



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

COURT (CHAMBER)

CASE OF FOTI AND OTHERS v. ITALY

(Application no. 7604/76; 7719/76; 7781/77; 7913/77)

JUDGMENT

STRASBOURG

10 December 1982

In the case of Foti and others,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court*, as a Chamber composed of the following judges:

Mr. G. WIARDA, *President*,
Mrs. D. BINDSCHEDLER-ROBERT,
Mr. D. EVRIGENIS,
Mr. J. PINHEIRO FARINHA,
Sir Vincent EVANS,
Mr. C. RUSSO,
Mr. R. BERNHARDT,

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

Having deliberated in private on 23 April, 25 and 26 June and 23 November 1982,

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

PROCEDURE

1. The case of Foti and others was referred to the Court by the European Commission of Human Rights ("the Commission"). The case originated in four applications (nos. 7604/76, 7719/76, 7781/77 and 7913/77) against the Italian Republic lodged with the Commission in 1976 and 1977 by four Italian nationals, Mr. Benito Foti, Mr. Felice Lentini, Mr. Demetrio Cenerini and Mr. Giovanni Gulli, under Article 25 (art. 25) of the Convention. On 9 May 1977, the Commission ordered the first three applications to be joined and, on 11 May 1978, ordered the fourth application to be joined to the other three.

2. The Commission's request was lodged with the registry of the Court on 20 May 1981, within the period of three months laid down by Articles 32 § 1 and 47 (art. 32-1, art. 47). The request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the Italian Republic recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The purpose of the request is to obtain a decision as to whether or not the

* Note by the registry: In this volume, the Rules of Court referred to are those in force at the time proceedings were instituted. These Rules have been replaced by a revised text that came into operation on 1 January 1983, but only in respect of cases brought before the Court after that date.

facts of the case disclose a breach by the respondent State of its obligations under Article 6 § 1 (art. 6-1).

3. The Chamber of seven judges to be constituted included, as ex officio members, Mr. C. Russo, the elected judge of Italian nationality (Article 43 of the Convention) (art. 43), and Mr. G. Wiarda, the President of the Court (Rule 21-3-b of the Rules of Court). On 30 May 1981, the President drew by lot, in the presence of the Registrar, the names of the five other members, namely, Mrs. D. Bindschedler-Robert, Mr. D. Evrigenis, Mr. J. Pinheiro Farinha, Mr. E. García de Enterría and Sir Vincent Evans (Article 43 in fine of the Convention and Rule 21-4) (art. 43).

4. Mr. Wiarda, who had assumed the office of President of the Chamber (Rule 21 § 5) ascertained, through the Registrar, the views of the Agent of the Italian Government ("the Government") and the Delegate of the Commission regarding the procedure to be followed. On 15 June 1981, he directed that the Agent should have until 31 October 1981 to lodge a memorial and that the Delegate should be entitled to reply in writing within two months from the date of the transmission of the Government's memorial to him by the Registrar. On 3 November, the President extended the first time-limit to 16 November.

The official French text of the Government's memorial and its appendices was received at the registry on 23 November 1981 and 7 January 1982, respectively.

5. On 21 January 1982, the Secretary to the Commission informed the Registrar that the Delegate would present his observations at the hearings; on 27 January, he forwarded to the Registrar the observations by applicants Foti, Lentini and Cenerini on the Government's memorial, stating that they also represented Mr. Gulli's views.

6. Having consulted, through the Registrar, the Agent of the Government and the Delegate of the Commission, the President directed on 4 February that the oral proceedings should open on 21 April.

7. The hearings were held in public at the Human Rights Building, Strasbourg, on 21 April. Shortly before their opening, the Chamber had held a preparatory meeting; it had authorised the use of Italian by the persons assisting the Delegate of the Commission (Rule 27 § 3).

There appeared before the Court:

- for the Government:

Mr. C. ZANGHI,

Delegate of the Agent;

- for the Commission:

Mr. E. BUSUTTIL,

Delegate,

Mr. C. CORIGLIANO, Mr. P. CATANOSO

and Mr. F. QUATTRONE, the applicants' lawyers

before the Commission, assisting the Delegate (Rule 29 § 1, second sentence of the Rules of the Court).

The Court heard their submissions and statements as well as their replies to the questions put by the Court and two of its members.

8. On various dates between 15 December 1981 and 17 August 1982, the registry received from the Commission and the Government, respectively, numerous documents and items of information either requested by or on behalf of the Chamber or provided by the Commission or the Government on their own initiative. This material included the four initial applications (14 March 1976, 2 September 1976, 28 November 1976 and 15 April 1977), several letters from the applicants to the Commission (13 April 1976, 26 June 1976, 25 August 1976, 11 October 1976, 28 October 1976, 20 December 1976, 26 December 1976, 4 February 1977, 16 February 1977, 24 February 1977, 1 April 1977, 18 August 1977 and 9 October 1977), the written observations submitted to the Commission by the Government (9 July 1977, 10 October 1977, 12 January 1978, 1 March 1978, 6 March 1979 and 25 October 1979) and the verbatim record of the hearing on 12 December 1979 before the Commission.

9. At the deliberations held on 23 November 1982, Mr. R. Bernhardt, first substitute judge, replaced Mr. E. García de Enterría, who was prevented from attending (Rules 22 § 1 and 24 § 1).

AS TO THE FACTS

10. The applicants, who are all Italian nationals, live in Reggio Calabria. They were prosecuted for acts committed in the course of demonstrations that took place in Reggio Calabria between 1970 and 1973. The popular unrest, which was particularly heightened between July 1970 and April 1971, was triggered off by the decision to transfer the capital of the province of Calabria from Reggio (its traditional site) to Catanzaro, and became particularly widespread on account of the economic situation in this part of the region. It took the form of general strikes, dynamite bombings and clashes with the police. It led to hundreds of arrests, about 1,200 charges and, in 1970 and 1971 alone, to 459 prosecutions; 94 of these were transferred, for serious reasons of public policy (Article 55 of the Code of Criminal Procedure - see paragraph 31 below), to a court in another town, including 86 to the Potenza Regional Court.

I. FACTS CONCERNING EACH APPLICANT

11. As to the exact dates of the facts concerning each applicant, the evidence in the case-file contains numerous contradictions and uncertainties which the efforts of the Court, and in particular the questions it put to the

persons appearing before it, have not entirely succeeded in removing. Subject to this reservation, the facts may be summarised as follows:

A. Mr. Foti

12. Mr. Benito Foti was born in 1932 and is a clerk. He complains of three different proceedings instituted against him.

1. Proceedings I

13. On 9 October 1970, the applicant was charged, together with three other persons, with obstructing the public highway and seditious assembly. The preliminary investigation commenced before the Reggio Calabria Regional Court had to be suspended by reason of the election to the Chamber of Deputies on 7 May 1972 of one of the applicant's co-accused, Mr. Fortunato Aloï. In 1975, the Chamber of Deputies authorised Mr. Aloï's parliamentary immunity to be waived (Article 65 of the Constitution), following which, on 22 March 1976, the investigating judge committed the persons concerned, including Mr. Foti, for trial.

14. On 17 May 1976, the public prosecutor (*procuratore della Repubblica*) of Reggio requested the public prosecutor (*procuratore generale*) attached to the Catanzaro Court of Appeal to apply for the case to be remitted to a court other than the Reggio Regional Court, for serious reasons of public policy. By order of 20 December 1976, registered on 12 January 1977, the Court of Cassation granted the application made by the latter public prosecutor on 22 May and transferred the case to the Potenza Regional Court, which received the case-file on 17 January 1977.

15. On 21 December 1977, the Potenza Regional Court summoned the applicant to appear. On 15 February 1978, it delivered a judgment acquitting the applicant, which was entered in the court registry on 27 February.

2. Proceedings II

16. In September 1971, Mr. Foti was arrested and charged, together with another person, with obstructing the public highway, seditious assembly, illegal possession of weapons (tear-gas grenades) and "serious resistance" to the police.

In November 1971, the Reggio investigating judge committed the applicant for trial. The committal decision included a discharge on one of the counts. In January 1976, the investigation chamber of the Reggio Regional Court declared inadmissible the appeal that the public prosecutor's office (*pubblico ministero*) had brought on that point.

17. In February 1976, the Reggio public prosecutor requested the public prosecutor attached to the Catanzaro Court of Appeal to apply for the case

to be remitted to a court other than the Reggio Regional Court, for serious reasons of public policy. By order of 11 June 1976, registered at the beginning of September, the Court of Cassation granted the application made in March 1976 by the latter public prosecutor and transferred the case to the Potenza Regional Court.

18. The Potenza public prosecutor's office received the case-file on 1 October and transmitted it to the Regional Court on 26 November. The applicant, after being summoned on 9 December 1976 to appear on 1 February 1977, received a four months' suspended sentence and a fine for illegal possession of weapons but was acquitted on the remaining charges.

On 2 June 1977, the Potenza Court of Appeal upheld this decision against which Mr. Foti had appealed. The applicant's subsequent appeal on a point of law to the Court of Cassation was dismissed on 25 June 1979.

3. Proceedings III

19. On 21 March 1973, the applicant was arrested and charged, together with two other persons, with obstructing the public highway.

20. On 27 February 1976, the Reggio public prosecutor requested the public prosecutor attached to the Catanzaro Court of Appeal to apply for the case to be remitted to a court other than the Reggio Regional Court, for serious reasons of public policy. By order of 14 June 1976, which was registered the following day, the Court of Cassation granted the application made by the latter public prosecutor on 5 March 1976 and transferred the case to the Potenza Regional Court.

21. The applicant was committed for trial on 14 January 1977. The Regional Court summoned Mr. Foti to appear on 29 March 1977, but had to adjourn the hearings until 7 June. On that date, it delivered a decision, which became final, acquitting the applicant.

B. Mr. Lentini

22. Mr. Felice Lentini was born in 1939 and is a carpenter. In September 1970, together with eight others, he was arrested and charged with resisting the police.

23. The Reggio Calabria public prosecutor conducted the investigation according to the "summary" procedure (Article 389 of the Code of Criminal Procedure) and committed the applicant for trial on 18 September 1972.

On 24 May 1974, however, he requested the public prosecutor attached to the Catanzaro Court of Appeal to apply for the case to be remitted to a court other than the Reggio Regional Court, for serious reasons of public policy. By order of 16 June 1975, the Court of Cassation granted the application made by the latter public prosecutor on 14 June 1974 and transferred the case to the Potenza Regional Court.

24. The Potenza Regional Court, at its first hearing on 26 May 1976, concluded that the ordinary procedure should be followed and consequently referred the case-file to an investigating judge for examination. After once more being committed for trial approximately two months later, Mr. Lentini was acquitted by the Regional Court on 18 January 1977 for lack of evidence by a decision which became final.

C. Mr. Cenerini

25. Mr. Demetrio Cenerini was born in 1942 and is a messenger. He was arrested on 15 July 1970 and charged on 18 July, together with seventeen other persons, with insulting the police. He was released from custody on 31 July 1970. The Reggio Calabria investigating judge committed him for trial on 18 October 1972.

26. On 27 May 1974, the Reggio public prosecutor requested the public prosecutor attached to the Catanzaro Court of Appeal to apply to the Court of Cassation for the case to be remitted to a court other than the Reggio Regional Court, for serious reasons of public policy. The latter public prosecutor did so on 3 June 1974, but did not forward the case-file until each of the eighteen persons charged had been served with judicial notification (see paragraphs 33-36 below). By order of 17 January 1975, which was registered approximately three months later, the Court of Cassation granted the application and transferred the case to the Potenza Regional Court.

27. The Potenza Regional Court, before which proceedings had been commenced by the public prosecutor's office in April 1976, summoned the applicant on 22 September to appear before it on 30 November. At that hearing, the defence objected, under Article 439 of the Code of Criminal Procedure, that the committal order was void because it had not been notified of the lodging of the preliminary investigation documents at the court registry before closure of the investigation proceedings. On 30 November 1976, the Court allowed the objection. Consequently, it sent the case-file back to the investigating judge, who on 12 May 1977 made a new committal order.

A first hearing fixed for 16 January 1978 had to be postponed because some important witnesses did not attend. At the following hearing on 15 March 1978, the case had to be adjourned again because the composition of the chamber had changed. Finally, on 7 June 1978, the Court discharged Mr. Cenerini, finding that the period of limitation had expired on 15 January 1978 (Articles 157 and 160 of the Penal Code).

D. Mr. Gulli

28. Mr. Giovanni Gulli was born in 1952 and is a labourer. He was arrested on 16 July 1970 and charged on 18 July, together with fifty-three others, with resisting and insulting the police, obstructing the public highway and seditious assembly. The Reggio Calabria investigating judge committed him for trial on 3 March 1973.

29. On 16 November 1974, the Reggio public prosecutor requested the public prosecutor attached to the Catanzaro Court of Appeal to apply to the Court of Cassation for the case to be remitted to a court other than the Reggio Regional Court, for serious reasons of public policy. The latter public prosecutor did so on 3 December 1974, but did not forward the case-file until 15 December 1975, after service of judicial notification on each of the fifty-four accused (see paragraphs 33-36 below). By order of 26 January 1976, which was lodged in the registry on 12 March 1976, the Court of Cassation granted the application and transferred the case to the Potenza Regional Court.

30. The Potenza Regional Court, before which proceedings had been commenced by the public prosecutor's office in June 1977, summoned the applicant on 2 February 1978 to appear before it on 29 March. At the hearing on that date, the consideration of the case had to be adjourned until 2 October because it had proved impossible to serve judicial notification on some of the accused.

On 2 October 1978, the Regional Court discharged Mr. Gulli, finding that the period of limitation had expired on 15 January 1978 (Articles 157 and 160 of the Penal Code).

II. RELEVANT PROVISIONS OF ITALIAN LAW

1. Transfer of the case to another court

31. Article 55, first paragraph, of the Code of Criminal Procedure provides (translation from Italian):

"At any time during or at any stage of the proceedings on the merits, on application by the public prosecutor attached to the Court of Appeal or the Court of Cassation, the Court of Cassation may transfer the preliminary investigation or trial proceedings to a different court, on serious grounds of public policy or on grounds of legitimate suspicion."

Article 56, second paragraph, specifies that the application is to be communicated to the accused (*imputato*) by the registry of the public prosecutor's office. The transfer proceedings suspend neither the preliminary investigation nor the trial, unless the Court of Cassation, which gives its ruling on the application by means of an order (Article 58), directs otherwise (Article 57).

2. Joinder of proceedings

32. Under Article 45 of the Code of Criminal Procedure (translation from Italian):

"There is a close connection between proceedings in the following cases:

1. Where the prosecutions concern offences (reati) committed on the same occasion by several persons gathered together ...;

...

4. If the evidence of an offence or of one of its circumstances is material for the evidence of another offence or one of its circumstances."

Where a close connection exists, Article 413 of that Code provides that proceedings may be joined provided this serves to expedite the procedure.

3. Notifications

33. Notifications in criminal cases are governed by the rules laid down by Articles 166 to 179 of the Code of Criminal Procedure.

34. As regards the initial notification of an accused person who is not in custody and where it is impossible to effect service on the person concerned, a copy shall be left at his domicile or normal place of work, with a third party living with him, even temporarily, or, failing that, with a caretaker or equivalent. If both places are unknown, a copy of the document shall be served on one of these persons wherever the accused resides or has an address. Where there are no such persons, or where they are unable or unwilling to accept service of a copy of the document, the latter shall be lodged in the town hall of the municipality in which the accused lives or, failing that, in which he has his normal place of work; notice that the document has been lodged shall be posted on the door of the accused's home or normal place of work (Article 169).

35. If notification is nevertheless impossible, the official responsible for serving it shall so inform the competent judicial or prosecuting authority. That authority, after having ordered further searches, in particular at the accused's place of birth or his last place of residence, shall draw up a declaration to the effect that the accused is untraceable (decreto di irreperibilità), assigning him a defence lawyer if he does not already have one and requiring that the notification which could not be served and any future notifications be lodged with the registry of the judicial authority (ufficio giudiziario) conducting the proceedings (Article 170).

36. Under Article 171, the accused is asked, in the first formal document in the proceedings to elect a domicile for notification purposes; he is required to report any change of domicile. According to the legislation applicable at the time (amended by Act no. 534 of 8 August 1977), where the information provided on this matter by the person concerned proved

incomplete, further searches had to be conducted pursuant to Articles 169 and 170.

4. Procedure in the event of statutory limitation

37. By virtue of Article 152 of the Code of Criminal Procedure, a court is obliged, at any stage of the proceedings, to take notice of its own motion of the extinction of an offence; statutory limitation takes effect by operation of law.

The statutory limitation period varies from eighteen months to twenty years, according to the seriousness of the potential penalty (Article 157 of the Penal Code); in calculating the period, account has to be taken of any suspension or interruption that may have occurred (Articles 159 and 160 of the Penal Code). Thus, in the case of Mr. Cenerini and Mr. Gulli, the period was seven and a half years (see paragraphs 27 and 30 above).

PROCEEDINGS BEFORE THE COMMISSION

38. Mr. Foti, Mr. Lentini, Mr. Cenerini and Mr. Gulli applied to the Commission on 14 March 1976, 2 September 1976, 22 November 1976 and 15 April 1977, respectively.

Each of the first three applicants complained of the transfer of his trial to the Potenza Regional Court, claiming that such a measure was incompatible with Article 6 § 1 (art. 6-1) of the Convention. Mr. Cenerini also complained, under Articles 2, 3, 4 and 5 (art. 2, art. 3, art. 4, art. 5), of ill-treatment he allegedly suffered at the hands of the police and of his detention in the police station.

Mr. Gulli's grievance was that the Governor of Reggio Calabria had on 2 December 1976 refused, because of the prosecution brought against him, to authorise his appointment as a personal guard (*guardia particolare*); he regarded this decision as a violation of Article 4 § 1 (art. 4-1). In a subsequent letter dated 7 May 1977, he made an additional submission on this point on the basis of Article 6 § 2 (art. 6-2); in addition, he alleged violation of Article 6 § 1 (art. 6-1) both on the ground that the proceedings had exceeded a "reasonable time" and because of the transfer of his trial to the Potenza Regional Court.

In their preliminary written observations, drafted by Mr. Corigliano on their behalf, the applicants used extremely strong language which the Court regards as unacceptable. For this reason too, the Commission decided on 14 October 1977 that it would no longer accept this lawyer as the adviser of Mr. Foti, Mr. Lentini and Mr. Cenerini, who thereupon appointed another lawyer (appendices I and II to the report).

39. On 9 May 1977, the Commission ordered the joinder of the first three applications under Rule 29 of its Rules of Procedure and decided to examine of its own motion the issue of trial "within a reasonable time", within the meaning of Article 6 § 1 (art. 6-1), and the issue of Article 13 (art. 13). In a memorial dated 18 August 1977, Mr. Foti, Mr. Lentini and Mr. Cenerini stated that they "adopted as their own" (" facciamo nostri") the reasons that led the Commission to take this initiative, adding that the breach of both provisions was "already implicitly alleged in the narrative part of their applications" (" violazione, peraltro, implicitamente già dedotta nella narrativa dei nostri ricorsi "). They thereby answered one of the Government's preliminary objections.

On 11 May 1978, the Commission declared the four applications admissible only in so far as they related to the length of the criminal proceedings in question; it rejected the remainder of the complaints *ratione temporis*, *ratione materiae*, for being manifestly ill-founded or for non-exhaustion of domestic remedies, depending upon the circumstances. It joined Mr. Gulli's application to the other three.

In its report of 15 October 1980 (Article 31 of the Convention) (art. 31), it expressed the unanimous opinion that the applicants' cases had not been heard "within a reasonable time" and that there had thus been a breach of Article 6 § 1 (art. 6-1); it considered it unnecessary to rule on the application of Article 13 (art. 13) in the instant case.

AS TO THE LAW

I. PRELIMINARY OBJECTIONS

40. The Government have pleaded several preliminary objections.

A number of these objections, put forward at the hearings on 21 April 1982, concern complaints that the Commission struck out on 11 May 1978 (see paragraphs 38-39 above). The Government have requested the Court likewise to declare the complaints in question inadmissible both on the original grounds given and, as regards the transfer of the proceedings to the Potenza Regional Court, for an additional reason, namely the lack from the outset of the status of victim on the part of Mr. Foti and, at the very least, the fact of being out of time (Article 26 in fine of the Convention) (art. 26) in respect of Mr. Lentini, Mr. Cenerini and Mr. Gulli.

41. It is not within the province of the Court to take cognisance of a request of this kind, for complaints rejected by the Commission fall outside the compass of the case as delimited by the decisions given on 11 May 1978

(see, *inter alia*, the Guzzardi judgment of 6 November 1980, Series A no. 39, p. 39, § 106).

On the other hand, the Court must rule on the two other objections, which relate to the part of the applications accepted by the Commission.

A. Objection regarding the *ex officio* examination of the "reasonable time" issue in the cases of Mr. Foti, Mr. Lentini and Mr. Cenerini

42. The Government objected firstly to the Commission having on its own initiative taken into consideration the issue of "reasonable time", within the meaning of Article 6 § 1 (art. 6-1), in the cases of Mr. Foti, Mr. Lentini and Mr. Cenerini. This plea, it was explained, did not extend to Mr. Gulli who himself raised the issue by letter dated 7 May 1977, less than a month after the dispatch of his initial application.

The Government's argument was as follows. The Commission is without any doubt empowered to decide upon the characterisation in law to be given to a matter, but solely in respect of the facts impugned before it. The original complaint formulated by the three applicants under Article 6 § 1 (art. 6-1) was directed against the transfer of their trials to the Potenza Regional Court and against that alone (see paragraph 38 above). By taking it upon itself of its own motion, as from 9 May 1977, to review observance of their right to a hearing "within a reasonable time" (see paragraph 39 above), the Commission had thus failed to confine itself to applying the maxim "*da mihi facta, dabo tibi jus*", thereby exceeding its jurisdiction.

43. The Government had already advanced this argument before the Commission, notably in their written observations of 9 July 1977 and 12 January 1978. Accordingly, no issue of estoppel arises here (see, *mutatis mutandis*, the above-mentioned Guzzardi judgment, Series A no. 39, pp. 21-22, § 59).

44. When they applied to the Commission for the first time, Mr. Foti, Mr. Lentini and Mr. Cenerini did not in any way assert, either expressly or in substance, that the criminal proceedings against them were being unduly prolonged. The international system of protection established by the Convention functions on the basis of applications be they governmental or individual, alleging violations (see Articles 24 and 25) (art. 24, art. 25). It does not enable the Commission and the Court either to take up a matter irrespective of the manner in which it came to their knowledge or even, in the context of pending proceedings, to seize on facts that have not been adduced by the applicant - be it a State or an individual - and to examine those facts for compatibility with the Convention.

The institutions set up under the Convention nonetheless do have jurisdiction to review in the light of the entirety of the Convention's requirements circumstances complained of by an applicant. In the

performance of their task, the Convention institutions are, notably, free to attribute to the facts of the case, as found to be established on the evidence before them, a characterisation in law different from that given by the applicant or, if need be, to view the facts in a different manner; furthermore, they have to take account not only of the original application but also of the additional documents intended to complete the latter by eliminating initial omissions or obscurities (see, for example, the above-mentioned Guzzardi judgment, Series A no. 39, pp. 22-23, §§ 62-63, and the Ringeisen judgment of 16 July 1971, Series A no. 13, pp. 40-41, § 98, as compared with p. 34, § 79, and pp. 39-40, §§ 96-97).

From the outset, the information furnished by Mr. Foti, Mr. Lentini and, above all, Mr. Cenerini showed that the proceedings in question had been pending for years. Subsequently, they kept the Commission advised of the progress of these proceedings - sometimes of their own initiative (see the letters of 25 August 1976, 11 October 1976, 20 December 1976, 26 December 1976, 4 February 1977, 16 February 1977, 24 February 1977) and at other times in reply to questions by the Commission (see the letter of 1 April 1977) -, calling on the latter to rule on their grievances as a matter of urgency. It was therefore possible for the Commission to consider that the facts adduced by the applicants potentially involved an issue of trial within a "reasonable time", within the meaning of Article 6 § 1 (art. 6-1).

Once the parties had been informed of the Commission's intention to examine the issue, the applicants declared that they were "adopting as their own" the grounds that had prompted the Commission to raise the matter *ex officio*; this the applicants did in a memorial dated 18 August 1977 and, hence, prior to the admissibility decision of 11 May 1978 (see paragraph 39 above). They thus manifested their agreement with the approach of the Commission and supplemented their application.

Consequently, the Court, being required to give a ruling in the light of the case as it now stands, holds that it has jurisdiction to settle this issue.

B. Objection as to non-exhaustion of domestic remedies

45. The Government also pleaded non-exhaustion of domestic remedies (Article 26) (art. 26), as their principal submission in respect of Mr. Gulli and in the alternative in respect of Mr. Foti, Mr. Lentini and Mr. Cenerini. The Government pointed out, citing the Van Oosterwijck judgment of 6 November 1980 (Series A no. 40, pp. 15-17, §§ 30, 31 and 33), that the applicants had omitted to rely on Article 6 § 1 (art. 6-1) before the national authorities, notwithstanding the direct applicability of that provision in Italian law. Nor had the applicants requested the national authorities to expedite the proceedings or, in the unlikely event of such action proving fruitless, attempted to establish liability on the part of those authorities

under Article 328 of the Penal Code taken in conjunction with Articles 55, 56 and 74 of the Code of Civil Procedure.

46. The Court will take cognisance of preliminary objections of this kind in so far as the respondent State may have first raised them before the Commission, in principle at the stage of the initial examination of admissibility, to the extent that their character and the circumstances permitted; if this condition is not fulfilled, the Government are estopped from raising the objection before the Court (see, *inter alia*, and the Artico judgment of 13 May 1980, Series A no. 37, pp. 12-14, §§ 24 and 27, and the above-mentioned Guzzardi judgment, Series A no. 39, p. 24, § 67).

47. Prior to the decision of 11 May 1978 on the admissibility of applications nos. 7604/76, 7719/76 and 7781/77 of Mr. Foti, Mr. Lentini and Mr. Cenerini, the Government had not argued non-exhaustion of domestic remedies in answer to the grievances coming under the head of "reasonable time"; they were, however, already aware of the Commission's intention to examine this issue. The subsequent reliance placed by the Government on Article 26 (art. 26) of the Convention was, moreover, different in approach from that represented by their submissions to the Court: before the Commission, the Government contended that the three individuals in question had applied to the Commission prematurely since they had not awaited the outcome of the prosecutions brought against them (see the supplementary memorial of March 1979 and the oral pleadings of 12 December 1979 before the Commission).

48. The same is not entirely true as regards Mr. Gulli. Even before the admissibility decision of 11 May 1978, the Government criticised him, if not for having omitted to pray in aid Article 6 § 1 (art. 6-1) in an explicit manner before the Italian courts, at least for not having made the slightest effort to have his rights upheld by those courts ("non risultando che l'interessato si sia in un qualsiasi modo attivato presso l'Autorità giudiziaria od altro organo per tutelare i diritti che si asseriscono lesi"). This argument related not only to the complaint regarding the transfer of the trial to the Potenza Regional Court but also to the allegation that the "reasonable time" had been exceeded; as confirmation of this, the Court would refer to the original Italian text of the written observations of 10 October 1977 notwithstanding a certain discrepancy between this text and the official French translation.

Nonetheless, when a Contracting State seeks to shelter behind the duty to exhaust remedies, it is for the State to establish the existence of available remedies that have not been utilised by those concerned (see, *inter alia*, the Deweer judgment of 27 February 1980, Series A no. 35, p. 15, § 26). However, the short passage cited above from the observations of 10 October 1977 went no further than vague assertions; it did not in any sense identify the means of redress to which, according to the Government, Mr. Gulli had wrongly neglected to have recourse. It was not for the Commission to

ascertain what were the particular remedies alluded to (see the above-mentioned Deweer judgment, *ibid.*).

Subsequent observations dated 1 March 1978, which dealt with the merits and, more precisely, with Article 13 (art. 13) of the Convention and no longer with admissibility, referred not to Article 328 of the Penal Code and Articles 55, 56 and 74 of the Code of Civil Procedure, but to Article 298 of the Code of Criminal Procedure (supervisory duty incumbent on the public prosecutor attached to the Court of Appeal) and to the legal rules governing time-barring of criminal actions. The Government had already cited these various texts, in greater detail and together with other texts (Articles 269-276 of the Code of Criminal Procedure), in their observations of 9 July 1977 on the applications of Mr. Foti, Mr. Lentini and Mr. Cenerini; they had described these texts as being "incitements" to a rapid conclusion of judicial proceedings. In a supplementary memorial of March 1979, that is subsequent to the decision of 11 May 1978 on the admissibility of application no. 7913/77, and then at the hearings before the Commission on 12 December 1979, the Government claimed that Mr. Gulli, like Mr. Foti, Mr. Lentini and Mr. Cenerini (see paragraph 47 above), had applied to the Commission prematurely.

49. It was in their memorial of November 1981 to the Court that the Government for the first time invoked Article 26 (art. 26) of the Convention in the manner described at paragraph 45 above. Moreover, in paragraph 3 of that memorial and at the hearings on 21 April 1982, they acknowledged the novelty of their objection, without explaining why they had not pleaded it earlier.

The Court, concurring with the Delegate of the Commission, accordingly concludes that there is estoppel in the case of each of the four applicants.

II. MERITS

A. The alleged breach of article 6 § 1 (art. 6-1)

50. The Commission expressed the opinion that the applicants had been the victims of a breach of their right to a hearing "within a reasonable time", within the meaning of Article 6 § 1 (art. 6-1).

The Government disagreed with this view.

1. The length of the proceedings

51. The first matter that must be determined is the relevant period to be considered.

(a) Commencement of the periods to be taken into account

52. In criminal matters, in order to assess whether the "reasonable time" requirement contained in Article 6 § 1 (art. 6-1) has been complied with, one must begin by ascertaining from which moment the person was "charged"; this may have occurred on a date prior to the case coming before the trial court (see, for example, the above-mentioned Deweer judgment, Series A no. 35, p. 22, § 42), such as the date of the arrest, the date when the person concerned was officially notified that he would be prosecuted or the date when the preliminary investigations were opened (see the Wemhoff judgment of 27 June 1968, Series A no. 7, pp. 26-27, § 19, the Neumeister judgment of the same date, Series A no. 8, p. 41, § 18, and the above-mentioned Ringeisen judgment, Series A no. 13, p. 45, § 110). Whilst "charge", for the purposes of Article 6 § 1 (art. 6-1), may in general be defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence", it may in some instances take the form of other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect (see, inter alia, the Eckle judgment of 15 July 1982, Series A no. 51, p. 33, § 73).

53. The decision to prosecute the applicants dates back to 9 October 1970 (proceedings I), September 1971 (proceedings II) and 21 March 1973 (proceedings III) for Mr. Foti, to September 1970 for Mr. Lentini and to 18 July 1970 for Mr. Cenerini and Mr. Gulli (see paragraphs 13, 16, 19, 22, 25 and 28 above). In the view of the Commission, these dates mark the opening of the criminal proceedings but the periods to be considered begin only on 1 August 1973, when the recognition by Italy of the right of individual petition took effect; however, in assessing the reasonableness of the time that elapsed after 31 July 1973, account must be taken of the then state of proceedings (see paragraph 103 of the report).

The Court concurs with this line of reasoning (see notably, *mutatis mutandis*, the above-mentioned Ringeisen judgment, Series A no. 13, pp. 41-42, § 101). It notes in particular that the declaration made by Italy under Article 25 (art. 25) is, according to its own terms, valid only in relation to acts, decisions, facts or events occurring subsequently to 31 July 1973.

(b) End of the periods to be taken into account

54. The closing date of the proceedings currently in issue was not a matter of contention.

With regard to Mr. Foti, the relevant dates were 15 February 1978 (proceedings I), 25 June 1979 (proceedings II) and 7 June 1977 (proceedings III), the first and third dates being those of the judgments by the Potenza Regional Court and the second date that of the judgment by the Court of Cassation (see paragraphs 15, 18 and 21 above).

For the other applicants, the periods to be considered terminated on 18 January 1977 (Mr. Lentini), 7 June 1978 (Mr. Cenerini) and 2 October 1978 (Mr. Gulli) when the Potenza Regional Court delivered judgment (see paragraphs 24, 27 and 30 above).

(c) Conclusion

55. The length of time to be reviewed for compatibility with Article 6 § 1 (art. 6-1) thus exceeds

- four years and six months (1 August 1973 - 15 February 1978) in the first proceedings against Mr. Foti;
- five years and ten months (1 August 1973 - 25 June 1979) in the second proceedings against him;
- three years and ten months (1 August 1973 - 7 June 1977) in the third proceedings against him;
- three years and five months (1 August 1973 - 18 January 1977) in the case of Mr. Lentini;
- four years and ten months (1 August 1973 - 7 June 1978) in the case of Mr. Cenerini;
- five years and two months (1 August 1973 - 2 October 1978) in the case of Mr. Gulli.

2. The reasonableness of the length of the proceedings

56. The reasonableness of the length of the proceedings has to be assessed in each instance according to the particular circumstances. In this exercise, the Court has regard to, amongst other things, the complexity of the case, the conduct of the applicant or applicants and the conduct of the judicial authorities (see the above-mentioned Eckle judgment, Series A no. 51, p. 35, § 80).

(a) The complexity of the case

57. In the submission of the applicants, the prosecutions brought were uncomplicated as regards both the nature of their object and the nature of the various procedural steps taken. The Government, on the contrary, asserted that the preliminary investigation involved a large number of measures; they also drew attention to the political climate prevailing in Reggio Calabria at the time of the trials (see paragraph 10 above).

58. The Court notes, as did the Commission that the offences of which the applicants were accused (insulting and resisting the police, possession of tear-gas grenades, obstruction of the public highway, and seditious assembly or demonstration) can in themselves scarcely be described as complex. As offences committed in public and established on the spot, they should not have given rise to a difficult process of preliminary investigation.

Furthermore, except in the second Foti case, they were dealt with at one jurisdictional level alone.

The applicants' cases were thus not especially complex and did not become so during the course of the proceedings. As far as the climate surrounding the prosecutions is concerned, this can only be taken into account when reviewing the conduct of the relevant authorities.

(b) The conduct of the applicants

59. Of the four applicants, Mr. Foti alone exercised, in the second proceedings brought against him, his right to enter an ordinary appeal and then to apply to the Court of Cassation (see paragraph 18 above).

Mr. Cenerini's objection that the decision committing him for trial was void was allowed by the Potenza Regional Court and its contribution to the duration of the proceedings was no more than five months and twelve days (see paragraph 27 above).

Accordingly, such delays as there were in the conduct of the proceedings were not imputable to the applicants.

(c) The conduct of the Italian authorities

60. In the submission of the applicants, the blame for the delays of which they complained was to be attributed to the conduct of the Italian authorities.

61. Before reviewing separately each set of proceedings in issue, the Court would recall the extent of the troubles that occurred in Reggio Calabria from 1970 until 1973 (see paragraph 10 above); these troubles had two important implications for the present case.

Firstly, they engendered an unusual political and social climate, and one in which the courts could legitimately fear, in the event of precipitate convictions or severe sentences, a recrudescence of tension and even a recurrence of the disorders.

Secondly, the troubles were not without effects on the workings of criminal justice. Such effects were felt mostly in the Reggio Regional Court, but the courts in Potenza, to which cases had been transferred, were also confronted with an exceptional backlog of business (see, *mutatis mutandis*, the Buchholz judgment of 6 May 1981, Series A no.42, pp. 20-21, § 61).

These circumstances must be borne in mind and, in particular, normal lapses of time stemming from the transfer of the cases are not to be regarded as unjustified.

(i) Mr. Foti

Proceedings I

62. Mr. Foti was charged in September 1970 and acquitted in February 1978. In its report, the Commission criticised the Reggio authorities for not having severed the case of Mr. Foti from that of Mr. Aloï, who had been

elected to the Chamber of Deputies, and the Potenza authorities for having been dilatory in fixing the first hearing (see paragraphs 13-15 above).

63. On the first point, the Court would recall that between the suspension of the preliminary investigation (May 1972) and the committal of Mr. Foti for trial (March 1976) there elapsed approximately three years and ten months, including a little more than two years and seven months after 31 July 1973. The Court does not consider that it has to review the conduct of the investigating judge, that is to say, the question whether he ought to have severed the proceedings against Mr. Foti and Mr. Aloï. Nor does the Court adjudge it to be within its province to determine whether the Chamber of Deputies ought to have waived Mr. Aloï's parliamentary immunity at an earlier date. In all cases before the Court, what is in issue is the international responsibility of the State (see especially, *mutatis mutandis*, the above-mentioned Buchholz judgment, Series A no. 42, p. 16, § 51, and the Young, James and Webster judgment of 13 August 1981, Series A no. 44, p. 20, § 49). Having regard to the lack of complexity of the case (see paragraph 58 above), the Court limits itself to holding the delay in question not to be reasonable.

64. On the second point (fixing of the date of hearing), it has to be observed that one year passed between the transferral order by the Court of Cassation and the summons of the applicant to appear before the Potenza Regional Court (20 December 1976 - 21 December 1977). In view of the latter Court's exceptional backlog of pending business at the relevant time, such a delay cannot justifiably be criticised in the particular circumstances (see paragraph 61 above).

Proceedings II

65. Between the appeal entered by the prosecuting authorities against the decision of November 1971 ordering a partial discharge and the dismissal of that appeal on 10 January 1976 by the investigation chamber, there occurred an interval of four years and two months, including a little more than two years and five months after 31 July 1973. The Government not having come forward with any plausible explanation in this respect, such a lapse of time is to be regarded as unduly long; the Court concurs with the Commission in reaching this conclusion.

66. On the other hand, the period between the transferral order by the Court of Cassation (11 June 1976) and the first hearing held by the Potenza Regional Court (1 February 1977) is not excessive since the latter Court was under a duty to satisfy itself that the preliminary investigation carried out at Reggio sufficed in the circumstances.

Proceedings III

67. A period of two years and eleven months, including two years and seven months after 31 July 1973, elapsed from the moment Mr. Foti was charged (21 March 1973) until the request by the Reggio public prosecutor to have the proceedings remitted to another court (27 February 1976). This

length of time cannot be justified, without more, by the procedural acts mentioned by the Government, namely the questioning of the accused and the witnesses, the issue of the order of provisional release from custody and the appeal against that order.

(ii) Mr. Lentini

68. Mr. Lentini was committed for trial on 18 September 1972. Yet, as the Commission was right to point out, no procedural measure seems to have been taken until 27 May 1974 when the Reggio public prosecutor requested the public prosecutor attached to the Catanzaro Court of Appeal to apply to have the proceedings remitted to a court other than the Reggio Regional Court. Thus, more than twenty-two months, including approximately ten months as from 1 August 1973, passed without any action on the part of the judicial authorities in Reggio. This has not been explained by the Government. The Court is conscious of the reasons capable of making a period of respite seem desirable (see paragraph 61 above); nonetheless, it does not consider, in the particular circumstances, that the prosecuting authorities had cause to be so dilatory.

69. A further period of time commenced with the issue by the Court of Cassation of the transferral order (16 June 1975) and ended with the first hearing before the Potenza Regional Court (26 May 1976). In view of the latter Court's exceptional backlog of pending business, this period, although exceeding eleven months, does not appear to be open to criticism (see paragraph 61 above).

(iii) Mr. Cenerini

70. Three periods call for comment in connection with the action brought against Mr. Cenerini.

71. The first, which extended from the committal of the applicant for trial (10 October 1972) until the request by the Reggio public prosecutor to have the proceedings remitted to another court (27 May 1974), lasted longer than nineteen months, including nine months after 31 July 1973. Here too (see paragraph 68 above), the action of the prosecuting authorities is to be regarded as dilatory in that the stated grounds for taking that action were serious reasons of public policy (see paragraph 26 above), which by their very nature imply a certain degree of urgency.

72. The second period, of approximately fifteen months, occurred between the issue of the transferral order by the Court of Cassation (17 January 1975) and the forwarding of the case-file to the Potenza Regional Court (April 1976). The Government have adduced no grounds capable of explaining this delay, which the Court finds to be excessive.

73. The same cannot be said of the third period, represented by the duration of the proceedings before the Potenza Regional Court (April 1976 - June 1978), in that there were valid reasons justifying the successive

adjournments of hearings: nullity of the committal order, absence of leading witnesses, changes in the membership of the chamber (see paragraph 27 above).

(iv) Mr. Gulli

74. More than twenty months, including fifteen and a half months after 31 July 1973, elapsed between the committal of Mr. Gulli for trial (3 March 1973) and the request by the Reggio public prosecutor for the proceedings to be transferred to another court (16 November 1974). On this point too (see paragraph 68 above), the Court finds that there was an abnormal delay.

75. Thereafter the case-file was transmitted to the Court of Cassation on 15 December 1975, more than one year after the application by the public prosecutor attached to the Catanzaro Court of Appeal for the case to be remitted to a court other than the Reggio Regional Court (3 December 1974). The Government have placed reliance on the difficulties encountered in serving the judicial notification on a number of Mr. Gulli's co-accused (see paragraph 29 above). Without underestimating these difficulties in the context of a mass trial involving fifty-four accused, the Court considers that they cannot deprive a person charged with a criminal offence of the guarantees under Article 6 § 1 (art. 6-1) and, in particular, of his right to a hearing within a reasonable time.

76. A third period is also to be regarded as unjustified. This period, which exceeds twenty months, runs from the lodging at the court registry of the grounds for the Court of Cassation's order (12 March 1976) to the summons to Mr. Gulli to appear before the Potenza Regional Court (2 February 1978). The Government have come forward with no explanation of this delay and they did not contest that the fifty-four cases were ready for trial when referred to the Potenza Regional Court.

(d) Conclusion

77. To sum up, the six sets of proceedings brought against the applicants were subject to delays incompatible with Article 6 § 1 (art. 6-1) of the Convention.

B. The alleged breach of article 13 (art. 13)

78. Like the Commission (see paragraph 151 of the report), the Court considers it superfluous to decide on the application of Article 13 (art. 13) in the instant case in view of the fact that the parties have not pursued the matter and in view of its own conclusion that there has been a breach of Article 6 § 1 (art. 6-1).

C. The application of article 50 (art. 50)

79. Counsel for the applicants stated that, should the Court find a violation of the Convention, their clients would be claiming just satisfaction under Article 50 (art. 50); counsel gave certain general indications as to the nature of the satisfaction sought.

The Government, for their part, did not take a stand on this issue.

80. Accordingly, although it was raised under Rule 47 bis of the Rules of Court, the question is not yet ready for decision. The Court is therefore obliged to reserve the matter and to fix the further procedure, taking due account of the possibility of an agreement between the respondent State and the applicants.

FOR THESE REASONS, THE COURT

1. Rejects by six votes to one the objection based by the Government on the " ex officio " examination of the issue of "reasonable time", within the meaning of Article 6 § 1 (art. 6-1), in the case of Mr. Foti, Mr. Lentini and Mr. Cenerini;
2. Declares unanimously that the Government are estopped from relying on the rule of exhaustion of domestic remedies;
3. Holds unanimously that there has been a breach of Article 6 § 1 (art. 6-1) in respect of the four applicants;
4. Holds unanimously that it is not necessary also to examine the case under Article 13 (art. 13);
5. Holds unanimously that the question of the application of Article 50 (art. 50) is not yet ready for decision; accordingly,
 - (a) reserves the whole of the said question;
 - (b) invites the Commission to submit to the Court, within two months from the delivery of the present judgment, its written observations on the said question and, in particular, to notify the Court of any friendly settlement at which the Government and the applicants might have arrived;
 - (c) reserves the further procedure and delegates to the President of the Chamber power to fix the same if need be.

Done in English and in French, the French text being authentic, at the Human Rights Building, Strasbourg, this tenth day of December, one thousand nine hundred and eighty-two.

For the President
Rudolf BERNHARDT
Judge

Marc-André EISSEN
Registrar

The separate opinion of Judge Pinheiro Farinha is annexed hereto in accordance with Article 51 § 2 (art. 51-2) of the Convention and Rule 50 § 2 of the Rules of Court.

R. B.
M.-A.E.

SEPARATE OPINION OF JUDGE PINHEIRO FARINHA

(Translation)

1. I am in agreement with the operative provisions of the judgment. Nevertheless, I feel bound to give my interpretation of point 1 of the operative provisions and I differ from the majority as regards paragraphs 64 and 69 of the judgment.

2. The Court has rejected the objection based on the "ex officio" examination of the "reasonable time" issue in the cases of Mr. Foti, Mr. Lentini and Mr. Cenerini.

The reason for this is, in my view, that the Commission did not examine the issue ex officio.

In point of fact, "from the outset, the information furnished by Mr. Foti, Mr. Lentini and, above all, Mr. Cenerini showed that the proceedings in question had been pending for years. Subsequently, they kept the Commission advised of the progress of these proceedings - sometimes of their own initiative ... and at other times in reply to questions by the Commission ... -, calling on the latter to rule on their grievances as a matter of urgency" (see paragraph 44 of the judgment).

The applicants had thus stated the facts (length of the proceedings). The Commission is competent to consider, even ex officio, whether the facts referred to it in an application disclose violations of the Convention other than those complained of in the application (see the Neumeister judgment of 27 June 1968, Series A no. 8, p.41, § 16). It should be borne in mind that applicants are not always in a position to appreciate the legal scope of their grievances. The Commission did not of its own motion investigate the question of the length of the proceedings. Once the applicants had indicated the duration of the proceedings, the Commission was obliged to review its compatibility with the Convention. Had the Commission taken it upon itself to inquire into this matter of duration, it would have been carrying out an ex officio examination in excess of its jurisdiction, but, in the present circumstances, this cannot be said to have been the case. It was for this reason that I voted in favour of point 1 of the operative provisions of the judgment.

3. In my view, the passing of "one year .. between the transferral order by the Court of Cassation and the summons of the applicant Foti to appear before the Potenza Regional Court" (see paragraph 64 of the judgment) goes beyond what is reasonable.

Similarly, and contrary to the conclusion set out in paragraph 69 of the judgment, I do not adjudge to be reasonable the delay between the issue by the Court of Cassation of the transferral order in the Lentini proceedings (16 June 1975) and the holding of the first hearing before the Potenza Regional Court (26 May 1976).