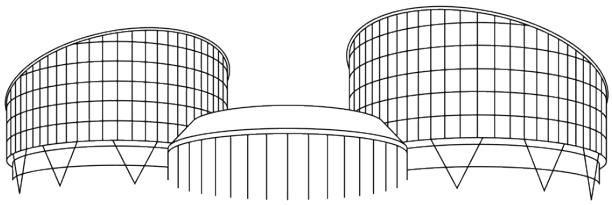

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF DEGUARA CARUANA GATTO AND OTHERS v. MALTA

(Application no. 14796/11)

JUDGMENT

STRASBOURG

9 July 2013

FINAL

09/10/2013

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Deguara Caruana Gatto and Others v. Malta,

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

Ineta Ziemele, *President,*
David Thór Björgvinsson,
George Nicolaou,
Ledi Bianku,
Zdravka Kalaydjieva,
Paul Mahoney, *judges,*
David Scicluna, ad hoc *judge,*

and Françoise Elens-Passos, *Section Registrar,*

Having deliberated in private on 18 June 2013,

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

PROCEDURE

1. The case originated in an application (no. 14796/11) against the Republic of Malta lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Ms Maria Theresa Deguara Caruana Gatto, Ms Maria Theresa Gera, Ms Victoria Amato Gauci, Mr Andrew Amato Gauci, Mr Philip Amato Gauci, Mr Louis Amato Gauci, Ms Giovanna Soler, Mr Nicholas Jensen, Ms Irene Bach, Ms Agnes Gera de Petri, Ms Caren Preziosi, Mr Alfred Gera de Petri (in his capacity as testamentary executor of the inheritance of Alfio Testa Ferrata Bonici Ghaxaq) and Ms Anna Maria Spiteri Debono, Maltese nationals; and Ms Francesca Amato Gauci, Ms Tanya O'Brien, Mr Joseph Gerard Amato Gauci, Ms Mariella Reimer and Ms Christianne Huber, Canadian nationals, ("the applicants") on 4 March 2011.

2. The applicants were represented by Dr I. Refalo, a lawyer practising in Valletta. The Maltese Government ("the Government") were represented by their Agent, Dr P. Grech, Attorney General.

3. The applicants alleged that they had suffered a violation of Article 1 of Protocol No. 1 to the Convention on account of the inordinate delay in establishing compensation, which had impinged on their right to obtain adequate compensation within a reasonable time. They also complained that given that more than twenty years after the taking of their property, they were still pursuing the compensation due to them, their right to a fair trial within a reasonable time had been violated.

4. On 14 March 2012 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

5. Mr Vincent De Gaetano, the judge elected in respect of Malta, was unable to sit in the case (Rule 28). Accordingly the President of the Chamber decided to appoint Mr David Scicluna to sit as an *ad hoc* judge (Rule 29 § 1(b)).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicants were born in 1923, 1937, 1940, 1979, 1981, 1967, 1944, 1954, 1950, 1949, 1952, 1944, 1961 1979, 1974, 1968, 1964, 1965 respectively.

A. Background of the case

7. The applicants and/or their predecessors were owners of properties nos. 223, 224, 225, 226 and 227 Marina Street, Msida, Malta, on land measuring a total of approximately 1,600 sq. m. Before the 1990s the properties had been requisitioned and were being used as a post office and premises for a Government department.

8. On 31 August 1990 the President of Malta declared that the properties were to be expropriated (acquired by a title of absolute purchase).

9. Subsequently, the premises were demolished and a complex was built, consisting of a basement with garages (two of which were allocated to EneMalta as an electricity substation), shops at ground level and social residential apartments on the upper floors.

10. On 22 May 1991 the owners were served with a copy of the President's declaration. They were also served with a Notice to Treat dated 20 May 1991 informing them that the sum being offered in compensation for the property was 129,000 Maltese liras (MTL) (approximately 300,490 euros (EUR)).

11. By means of a judicial letter dated 29 May 1991, the owners (except for the last two applicants) declared that they would not accept the compensation offered and that they considered MTL 380,000 (approximately EUR 885,150) to be just compensation. The last two applicants also contested the compensation offered by means of a judicial letter dated 14 June 1991, in which they stated that they considered MTL 250,000 (approximately EUR 582,350) to be just compensation.

12. On 21 October 1993 the Commissioner of Land ("the CoL") deposited the sum of MTL 129,000 (approximately EUR 300,490) in court by means of a schedule of deposit (in accordance with Article 22 (4) of Chapter 88 of the Laws of Malta).

13. On 25 January 1994 the CoL instituted proceedings before the Land Arbitration Board ("the LAB") to determine the amount of compensation due for the above-mentioned property. Two court-appointed architects, F.V. and J.M., estimated the total value of the property together with other tenements (nos. 2, 3 and 4 Qrejten Street, Msida) at MTL 205,500 (approximately EUR 478,700).

14. By a decision of 10 October 1996 the LAB found that the compensation payable for all the properties was MTL 205,500.

15. Tenements nos. 2, 3 and 4 Qrejten Street, Msida, were the subject of another court case in respect of which there is no indication as to whether it has been decided.

B. Retrial proceedings

16. On 10 January 1997 the CoL lodged an application for a retrial on the grounds that the decision of 10 October 1996 (case no. 2/94) had covered other property which was not the subject of the case and had not taken account of the sum already deposited in court. He subsequently submitted that if the application for a new trial was granted, the same two architects who had originally been appointed should be retained.

17. In April 1997, the applicants filed an objection to the retrial.

18. In a hearing of 4 June 2002, however, the applicants did not object to the case being retried. The LAB appointed two new architects, R.L. and J.J., to value the property afresh and adjourned the case pending decision.

19. By means of an application dated 4 October 2002, the CoL asked the LAB to revoke its decision to appoint architects R.L. and J.J., since it had not given a separate decision authorising a retrial and there had been no reason to replace the original architects. He asked the LAB to order a retrial.

20. On 8 April 2003 the LAB revoked the decision of 10 October 1996 and ordered that the retrial be started on the same day. In another decision of 8 April 2003 it considered the CoL's application contesting the architects' appointment. On the grounds that it could not have appointed architects before deciding whether to grant the request for retrial, the LAB revoked its decision of 4 June 2002. The minutes of the hearing stated that application no. 1/97 had been decided in part; however, since the LAB as constituted did not have competence to hear the case, it suspended the case *sine die*, pending the composition by a different Board.

21. Subsequently, the parties requested that the proceedings be resumed, both of them citing case no. 1/97. The new chairman of the LAB did not notice the error and rescheduled case no. 1/97. The parties made

submissions regarding the appointment of the architects and the case regarding the compensation due was adjourned to 20 October 2003.

22. Afterwards, Act XVII of 2004 ("the 2004 Act") was promulgated, *inter alia*, amending Article 25 (1) of Chapter 88 (see relevant domestic law) by adding a proviso to the effect that the compensation awarded should not exceed the higher amount of compensation proposed by any of the parties. The 2004 Act entered into force on 23 December 2004 and, pursuant to its section 4(2), the above provision had retrospective effect (see relevant domestic law).

23. Following a number of adjournments, by a decision of 12 September 2005 the LAB appointed R.L. and J.J. as architects and fixed a term of two weeks for them to present a report in the light of the amended legislation. R.L. and J.J. had inspected the property two years earlier, on 4 September 2003, in connection with the proceedings concerning properties nos. 2, 3 and 4 Qrejten Street, Msida.

24. Following a number of further adjournments, by a judgment of 27 March 2006 the LAB noted that the new architects had re-valued the properties at MTL 1,681,895 (approximately EUR 3,032,600), although they had been unable to actually visit the properties since they had been demolished. However, it further noted that in accordance with the new 2004 Act, the court could not award more than had been requested. It awarded compensation of MTL 380,000, (approximately EUR 885,160), which was the highest amount claimed by the parties, of which MTL 129,000 (approximately EUR 300,490) had already been deposited in court.

25. The applicants appealed (by means of two almost identical appeal applications), claiming that the compensation should be in accordance with the architects' valuation. They complained that at the time when the proceedings before the LAB had commenced, including those for retrial, the compensation due to them had not been subject to capping, but was to have been based on the market value of the property on an open market on the day of the Notice to Treat, as established by the architects and the LAB. Thus, the retroactive application of the 2004 Act had affected their right to receive fair compensation, in violation of their property rights, both because their legitimate expectation to be awarded fair compensation had been interfered with, and because the sum eventually awarded did not constitute fair compensation. Moreover, the length of the proceedings before the LAB had breached their right to a fair trial within a reasonable time, with further consequences on their property rights – on the ground of both the changes to the law and the principle of compensation within a reasonable time.

26. The CoL also lodged an appeal concerning various issues: the architects' appointment under the principle of independence and impartiality; the composition of the LAB; and the numbering of the decision, - in that it reflected the number of the request for retrial and not the retried and decided case.

27. By a decision of 24 January 2007, the Court of Appeal, in its inferior jurisdiction, referred the following issues to the Civil Court (First Hall), in its constitutional jurisdiction: (i) whether the applicants' property rights had been violated; and (ii) whether there had been a violation of the right to a fair hearing, as the CoL had claimed. No referral was made in respect of the applicants' complaint regarding the length of the proceedings.

C. Constitutional referral

28. The Civil Court (First Hall), in its constitutional jurisdiction, noted that the applicants had made the following claims: (i) that Article 1 of Protocol No. 1 had been violated since they had not been awarded adequate compensation, the amount of compensation having been limited by a legislative interference; (ii) that legislative interference had breached their rights under Article 17 of the Convention in conjunction with Article 1 of Protocol No. 1; and (iii) that Article 6 had been violated since the compensation proceedings had not been decided within a reasonable time. That had had consequences on their property rights in view of the subsequent legislative amendment, which had breached the principle of equality of arms.

29. By a judgment of 27 November 2008, the Civil Court (First Hall), in its constitutional jurisdiction, declared that the 2004 Act had violated the applicants' property rights under Article 1 of Protocol No. 1. It declared the decision of 27 March 2006 null and void, and ordered that the case be remitted to the Court of Appeal and that compensation be established in accordance with the law as it had stood before the passing of the Act in 2004. No violation of the right to a fair trial could be upheld *vis-à-vis* the CoL.

30. The CoL appealed and the applicants cross-appealed, the latter alleging that their rights had been violated under Articles 6 and 17 of the Convention.

31. The Constitutional Court considered that the applicants' complaints revolved around two matters: (i) the retroactive application of the 2004 Act, which had allegedly violated their legitimate expectation to compensation as established by the laws in force at the time of the taking, thus denying them part of their compensation; and (ii) the lack of adequate compensation awarded to them.

32. By a judgment of 6 September 2010 the Constitutional Court noted that the Court of Appeal in its inferior jurisdiction had not had competence to hear the merits of the case, it being within the competence of the Court of Appeal in its superior jurisdiction. Nevertheless, it considered that the referral made by the Court of Appeal in its inferior jurisdiction was, in itself, valid. Its decision had not included the issues arising under Articles 6 and 17, which therefore could not be entered into because the courts with

constitutional jurisdiction were limited to dealing with matters referred to them by the Court of Appeal. The Constitutional Court reversed the first-instance judgment in part. It upheld the part of the judgment dismissing the CoL's complaints and quashed the rest, therefore finding no violation of the applicants' property rights. It considered that before the 2004 Act the LAB could have awarded compensation higher than that requested by the parties, thus rather than clarifying the law, the Act limited the compensation that could be awarded. Nevertheless, the applicants did not have a possession under Article 1 of Protocol No. 1, in that they had had no legitimate expectation to receive an amount higher than MTL 380,000 (as established by their *ex parte* expert), which they had claimed. Firstly, when the 2004 Act came into effect, the report of the new architects had not yet been included in the case file. Secondly, before the 2004 Act the applicants had not claimed compensation higher than that awarded, and thirdly, when architects R.L. and J.J. were appointed, the applicants had been aware of the new legislation. Moreover, the applicants had received fair compensation since they had been awarded the entire sum they had asked for. Indeed, it was clear that the valuation made by the court-appointed experts was in stark contrast with the valuations made by the previous architects and the *ex parte* experts; it was therefore arbitrary and disproportionate, as no reasons had been given to justify the huge difference. Thus, the 2004 Act had not violated the applicants' rights under Article 1 of Protocol No. 1. As to the fact that twenty years had passed without compensation having been paid, the court considered that part of the monies had already been deposited and could have been withdrawn by the applicants without prejudice to further proceedings. Moreover, the applicants had eventually been awarded triple the sum which had been offered to them at the time of the expropriation and were still to receive 5% interest on the amount, thus they were not made to bear an excessive individual burden. The court ordered that the case be remitted to the Court of Appeal in its superior jurisdiction for the continuation of the proceedings.

D. Continuation of the proceedings

33. By a judgment of 25 February 2011 the Court of Appeal in its superior jurisdiction held that the decision of 27 March 2006 was null and void owing to a procedural defect, namely in so far as the impugned decision had been given within the ambit of case no. 1/97, and not the proceedings on the merits relating to compensation claim, no. 2/94. Indeed, the relevant proceedings were never rescheduled following their adjournment in 2003. This had happened because the parties themselves – both the State and the applicants –had cited the wrong number when asking for the case to be rescheduled, and the LAB chairman had made the same error. The Court of Appeal considered that it was not in a position to order

the correction of the relevant case numbers. Thus, in the circumstances, no appeal could be entertained.

34. Consequently, there has to date been no judgment establishing the amount due in compensation for the property expropriated more than twenty years ago.

35. By a judicial letter of 25 March 2011, the applicants asked the CoL to take the relevant measures to determine the amount of compensation payable for the expropriation. No reply was received.

36. Following the communication of the application to the respondent Government in March 2012, on 8 November 2012 the CoL asked the LAB to restore case no. 2/94 to its list of cases for the eventual determination of compensation.

II. RELEVANT DOMESTIC LAW

37. Act XVII of 2004 added a proviso to Article 25 (1) of the Land Acquisition (Public Purposes) Ordinance, Chapter 88 of the Laws of Malta, amending it to read as follows:

> "(1) The Board shall be competent -
>
> ...
>
> (*e*) to assess the amount of compensation payable under any of the provisions of this Ordinance and for that purpose to declare whether any area is a building site or agricultural or waste land;
>
> ...
>
> ... Provided that the amount of compensation to be assessed by the Board in accordance with the provisions of paragraph (*e*), shall not exceed the higher amount of compensation as proposed by any of the parties."

The transitional provision, section 4(2) of the 2004 Act, reads as follows:

> "The provisions of Articles 25 and 31 of the Ordinance as amended by this section shall apply to any proceedings relating to any land covered by any declaration issued under Article 3 of the Ordinance, even if issued prior to the date of the coming into force of this section."

38. Article 27 (1) of the Ordinance, regarding compensation, in so far as relevant, reads as follows:

> " (1) Without prejudice to any special provision contained in this Ordinance, in assessing compensation the Board shall act in accordance with the following rules:
>
> (*a*) no allowance shall be made on account of the acquisition being compulsory;

(*b*) the value of the land shall, subject as hereinafter provided, be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise:

Provided that -

(i) the value of the land shall be the value as at the time when the President's Declaration was served, without regard to any improvements or works made or constructed thereafter on the said land and where the land was in the possession of the competent authority immediately prior to the service of the President's Declaration no regard shall be had, in assessing the value of the land, to any improvements or works made or constructed by the competent authority while in possession of the land; (...)"

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 TO THE CONVENTION

39. The applicants complained that they had suffered a violation of Article 1 of Protocol No. 1 to the Convention in so far as more than twenty years after the property had been taken they were still pursuing compensation due to them while, as a result of the inordinate delay in the proceedings, their right to obtain adequate compensation had been hampered by legislative interference with pending proceedings which limited their right to compensation. Article 1 of Protocol No. 1 to the Convention reads as follows:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

40. The Government contested that argument.

A. Admissibility

41. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicants' submissions

42. The applicants submitted that as the situation stood, the offer of compensation amounting to MTL 129,000 did not reflect adequate compensation for the expropriation of their property. They submitted that in the circumstances of the case, only the current market value of the property could suffice as adequate compensation. Further, they noted that the inordinate delay in establishing compensation had impinged on their right to obtain compensation within a reasonable time in accordance with Article 1 of Protocol No. 1. They claimed that as individuals they had suffered an excessive burden for twenty-two years, during which they had not obtained compensation while the Government were enjoying the benefits of the property and the income derived from it; the property now included a number of garages and shops built by the Government, and a post office which had been sold to a private company. The delay in the proceedings had made matters even worse, as whenever one of the many applicants passed away, his or her heirs had to pay tax on the immovables, which legally still belonged to them (until the deed of expropriation had been concluded), despite the fact that the property had been taken decades ago.

43. In reply to the Government's argument, the applicants submitted that the retrial which the Government had sought was an extraordinary remedy and that by objecting to its use, the applicants had merely exercised their right to ensure the certainty of the existing judgment. As a result of the retrial, they no longer had that certainty, particularly given the outcome of the proceedings.

44. The applicants complained that they had suffered as a result of the lengthy and inconclusive proceedings because to date no compensation has been awarded and the change in the law pending proceedings capped the amount of compensation awardable. This, in their view, amounted to a legislative amendment that interfered with their right to property in the context of pending proceedings.

(b) The Government's submissions

45. The Government submitted that the taking had been lawful under the terms of the Land Acquisition Ordinance and had been effected in the public interest, as the property had been acquired in order to provide social accommodation for the benefit of the community at large.

46. As to compensation, the Government submitted that in 1993 the sum of EUR 300,490 had been deposited in favour of the applicants, who had been free to withdraw it without prejudicing their objection to the valuation.

Moreover, the applicants had contributed to the delay in payment: in the first place, by not cooperating when it was obvious that there had been a mistake in the decision of the LAB of 10 October 1996; secondly, by demanding the appointment of new technical experts; and thirdly, by making unfounded human-rights claims. In this light, the Government considered that the applicants had not suffered a disproportionate burden.

47. The Government further submitted that the 2004 Act had not deprived the applicants of the price the property would fetch on the open market. Indeed, the applicants were still entitled to receive the full market value of the property as defined by Article 27 (1) (b) of the Ordinance. The amount claimed by the applicants in their original objection to the Notice to Treat had to be considered as the maximum amount which a willing seller might be expected to realise as, according to the Government, it was inconceivable that anyone would pay more than what the seller demanded. Moreover, the Government considered that it was absurd for the applicants to claim that they suffered a burden given that they would obtain exactly what they had requested.

2. The Court's assessment

48. The Court reiterates that Article 1 of Protocol No. 1 guarantees, in substance, the right to property and comprises three distinct rules (see, for example, *Sporrong and Lönnroth v. Sweden,* 23 September 1982, § 61, Series A no. 52). The first, which is expressed in the first sentence of the first paragraph and is of a general nature, lays down the principle of peaceful enjoyment of property. The second rule, in the second sentence of the same paragraph, covers deprivation of possessions and subjects it to certain conditions. The third, contained in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties. However, the rules are not "distinct" in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property. They must be construed in the light of the general principle laid down in the first rule (see, for example, *Air Canada v. the United Kingdom,* 5 May 1995, §§ 29 and 30, Series A no. 316-A).

49. The taking of property can be justified only if it is shown, *inter alia*, to be "in the public interest" and "subject to the conditions provided for by law". The Court reiterates that because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is "in the public interest". Furthermore, the notion of "public interest" is necessarily extensive. In particular, the decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues. The Court, finding it natural that the margin of appreciation available to the

legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is "in the public interest" unless that judgment is manifestly without reasonable foundation (see *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, ECHR 2005-VI, § 91; *Immobiliare Saffi v. Italy*, [GC], no. 22774/93, § 49, ECHR 1999-V; and, *mutatis mutandis*, *Fleri Soler and Camilleri v. Malta*, no. 35349/05, § 65, 26 September 2006). The Court also reiterates that in the area of land development and town planning, the Contracting States should enjoy a wide margin of appreciation in order to implement their town and country planning policies. Nevertheless, in the exercise of its power of review, the Court must determine whether the requisite balance was maintained in a manner consonant with the individual's right of property (see *Abdilla v. Malta* (dec.), no 38244/03, 3 November 2005, and *Vassallo v. Malta*, no. 57862/09, § 37, 11 October 2011).

50. Thus, any interference with property must also satisfy the requirement of proportionality. As the Court has repeatedly stated, a fair balance must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights, the search for such a fair balance being inherent in the whole of the Convention. The requisite balance will not be struck where the person concerned bears an individual and excessive burden (see *Sporrong and Lönnroth,* cited above, §§ 69-74; and *Brumărescu v. Romania* [GC], no. 28342/95, § 78, ECHR 1999-VII).

51. Compensation terms under the relevant legislation are material to the assessment of whether the contested measure respects the requisite fair balance and, notably, whether it imposes a disproportionate burden on the individuals (see *Jahn and Others,* cited above, § 94). In this connection, the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference, and a total lack of compensation can be considered justifiable under Article 1 of Protocol No. 1 only in exceptional circumstances (see *The Holy Monasteries v. Greece*, 9 December 1994, § 71, Series A no. 301-A). However, while it is true that in many cases of lawful expropriation only full compensation can be regarded as reasonably related to the value of the property, Article 1 of Protocol No. 1 does not guarantee a right to full compensation in all circumstances. Legitimate objectives in the "public interest", such as those pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value (see *Urbárska Obec Trenčianske Biskupice v. Slovakia*, no. 74258/01, § 115, ECHR 2007-(extracts)).

52. The Court reiterates, however, that the adequacy of the compensation would be diminished if it were to be paid without reference to various circumstances liable to reduce its value, such as unreasonable delay.

Abnormally lengthy delays in the payment of compensation for expropriation lead to increased financial loss for the person whose property has been expropriated, putting him in a position of uncertainty (see *Akkuş v. Turkey*, 9 July 1997, § 29, *Reports of Judgments and Decisions*). The same applies to abnormally lengthy delays in administrative or judicial proceedings in which such compensation is determined, especially when people whose property has been expropriated are obliged to resort to such proceedings in order to obtain the compensation to which they are entitled (see *Aka v. Turkey*, 23 September 1998, § 49, *Reports* and *Vassallo*, cited above § 39).

53. The Court notes that it has not been contested that, in the present case, there has been a deprivation of possessions within the meaning of the first paragraph of Article 1 of Protocol No. 1, and that the taking has been carried out in accordance with procedures provided for by law.

54. As to the public interest requirement, while the Government conceded that on rebuilding the property, a portion of the expropriated premises had been used for commercial enterprise, the Court notes that the greater part of the building, namely the upper floors, has in fact been used for social housing. In this light, the Court is ready to accept that the taking pursued legitimate objectives in the "public interest".

55. As to the proportionality of the measure, the Court observes that the Government stressed that a part of the award had been deposited in an interest-bearing account as early as 1993. The Court has previously stated that it was not convinced that the acceptance of such sums would not have prejudiced any future claims the applicants may have had in that respect (see, for example, *Schembri and Others v. Malta*, no. 42583/06, § 44, 10 November 2009). However, the Court notes that in the present case, the Constitutional Court shared the Government's stand and declared that withdrawing the deposited sums would not prejudice future claims. Such a statement cannot be ignored by the Court, which may revise its position upon being presented with relevant evidence as to the practice of the Maltese courts in this matter. Nevertheless, despite the recurrence of such cases before the domestic courts, the Government to date have not presented concrete and coherent examples capable of totally dispelling the Court's concerns in this respect.

56. In so far as the Government argued that the delay in paying compensation had been caused by the applicants, namely their objections to the retrial which lasted five years and the fact that they made what the Government referred to as "unfounded human-rights claims" – which the Court notes took the constitutional courts three and a half years to decide upon in the context of the compensation proceedings – the Court reiterates that the judicial authorities remain responsible for the conduct of the proceedings before them and have to weigh the advantages of continued adjournments against the requirement of promptness (see, *mutatis mutandis*,

Gera de Petri, cited above, § 43 and *Vassallo*, cited above § 46). More importantly, the Court considers that the owners cannot be blamed (as submitted by the Government) for having defended their case before the domestic jurisdictions. Indeed, the evident error indicated by the Government in a judicial decision referring to property that was not the subject of those proceedings, was first made and then endorsed by the LAB, which had the responsibility to determine the applicants' compensation and was not attributable to the applicants. Similarly, the applicants cannot be blamed for making use of their right to institute proceedings, under constitutional law, to safeguard their human rights in respect of complaints which, moreover, both in the domestic court's opinion and in this Court's view, are clearly not ill-founded (see paragraphs 29 and 41 above).

57. The Court considers that it is not necessary to determine whether the amount that the LAB might award would satisfy the proportionality requirement, particularly in view of an eventual retroactive application of the 2004 Act. It suffices to say that, having regard to the fact that the applicants have not been awarded compensation for the expropriation of the property to date, twenty-three years after it was taken, the applicants have been required to bear a disproportionate burden and therefore the requisite balance has not been struck.

58. There has accordingly been a violation of Article 1 of Protocol No. 1 to the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

59. The applicants complained of a violation of Article 6 of the Convention, under various heads. Firstly, they complained that the 2004 Act had introduced a legislative amendment that interfered with their rights in pending proceedings. Secondly, they complained that the proceedings regarding the compensation due to them have not been concluded within a reasonable time. They relied on Article 6 of the Convention, which, in so far as relevant, reads as follows:

Article 6

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

A. Admissibility

1. Preliminary objections

60. The Government submitted that the applicants had failed to exhaust domestic remedies in respect of their complaints under Article 6, which had

not been raised in the context of the domestic proceedings. They further pointed out that even if the applicants had raised them, in the circumstances of the present case, the referral court had omitted to refer them and they had therefore not been examined. Moreover, the Government noted that there were no time–limits on bringing an action under the European Convention Act.

61. The applicants submitted that, as proved by documents presented to this Court, they had raised the Article 6 complaints in due time, and it was the Court of Appeal that had failed to refer their length-of-proceedings complaint. They contended that they should not have to suffer the consequences of the failure of the domestic courts. Moreover, they considered that it would defeat the purpose of human-rights protection to expect the applicants to undertake a fresh set of constitutional proceedings in a situation where their case had already been before the domestic courts for twenty-two years, to no avail.

2. The Court's assessment

62. In accordance with Article 35 § 1 of the Convention, the Court may deal with an issue only after all domestic remedies have been exhausted. The purpose of this rule is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court (see, among other authorities, *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V). Thus, the complaint submitted to the Court must first have been made to the appropriate national courts, at least in substance, in accordance with the formal requirements of domestic law and within the prescribed time-limits (see *Zarb Adami v. Malta* (dec.), no. 17209/02, 24 May 2005).

(a) Retrospective application of the law pending proceedings

63. The Court notes that in the domestic proceedings, the applicants raised the matter of the retroactive application of the law solely in so far as it affected their right to receive fair compensation for the violation of their property rights. The Court emphasises that the application of the rule of exhaustion must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting Parties have agreed to set up. Accordingly, it has recognised that Article 35 must be applied with some degree of flexibility and without excessive formalism. It has further recognised that this rule is neither absolute nor capable of being applied automatically; in reviewing whether it has been observed it is essential to have regard to the particular circumstances of each individual case (see *Sammut and Visa Investments Limited v. Malta*, (dec.), § 59, no. 27023/03, 16 October 2007).

64. In the present circumstances, the Court does not consider it necessary to decide on the Government's objection, given that as a result of the Court of Appeal's judgment of 25 February 2011, the compensation proceedings following the order for retrial were declared null and void.

65. Following the Court's conclusion in paragraphs 57 and 58 above, it is now for the Court to determine the relevant compensation in the context of the applicants' just satisfaction claims (see *Vassallo v. Malta* (just satisfaction), no. 57862/09, § 13, 6 November 2012). Bearing in mind that proceedings in the domestic order will, thus, not need to be continued and therefore that the applicants will not be affected by the retroactive application of the 2004 Act, it cannot be said that the applicants have victim status in respect of this part of the complaint, which is therefore incompatible *ratione personae* with the provisions of the Convention and must be declared inadmissible in accordance with Article 35 §§ 3 and 4 of the Convention.

(b) Length of proceedings

66. The Court notes that the applicants complained that the length of the proceedings before the LAB had breached their right to a fair trial within a reasonable time. However, neither the relevant decision nor the Government explain why the Court of Appeal failed to refer this complaint. Indeed, the Civil Court in its constitutional jurisdiction took note of the fact that the applicants had raised this complaint; similarly, while the Constitutional Court also noted the existence of the complaint, it was unable to take cognisance of it because the Court of Appeal had not referred it. The Court observes that it does not transpire in any way from the case file that the complaint was not lodged properly, or that there was no reason to refer it. In this light, the Court cannot accept that the applicants did not attempt to make use of remedies that were, in principle, accessible and effective.

67. While it is true that the applicants could have attempted to bring constitutional proceedings separately, namely outside the context of a referral request, the Court cannot ignore the practical difficulties involved and reiterates that the rule of exhaustion of domestic remedies requires an applicant to have normal recourse to remedies within the national legal system which are available and sufficient to afford redress in respect of the breaches alleged. Under the established case-law, when a remedy has been pursued, use of another remedy which has essentially the same objective is not required (see, *inter alia*, *Kozacıoğlu v. Turkey [GC],* no. 2334/03, § 40, 19 February 2009).

68. It follows that, although there were other means of access to a remedy, in the present case, given that the applicants' properly-lodged complaints with the Court of Appeal remained unheard, the mere fact that the applicants could have attempted to remedy the alleged violation in an

alternative way and that they may still make such a complaint, as is permissible under domestic law, does not result in a failure on their part to exhaust domestic remedies (see, *mutatis mutandis*, *Micallef v. Malta* [GC], no. 17056/06, § 58, ECHR 2009-...).

69. Accordingly, the Court dismisses the Government's objection in respect of the length-of-proceedings complaint.

70. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

71. The applicants submitted that more than twenty years after the taking of their property, they were still pursuing compensation due to them and that this had violated their right to a fair trial within a reasonable time. In reply to the Government's argument, they noted that they had the right to raise their human-rights issues, which were clearly not frivolous given the communication of their complaints by the European Court of Human Rights to the respondent Government.

72. Without prejudice to the above objection, the Government submitted that although the issue at stake was not complex, by objecting to a retrial in the knowledge that there had been a mistake in the decision of 10 October 1996, the applicants had made it virtually impossible for the domestic courts to decide. Five years passed before the applicants finally withdrew their objections and authorised the LAB to proceed with a retrial. Furthermore, the applicants had contributed to the delay by unnecessarily demanding the appointment of new architects, despite the fact that valuations had already been made. Following the LAB decision in March 2006, the applicants had further delayed proceedings by lodging unfounded human-rights complaints involving the constitutional courts. Thus, it was solely the applicants who were behind the delays in what had originally been a straightforward case.

73. The Court notes that on 31 August 1990 the President of Malta declared that the applicants' properties were to be expropriated. Following an unsuccessful offer of compensation in 1991, on 25 January 1994 the CoL instituted proceedings to establish the compensation due to the applicants. A first judgment on the matter was delivered on 10 October 1996. Subsequently, it took the LAB more than six years, namely, until 8 April 2003, to decide on the CoL's retrial request and a further eight years – until 25 February 2011 – on two levels of jurisdiction (LAB and Court of Appeal) to deliver a decision on the case (a set of constitutional proceedings

started on 24 January 2007 and ended on 6 September 2010 in the context of the appeal compensation proceedings). Moreover, that decision annulled the proceedings, returning the applicants to the position they were in a decade earlier when the Government's request for a retrial was upheld.

74. Consequently, the proceedings for the determination of the compensation due to the applicants remain pending, after more than twenty years, over what can be considered as at least two levels of jurisdiction.

75. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case; the conduct of the applicants and the relevant authorities; and what was at stake for the applicants in the dispute (see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII).

76. The Court observes that the applicants' case, as conceded by the Government, was not complex: before the LAB it was restricted to determining the amount of compensation for the property; and before the constitutional jurisdictions it was essentially about the proportionality of the measure in the light of compensation limits. The Court further finds that what was at stake in the proceedings could, in principle, be regarded as of importance to the applicants.

77. The Court has already held, in paragraph 56 above, that the applicants cannot be blamed for exercising their rights under domestic law. The Court observes that it has not been shown that the delays in the proceedings were the result of repetitive failures on the part of the applicants. Indeed, as it appears, the fact that proceedings did not end in 1996 (after two years) had not been due to any fault of the applicants. It was the Government, who at that point, requested a retrial to correct what they refer to as a manifest error made by the LAB. The LAB took six years to decide on the retrial request, and then about three years to decide on the merits of the case again at first instance. No reasons have been advanced for the repeated adjournments. It then took the Court of Appeal just under a year to make an incomplete constitutional referral, and nearly another year following the constitutional proceedings to dismiss the case on procedural grounds. Again, no explanation has been submitted for those periods of inaction. On the other hand, the Court considers that three years for two degrees of jurisdiction before the constitutional jurisdictions cannot be considered excessive. However, having regard to the entire duration of the proceedings, which lasted over two decades and which appears to have been mainly the result of a weakness in the legal system, the Court considers that the overall length of the proceedings was excessive and failed to meet the "reasonable time" requirement.

78. There has accordingly been a breach of Article 6 § 1 on account of the length of the proceedings.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

79. Lastly, the applicants complained under Article 13 that they had been denied an effective remedy in relation to their complaints under Articles 6 and 17 of the Convention and Article 1 of Protocol No. 1, alone and in conjunction with Article 6 of the Convention. Article 13 of the Convention, in so far as relevant reads as follows:

Article 13

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. In respect of their property rights and the alleged legislative interference

80. The Court reiterates that the remedy required by Article 13 must be "effective" in practice as well as in law (see, for example, *İlhan v. Turkey [GC], no. 22277/93*, § 97, ECHR 2000-VII). The term "effective" is also considered to mean that the remedy must be adequate and accessible (see *Paulino Tomás v. Portugal* (dec.), no. 58698/00, ECHR 2003-XIII). However, the Court also reiterates that the effectiveness of a remedy within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant (see *Sürmeli v. Germany* [GC], no. 75529/01, § 98, ECHR 2006-VII) and the mere fact that an applicant's claim fails is not in itself sufficient to render the remedy ineffective (*Amann v. Switzerland*, [GC], no. 27798/95, §§ 88-89, ECHR 2002-II).

81. The Court notes that in respect of their complaints under Article 1 of Protocol No. 1 and Article 6 of the Convention, the applicants asked the Court of Appeal to refer the case to the constitutional jurisdictions. A referral was made in respect of the applicants' complaints concerning their property rights, encompassing the complaint regarding the alleged legislative interference with pending proceedings.

82. Thus, the Court notes that a remedy was provided under Maltese law, enabling the applicants to raise their Convention complaints with the national courts. Following the referral, they pursued constitutional proceedings before the Civil Court (First Hall) in its constitutional jurisdiction and, on appeal, before the Constitutional Court. Moreover, the Court observes that the applicants were in fact successful at first instance, and although the judgment was overturned on appeal, there is nothing to

indicate that, had the Constitutional Court found in favour of the applicants, it would not have provided adequate redress (see, *mutatis mutandis*, *Gera de Petri Testaferrata Bonici Ghaxaq v. Malta*, (merits) no. 26771/07, § 70, 5 April 2011).

83. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

B. In respect of their length complaint

84. In so far as the complaint refers to the lack of an effective remedy in relation to their length-of-proceedings complaint, again the Court observes that a remedy was provided under Maltese law, either in the context of ordinary proceedings, by means of a referral to the constitutional jurisdictions by the court hearing the merits of the case, or alternatively through the separate institution of constitutional redress proceedings. The Court regards the lack of an explanation for the Court of Appeal's incomplete referral as unfortunate; nevertheless, the applicants did have an alternative remedy. The Court notes that although the applicants were not required to undertake the alternative remedy for the purposes of exhaustion of domestic remedies (see paragraph 68 above), the possibility of undertaking separate constitutional proceedings existed in both theory and practice. In consequence, the latter remedy was still accessible and it has not been shown that it would not have been effective for the purposes of Article 13 (see *Central Mediterranean Development Corporation Limited v. Malta*, no. 35829/03, § 51, 24 October 2006).

85. It follows that this part of the application is also manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

C. In respect of their right to obtain compensation

86. In so far as the complaint refers to the lack of an effective remedy as a result of the Court of Appeal's judgment of February 2011, the Government submitted that the applicants had failed to exhaust domestic remedies in respect of this complaint. The Court considers that it is not necessary to examine the Government's objection in this respect as the complaint is in any event inadmissible for the following reasons.

87. The Court considers that this complaint is to be examined under Article 6, namely in so far as the said provision provides for access to court in the determination of civil rights and obligations.

88. The Court reiterates that the institution of proceedings does not, in itself, satisfy all the requirements of Article 6 § 1. The right of access to court includes the right not only to institute proceedings but also to obtain a

"determination" of the dispute by a court. It would be illusory if a Contracting State's domestic legal system allowed an individual to bring a civil action before a court without ensuring that the case was determined by a final decision in the judicial proceedings. It would be inconceivable for Article 6 § 1 to describe in detail procedural guarantees afforded to litigants – proceedings that are fair, public and expeditious – without guaranteeing to the parties that their civil disputes will be finally determined (see *Multiplex v. Croatia*, no. 58112/00, § 45, 10 July 2003, and *Kutić v. Croatia*, no. 48778/99, § 25, ECHR 2002-II). The Court reiterates that on deciding, on the basis of a particularly strict construction of a procedural rule, not to examine the merits of a case, domestic courts may undermine the very essence of an applicant's right to court, which is part of the right to a fair trial guaranteed by Article 6 § 1 of the Convention (see *Běleš and Others v. the Czech Republic*, no. 47273/99, § 51, ECHR 2002-IX, and *Muscat v. Malta*, no. 24197/10, § 43, 17 July 2012).

89. The Court observes with particular concern the decision of the Court of Appeal of 25 February 2011 by which years of proceedings came to nothing because of a minor procedural irregularity which it did not correct and which none of the domestic courts previously seized with the matter had noted. Indeed, given the protracted compensation proceedings lasting for over two decades, the Court considers that it is unfortunate that the domestic courts had not found it possible to take a different view of the matter. However, although the course of action taken by the domestic courts may have been unfortunate, the Court notes that, in principle, the applicants would still be able to pursue their claim for compensation, as demonstrated by the Government's recent request to recommence those proceedings. In consequence, in the circumstances of the present case, it cannot be said that the applicants were denied the very essence of their right to a court.

90. It follows that this part of the application is also manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

D. Article 17 of the Convention

91. As to the complaint under Article 17 of the Convention alone or in conjunction with other articles, the Court considers that this complaint does not go beyond the aforementioned allegations of breaches of other provisions of the Convention and therefore no issue arises under Article 17 proper.

92. It follows that this part of the application is also manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

93. Article 41 of the Convention provides:

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

A. Damage

94. The applicants claimed 3,917,761 euros (EUR) in respect of pecuniary damage, representing the value of the property according to the valuation of architects R.L. and J.J., together with 8 % interest from the date of expropriation until the date of payment of compensation. They further claimed EUR 10,000 per applicant in non-pecuniary damage for the mental suffering they endured as a result of the violations found.

95. The Government objected to the applicants' claims and asked the Court to allow the LAB to decide on the compensation issue. However, they submitted that in the event that the Court felt that it had to afford the relevant just satisfaction, the amount to be awarded should be calculated on the average between the amount established in the Government's Notice to Treat in 1991 (EUR 300,570) and the higher amount demanded by the applicants the same year (EUR 885,400). Such an average would amount to EUR 442,700 and would be equivalent to the value of the property in 1990. According to the Court's case-law in this type of case, that amount should be adjusted to reflect inflation plus 5% interest, thus amounting to EUR 1,207,673. The Government, however, submitted that given the purpose of the expropriation, a reduction of 15 % would be reasonable, thus amounting to EUR 1,026,522. The Government proposed this amount in order to conclude the matter and establish legal title to the land. They further noted that, according to an *ex parte* architect's valuation, the market value of the property in 2012 was EUR 1,200,000.

Lastly, the Government considered that the applicants had not suffered any non-pecuniary damage and that in any event such an award should not exceed EUR 5,000 jointly.

96. In view of the fact that the domestic proceedings relating to the payment of compensation have not yet ended and, more precisely, a recommencement was recently requested, more than twenty years after the property was taken, the Court considers that it would be unreasonable to wait for the outcome of such proceedings (see *Curmi v. Malta*, (merits) no. 2243/10, § 65, 22 November 2011). Thus, the Court will determine the compensation due for the applicants' property measuring 1,600 sq. m., in exchange for which the applicants are obliged to formally transfer the property to the Government.

97. In such cases, in determining the amount of adequate compensation, the Court must base itself on the criteria laid down in its judgments regarding Article 1 of Protocol No. 1. The Court considers that the compensation in the present case should be based on the lines set out in *Schembri and Others v. Malta* ((just satisfaction), no. 42583/06, § 18, 28 September 2010). Thus, the sum to be awarded to the applicants should be calculated on the basis of the value of the property at the time of the taking, and be converted to the current value to offset the effects of inflation, plus simple statutory interest applied to the capital progressively adjusted. Since in the present case the applicants have not received any payment at the national level, no deduction is necessary. The Court further notes that the sum already deposited by the Government in 1993, which the applicants have not withdrawn, should not remain payable over and above the award made by this Court.

98. The Court appreciates that the Government have made a proposal in accordance with its case-law. However, the Court is unable to accept the amount chosen by the Government as representing the value of the property at the time of the taking which is the starting point of that calculation. Similarly the Court cannot accept the valuation submitted by the applicants as representing the value of the property at the time of the taking. Indeed the Court notes the discrepancy between the two *ex parte* valuations presented by the applicants during the domestic proceedings, the second valuation being more than four times the amount originally estimated. The Court notes that the LAB, in its decision of 27 March 2006, considered that the fair value of the property in 1990, when it was taken, was EUR 885,160, (see paragraph 24 above) as submitted by the applicants' *ex parte* architects. The Government have not substantiated why they found that valuation to be too high. The Court therefore considers that a sum close to that accepted by the LAB must be used as a starting point for its valuation. Furthermore, the Court has regard to the legitimate purpose of the restriction imposed, mainly social housing, recalling that legitimate objectives in the "public interest", such as those pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less reimbursement than that of the full market value (see, *inter alia*, *Ghigo v. Malta* (just satisfaction), no. 31122/05, § 18, 17 July 2008). Thus, in accordance with the guidelines set out in *Schembri and Others* (cited above), the Court awards the applicants, jointly, EUR 1,630,000 in respect of pecuniary damage for the transfer of the property at issue, plus any tax that may be chargeable on that amount.

99. The Court considers that the applicants must have experienced frustration and stress given the nature of the breaches found in the present case and thus awards them EUR 40,000 jointly, in respect of non-pecuniary damage.

B. Costs and expenses

100. The applicants also claimed EUR 77,911 as per two judicial bills of costs (EUR 1,797 for the constitutional proceedings and EUR 76,113.76 for the LAB and Court of Appeal proceedings) for the costs and expenses incurred before the domestic courts and EUR 3,336 for those incurred before the Court.

101. The Government did not object to the payment of costs and expenses related to the domestic constitutional proceedings. However, they objected to the second invoice, which in their view had not been drawn up according to the law and which they intended to contest before the domestic courts. In respect of proceedings before the Court, they considered that the award should not exceed EUR 2,000.

102. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, the Court also notes that it has rejected some of the applicants' complaints. Regard being had to the information in its possession, the Court considers it reasonable to award the sum of EUR 50,000, jointly, for costs and expenses incurred in respect of the domestic proceedings and the proceedings before the Court.

C. Default interest

103. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint under Article 1 of Protocol No. 1 to the Convention and Article 6 in relation to the length of proceedings admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 1 of Protocol No. 1 to the Convention in so far as the applicants have not been awarded compensation for the expropriation of the property to date;

3. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the length of the proceedings;

4. *Holds*

(a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:

(i) EUR 1,630,000 (one million six hundred and thirty thousand euros), jointly, plus any tax that may be chargeable on that amount, in respect of pecuniary damage for the transfer of the property at issue;

(ii) EUR 40,000 (forty thousand euros), jointly, plus any tax that may be chargeable, in respect of non-pecuniary damage;

(iii) EUR 50,000 (fifty thousand euros), jointly, plus any tax that may be chargeable to the applicants, in respect of costs and expenses incurred in respect of the domestic proceedings and the proceedings before the Court;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 9 July 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos	Ineta Ziemele
Registrar	President