts: certain indictments divisions refuse to allow extradition of a person who has been convicted in his absence in a country where it is not possible for him to be retried on surrendering to justice (see, for example, the decision of the Limoges Court of Appeal, 15 May 1979, cited in the Bozano v. France judgment of 18 December 1986, Series A no. 111, p. 10, para. 18), and the Conseil d'État has declared the extradition of persons liable to the death penalty on the territory of the requesting State to be incompatible with French public policy (see, for instance, the Fidan judgment of 27 February 1987, with submissions by Government Commissioner Jean-Claude Bonichot, Recueil Dalloz Sirey 1987, jurisprudence, pp. 305-310, and the Gacem judgment of 14 December 1987, Recueil Lebon 1987, tables, p. 733).

In the Court's opinion, it has not been shown that in the circumstances of the case France was required to refuse its co-operation in enforcing the sentences.

3. Conclusion

111. In short, no violation of Article 5 para. 1 (art. 5-1) has been established.

FOR THESE REASONS, THE COURT

1. Holds unanimously that it does not have jurisdiction to examine the merits of the case from the point of view of Article 6 (art. 6);

2. Holds unanimously that it has jurisdiction to examine the preliminary objection of failure to exhaust domestic remedies raised by the French Government with respect to the complaint relating to Article 5 para. 1 (art. 5-1);

3. Dismisses unanimously the said objection;

4. Holds by twelve votes to eleven that there has not been a violation of Article 5 para. 1 (art. 5-1).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 26 June 1992.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) partly dissenting opinion of Mr Cremona;

(b) concurring opinion of Mr Matscher;

(c) joint dissenting opinon of Mr Pettiti, Mr Valticos and Mr Lopes Rocha, approved by Mr Walsh and Mr Spielmann;

(d) joint dissenting opinion of Mr Macdonald, Mr Bernhardt, Mr Pekkanen and Mr Wildhaber;

(e) dissenting opinion of Mr Russo.

R.R.
M.-A.E

PARTLY DISSENTING OPINION OF JUDGE CREMONA

Whilst agreeing with my colleagues on the Article 6 (art. 6) issue, I am afraid I cannot do the same with regard to that concerning Article 5 para. 1 (art. 5-1).

In a nutshell, I cannot accept that France, on whose territory the applicants were in fact detained (in pursuance of a centuries-old Franco-Andorran custom which, like the majority, I am prepared to consider a sufficient legal basis), can be justified in not exercising the minimum degree of control reasonable in the circumstances in respect of the Andorran conviction's compatibility with the Convention for the purposes of the lawfulness of the detention itself.

Indeed in the instant case it was not a question of ascertaining whether, for instance, a particular judge had been or had not been qualified to sit on the sentencing court, which in general for the receiving State is hardly practicable. The essential point here is that, because of its very close and special links with the Andorran judicial machine, France knew full well the organic composition of the sentencing court (actually comprising in this case a joint head of the police), which clearly tainted its independence and impartiality (see paragraphs 16 and 38). Indeed after this case the said joint head of the police stopped sitting on the court.

The importance of the last-mentioned principle (court's independence and impartiality) hardly needs stressing.

CONCURRING OPINION OF JUDGE MATSCHER

(Translation)

Although I entirely agree with the Court's conclusions with reference to section II B 2 of the "As to the law" part of the judgment, I consider that they should be based on different reasoning.

I concede to begin with that the applicants pleaded this aspect of their complaint from the point of view of Article 5 (art. 5). But the Court is free as regards the characterisation in law of the facts in issue, and is not bound by the characterisation put forward by those appearing before it.

The applicants considered firstly that their detention in France was unlawful because of the lack of a sufficient legal basis in French law.

That the applicants' detention in France was lawful within the meaning of Article 5 para. 1 (a) (art. 5-1-a) has been stated in section II B 1, with cogent reasons being given, and I have nothing to add to this.

The applicants also considered that there had been a violation of their rights under the Convention in that they were serving a sentence of imprisonment in a French penal establishment following a conviction pronounced by an Andorran court, a conviction which in their opinion had been obtained as a result of proceedings contrary to Article 6 (art. 6) of the Convention; consequently, by enforcing that judgment in the form of imprisonment without carrying out any review of its compatibility with the requirements of the Convention, France had been guilty of a violation of the Convention. On this point also they relied on Article 5 (art. 5).

The Court rightly concluded that there had been no violation of the Convention. But in my opinion what is in issue here is not Article 5 para. 1 (a) (art. 5-1-a), which requires only the lawfulness of the detention after conviction by a competent court (a condition which was satisfied) and not the lawfulness of the conviction, which is a question of Article 6 (art. 6) (which is not directly applicable in the present case, as was rightly stated in section I of the "As to the law" part of the judgment).

According to the Court's case-law, certain provisions of the Convention do have what one might call an indirect effect, even where they are not directly applicable. Thus, for example, a State may violate Articles 3 and/or 6 (art. 3, art. 6) of the Convention by ordering a person to be extradited or deported to a country, whether or not a member State of the Convention, where he runs a real risk of suffering treatment contrary to those provisions of the Convention (Soering v. the United Kingdom judgment of 7 July 1989, Series A no. 161); other hypothetical cases of an indirect effect of certain provisions of the Convention are also quite conceivable.

The same argument applies in reverse, so to speak; a contracting State may incur responsibility by reason of assisting in the enforcement of a foreign judgment, originating from a contracting or a non-contracting State,

which has been obtained in conditions which constitute a breach of Article 6 (art. 6), whether it is a civil or criminal judgment, and in the latter case whether it imposes a fine or a sentence of imprisonment.

This must clearly be a flagrant breach of Article 6 (art. 6) or, to put it differently, Article 6 (art. 6) has in its indirect applicability only a reduced effect, less than that which it would have if directly applicable (the theory of the "reduced effect" of ordre public with reference to the recognition of foreign judgments or other public acts is well known to international law).

There is no need here to develop general rules on the extent of the indirect effect of Article 6 (art. 6); in any event, in establishing the factors to be taken into consideration, the seriousness of the conviction and sentence pronounced abroad also plays a part.

To see whether the enforcement of a foreign judgment will clash with this indirect effect of Article 6 (art. 6), the requested State must, to be sure, carry out a review of some kind. Such a review is provided for in all legislative systems, the thoroughness of the review and the conditions of its exercise being left to the legislation of the requested State; it merely has to comply with the requirements of the Convention.

In the present case, by enforcing the judgment of the Andorran court - even though it would have been unlawful under Article 6 (art. 6) if that provision had been directly applicable - France acted in a manner in conformity with the Convention, as the unlawfulness in question was not of such a nature as to incur that State’s international responsibility in this respect.

In the contrary case, there would not be a violation of Article 5 (art. 5) but of Article 6 (art. 6) with respect to its indirect application. This is confirmed by the fact that the situation would be analogous if it was a case of the enforcement of a fine or a civil judgment, where Article 5 (art. 5) is clearly of no relevance.

A final argument in support of the thesis put forward in this concurring opinion: in domestic law too, that is to say, where there is no "international" factor, imprisonment following a conviction obtained under circumstances contrary to Article 6 (art. 6) would not as a general rule constitute a violation of Article 5 (art. 5); it would only be Article 6 (art. 6) which had been violated.

JOINT DISSENTING OPINION OF JUDGES PETTITI, VALTICOS AND LOPES ROCHA, APPROVED BY JUDGES WALSH AND SPIELMANN

(Translation)

We regret that we are unable to share the opinion of the majority of the Court with respect to Article 5 (art. 5) of the Convention.

With reference to Article 6 (art. 6), it is by an essentially formal argument that the conclusion has been reached that the Convention is not applicable in Andorra. Thus it is not applicable in Andorra as such since the "Principality" is not - or at least not fully - an international entity and in any case has not acceded to the Convention. Nor has France or Spain, who have ratified the Convention, declared it to be applicable in Andorra under Article 63 (art. 63), and indeed a declaration under that Article could not have been made with respect to Andorra, as Andorra is not strictly speaking a territory for whose international relations France or Spain is responsible.

This argument is unsatisfactory, however, as it would lead to the conclusion that not only is the Convention not applicable in Andorra, but also that it could not be applicable, as long as Andorra did not have legal personality in international law and remained, as the representative of the Spanish Government has said, a de facto regime, despite having become a party to certain international agreements.

How far can the President of the French Republic disregard France's international obligations with respect to human rights when he acts as Co-Prince of Andorra? How far can the Prefect of the Pyrénées-Orientales department do so when acting in his capacity as French Permanent Delegate in Andorra? Or the French judges who have been appointed by the Co-Prince or the veguer as "Andorran" judges and have temporarily received Andorran nationality by virtue of their office? Or the French gendarmes serving in Andorra? And the same questions, mutatis mutandis, could be asked with respect to the Andorran officials of Spanish nationality. The vacillation in French case-law as regards the status of Andorra from the point of view of France (see Charles Rousseau, Droit international public, volume II, Paris, 1974, pp. 345-346) is significant in this respect. Can one carry to extremes the argument that France and Spain play no part and hence have no international obligation as a result of the part played by their officers in the administration of Andorra? Can one accept that because the Convention has been ratified by France and Spain, human rights must be respected on both sides of the Pyrenees, but not in a small piece of land in the Pyrenees, despite the responsibilities these two countries exercise there, and despite the fact that this little territory would thus not be subject to the rules of international human rights law?

It seems difficult to accept that there is a watertight partition between the entity of Andorra and the States to which the two Co-Princes belong, when in so many respects (enforcement of sentences being a further example) those States participate in its administration.

It must thus be considered that the Co-Princes should even now use their authority and influence in order to give effect in Andorra to the fundamental principles of the European Convention on Human Rights, which has the force of law or even overrides national law in their own countries, and more generally is a basic element of the rule of law in Europe.

With reference to Article 5 (art. 5), as the case concerns a fact (a long term of imprisonment) which must take place in France, the Convention is certainly applicable. And it would be contrary to the Convention for a country which was bound by it to agree to deprive a person of his liberty where he had been convicted in another country under conditions which did not appear to be compatible with the Convention.

The French Co-Prince has moreover declared, in a passage quoted by the Agent of the Government, that the rule of law must be introduced in Andorra.

Although the member States of the Council of Europe claimed to hold out their system as a model for the countries of Eastern Europe, they would still be unable, despite the preamble to the Treaty and despite their joint commitment, to ensure respect for human rights in a small parcel of land, an area "outside the law", even though one of the Co-Princes was an authority of a member State.

France cannot at one and the same time refer to the bilateral customary law which has come into being for Andorra, decline to recognise an Andorran "State", and refuse to allow persons detained guarantees similar to those of the European Convention on the International Validity of Criminal Judgments and the Convention on the Transfer of Sentenced Persons, on the pretext that these conventions cannot be relied on against Andorra.

The French Co-Prince could intervene to alter the custom which he has jointly inherited and for which he is jointly responsible.

Indeed, the explanatory report on the European Convention on the International Validity of Criminal Judgments contains the following statement:

> "[A condition for enforcement of a foreign judgment is that] the decision must have been rendered in full observation of the fundamental principles of the Convention on Human Rights, notably Article 6 (art. 6), which lays down certain minimum requirements for court proceedings. Though it is not expressly stated in the text there was complete agreement that it was unthinkable to acknowledge the outcome of a trial as a valid judgment if it fell short of basic democratic requirements." (Council of Europe, Strasbourg 1970, p. 15)

The principle expressed in the passage cited retains its full validity in the Convention on the Transfer of Sentenced Persons of 21 March 1983.

Nor can it be objected that France has not signed that convention, as France has signed and ratified the Transfer Convention, which follows the same principles and is moreover intended to supplement, not to amend the Validity Convention.

The principle of good faith in international relations should induce France to comply with the obligations contained in both conventions.

The two States refuse to recognise Andorra as a sovereign State, and this means that foreigners convicted in Andorra are deprived of the guarantees provided for in the Convention on the Transfer of Sentenced Persons and the Convention on the International Validity of Criminal Judgments. It would simply be a matter for those two States, acting through the Co-Princes and veguers, to change the custom in the right direction.

Under Article 1 (art. 1) of the European Convention on Human Rights, France and Spain undertake to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention.

The system of enforcement of sentences is an integral part of the criminal procedure and the judgment is subject to the same principles of criminal procedure (see the Weeks v. the United Kingdom[1] and Van Droogenbroeck v. Belgium(2) judgments). Mr Drozd and Mr Janousek were therefore subject to the "jurisdiction" of France for Convention purposes.

Article 5 (art. 5) has been relied on in its entirety by the applicants. It should therefore also be examined with respect to the system of enforcement of sentences.

The acceptance by the two States of the enforcement of sentences on their territory implies a responsibility on their part, which cannot be avoided on the pretext that the Co-Princes act in a personal capacity.

As Mr Frowein rightly observed in his dissenting opinion:

> "France's responsibility could nevertheless be excluded if France had no real power to guarantee observance of the rights set out in the Convention (no. 6231/73, Ilse Hess v. the United Kingdom, decision of 28 May 1975, DR 2, pp. 72- 75). As its competence to legislate and its appointment of judges show, France does have the power to ensure that the Convention is respected."

Foreigners who have been convicted by a criminal court in Andorra and serve their sentences in France are treated in a way which has certain discriminatory aspects:

1. Such foreigners cannot benefit from a pardon, which can be granted to persons who have been convicted in France.

2. They cannot benefit from release on licence under the same conditions as other prisoners. In their case, such a measure has to be approved by the Andorran authorities after they have been duly consulted. In the absence of

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[1] Judgment of 27 March 1987, Series A no. 114. (2) Judgment of 24 June 1982, Series A no. 50.

a bilateral or trilateral convention and in the absence of defined criteria, there is no equality of treatment.

3. Under Article D.505 of the Code of Criminal Procedure, prisoners of foreign nationality are in theory subject to the same rules as those of French nationality, apart from release on licence.

Under Article 713.3 a sentence pronounced abroad is directly enforceable, but only by virtue of a multilateral convention or agreement.

The following comment by Mr Frowein in his dissenting opinion may be noted, by way of analogy:

> "... since Andorra is not an independent State but an entity under the jurisdiction of the two Co-Princes, we consider that Spain has a duty under the Convention to ensure that the Spanish Co-Prince exercises his authority in a way compatible with the Convention (see no. 13258/87, M. and Co. v. Germany, decision of 9.2.90, due to appear in DR)."

Every State has the duty and the positive obligation to ensure that persons detained on its territory are treated in a way which is not discriminatory. The Court's case-law in favour of prisoners' rights is consistent (c.f. the cases of Silver and Others v. the United Kingdom[2], Campbell v. the United Kingdom[3], etc.). The applicants are in a category of persons detained who are discriminated against in comparison to those detained as a result of convictions pronounced by French courts.

Finally, a finding of a violation would not entail the prisoners' release, but merely their return to Andorra. The Co- Princes and veguers would have to use their influence so that appeal proceedings would be possible and the composition of the Andorran courts would be altered in future.

For the above reasons we consider that there has been a violation of Article 5 (art. 5) of the European Convention on Human Rights by France.

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[2] Judgment of 25 March 1983, Series A no. 61.
[3] Judgment of 25 March 1992, Series A no. 233.

JOINT DISSENTING OPINION OF JUDGES MACDONALD, BERNHARDT, PEKKANEN AND WILDHABER

We share the opinion of the majority that neither France nor Spain can be made responsible, under the European Convention on Human Rights, for the condemnation of the applicants by the Andorran court. It is to be regretted that the Convention is not applicable in the territory of Andorra, and that the organs of that entity are not bound by it, but, for the reasons explained in the judgment, this lacuna cannot be eliminated by making the two States responsible, solely on the basis that the Co-Princes are closely connected with these countries.

We also agree with the majority that the practice to execute Andorra prison sentences in France or Spain has an adequate legal basis founded on long-standing custom.

As soon as the applicants entered France and were subjected to organs of this State, they came under the protection of the Convention including Article 5 (art. 5). This does not mean that France (or Spain) cannot execute prison sentences promulgated by courts of third countries or entities, nor does this mean that such sentences can only be executed if such foreign courts have acted entirely in conformity with the provisions of the Convention which is not binding for them. But there must be some effective control that the foreign court has respected those guarantees which must be considered fundamental under the European Convention. The independence of the judiciary and of the judges belong to these fundamental guarantees. Such a control is of special importance when prison sentences deprive a person of his freedom for long periods - up to fourteen years in the present case. France has not executed such a control, nor has it taken due account of the composition of the Andorran court which is hardly compatible with basic principles of the European Convention.

DISSENTING OPINION OF JUDGE RUSSO

(Translation)

I am convinced that there was a violation of Article 5 (art. 5) of the Convention in this case. I reach this conclusion by subscribing to the second part of the dissenting opinion written by Mr Pettiti, Mr Valticos and Mr Lopes Rocha and approved by Mr Walsh and Mr Spielmann, starting with the words "With reference to Article 5 (art. 5) ... ".