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

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ECHR 280 (2023)
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# Conviction of Total S.A. and Vitol S.A. for bribing foreign public officials in contravention of UN "oil-for-food" programme did not breach Article 7 of the Convention

In today's **Chamber** judgment[1] in the case of Total S.A. and Vitol S.A. v. France (applications nos. 34634/18 and 43546/18) the European Court of Human Rights held, unanimously, that there had been:

**no violation of Article 7 (no punishment without law)** of the European Convention on Human Rights.

The case concerned the applicant companies' conviction for the offence of bribing foreign public officials.

The applicant companies were found guilty of bribing foreign public officials, in contravention of the UN "oil-for-food" programme, and sentenced under Article 435-3 of the Criminal Code. Relying on Article 7 of the Convention (no punishment without law), they complained that the law in question lacked accessibility and foreseeability. As noted by the Paris Court of Appeal, at issue were "transactions agreed after 1 October 2000 and up to 20 March 2003, when Iraq was invaded by the coalition led by the United States".

As to the establishment of the offence, the Court noted that the Court of Appeal had found, in a very lengthily reasoned judgment as to both the facts and the law, that the applicant companies had deliberately agreed to and arranged for the payment of secret commissions, referred to as "surcharges", to Iraqi leaders, who had solicited them to bypass the scheme set up by the UN, in breach of Resolutions 661 and 986. The Court of Appeal had concluded that those actions were punishable under Article 435-3 of the Criminal Code as in force at the material time.

In view of the circumstances as a whole and the facts of the case in particular, the Court found that the applicable law at the time of the transactions had been accessible and sufficiently foreseeable for the applicant companies to have known that by paying secret commissions, referred to as "surcharges", in the context of the relevant Iraqi oil-trading transactions and in contravention of the UN "oil-for-food" programme, they were likely to incur criminal liability under Article 435-3 of the Criminal Code, taken both separately and in conjunction with the rules of international law then applicable. The Court concluded that there had been no violation of Article 7 of the Convention.

## Principal facts

The first applicant company, Total S.A., is the parent company of the Total group and has its registered office in Courbevoie (France). The second applicant company, Vitol S.A., has its registered office in Geneva (Switzerland).

During the night of 1 to 2 August 1990 the Iraqi army invaded Kuwait. On 6 August 1990 the United Nations (UN) Security Council adopted Resolution 661, imposing a series of measures that resulted in an international embargo on all Iraqi foreign trade. This embargo precipitated a food and health

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.
Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

crisis among the Iraqi population, which led the Security Council to introduce the so-called "oil-for-food" programme under the terms laid down in Resolution 986 of 14 April 1995.

Under this scheme, buyers, namely international oil companies approved by their governments and subject to UN approval, could purchase Iraqi crude oil from an Iraqi State company, the State Oil Marketing Organisation (SOMO), at a price suggested by the Iraqi government and approved by the UN. Two hundred and forty-eight oil companies received such approval, including the Total group subsidiaries Total International Limited France and Total Oil Trading S.A. The importing companies were to settle the purchases by letters of credit made out to a New York bank, where an escrow account opened and administered by the UN had been set up to receive all proceeds from the transactions.

Following the military intervention carried out by a coalition of States against Saddam Hussein's regime, research in the Iraqi archives brought to light shortcomings in this programme. In addition, the French national financial intelligence unit, known as "Tracfin", received several reports of suspicious financial movements emanating from large French firms or their French or foreign subsidiaries; investigations revealed that the Total group had paid secret commissions in connection with oil-purchasing transactions in certain countries, specifically in Iraq during the embargo. In parallel with the proceedings brought in France, Vitol S.A. pleaded guilty to similar charges before the US courts.

In a decision of 28 July 2011 the French investigating judge committed 18 individuals and the two applicant companies to stand trial before the Criminal Court. On 8 July 2013 the Paris Criminal Court acquitted Total S.A. and ruled that the prosecution had become time-barred in the case of Vitol S.A. In a lengthily reasoned judgment delivered on 26 February 2016, the Paris Court of Appeal found that the constituent elements of the offence of bribing foreign public officials, within the meaning of Article 435-3 of the Criminal Code, were made out in respect of the two applicant companies. The companies lodged appeals on points of law, which were dismissed by the Criminal Division of the Court of Cassation in a judgment delivered on 14 March 2018.

## Complaints, procedure and composition of the Court

Relying on Article 7 (no punishment without law), the applicant companies complained about their conviction on charges of bribery of foreign public officials under Article 435-3 of the Criminal Code, on the grounds that such a conviction had not been foreseeable at the time that the impugned acts were committed.

The applications were lodged with the European Court of Human Rights on 20 July 2018 and 11 September 2018.

Judgment was given by a Chamber of seven judges, composed as follows:

Georges **Ravarani** (Luxembourg), *President*,
Lado **Chanturia** (Georgia),
Carlo **Ranzoni** (Liechtenstein),
Mārtiņš **Mits** (Latvia),
Stéphanie **Mourou-Vikström** (Monaco),
Mattias **Guyomar** (France),
Kateřina **Šimáčková** (the Czech Republic),

and also Martina **Keller**, *Deputy Section Registrar.*

## Decision of the Court

### Article 7

First, concerning the accessibility of the law defining the offence in question, the Court observed that the provisions of Article 435-3 of the Criminal Code had entered into force on 29 September 2000, which was to say prior to the period during which the culpable acts attributed to the applicant companies had been committed, and that they had stemmed from a law which had transposed the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 17 September 1997. Moreover, no later than August 1990, only a few days after the invasion of Kuwait by Iraq, financial relations with that State had already been regulated by decree. Secondly, concerning the foreseeability of the courts' interpretation of the law under which the charges had been brought, the Court acknowledged that the applicant companies had been the first entities to have been convicted of the offence of bribing foreign public officials under Article 435-3 of the Criminal Code. The State could not, however, be criticised for a failure to meet the requirement of foreseeability of the law in so far as the domestic courts had not previously had occasion to clarify that statute's ambit and scope through judicial interpretation. The Court emphasised that all the domestic courts (the Criminal Court, the Court of Appeal and the Court of Cassation) had considered that the provisions of Article 435-3 of the Criminal Code were clear and applicable to the facts of the case.

As to the establishment of the offence, the Court noted, first, that in determining the facts, the Court of Appeal had found, in a very lengthily reasoned judgment as to both the facts and the law, that the applicant companies had deliberately agreed to and arranged for the payment of secret commissions, referred to as "surcharges", to Iraqi leaders, who had solicited them to bypass the scheme implemented by the UN, in breach of Resolutions 661 and 986. The Court of Appeal had concluded that those actions were punishable under Article 435-3 of the Criminal Code as in force at the relevant time.

Next, the Court observed that the domestic courts had examined whether the various constituent elements of the offence of bribing a foreign public official were made out. The Paris Court of Appeal's judgment had provided lengthy, detailed reasoning on that point, thus responding to the arguments raised by the applicant companies, both of which had been assisted by several lawyers, and had carried out a detailed analysis of each element in the light of its interpretation of the provision defining the offence in question.

Lastly, the Court emphasised that the Court of Appeal had examined the particular situation of each of the applicant companies, having regard both to their individual conduct and to the factual circumstances and context surrounding it. In its judgment, the Court of Cassation had, for its part, endorsed the Court of Appeal's assessment, taking the view that the acts established by the latter had indeed fallen within the ambit of paragraph 2 of Article 435-3 of the Criminal Code as in force at the relevant time. A significant part of the assessment had been devoted to the international context of the case, and in particular to sources of international law, such as the rules laid down in UN Security Council Resolutions 661 and 986, the terms of the Memorandum of Understanding entered into on 20 May 1996 with a view to the proper application of Resolution 986, and the provisions of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. In the Court's view, the applicant companies could therefore not claim that their business conduct had been in compliance with the international law in force at the time, which Article 435-3 of the Criminal Code had partly transposed into domestic law. Moreover, the Court took into consideration the fact, noted by the domestic courts, that the applicant companies had been "well versed in the international oil business". Given its status and expertise in that area, the first applicant company could therefore not have been unaware that its decision, in the words of the Paris Court of Appeal, "to use the secondary market in parallel with the legal UN route by accepting the system of surcharges using highly sophisticated methods, … as part of a complex organisation

requiring substantial involvement", and to have done so repeatedly and deliberately, resorting to "clandestine payment circuits which, even then, were variable", with secret commissions being paid "not to Iraqi State or SOMO accounts, but to accounts opened outside Iraq under the names of individuals and going through shell companies", was likely to bring that decision within the ambit of the offence of bribing foreign public officials under the aforementioned Article 435-3. As to the second applicant company, which was specialised in the oil and gas trade, the Court noted that it had acknowledged the facts before the French judicial authorities, after also pleading guilty to the same charges as part of a "plea bargain" validated by a decision of the New York State Supreme Court in 2007, in addition to the fact that the Paris Court of Appeal had found that it had "arranged to conceal its activities as payer [of surcharges] by hiding behind shell companies". The Court rejected the argument that the second applicant company could not have foreseen, at the relevant time, the potential consequences of its conduct under the criminal law, when it had knowingly taken part in this clandestine arrangement.

The Court saw no reason to reach a different conclusion from that of the domestic courts, which had considered that the applicant companies, being well acquainted with the oil trade and experienced in large-scale international transactions, ought to have exercised greater caution and taken special care in assessing the risks when they had decided to undertake transactions for the purchase of Iraqi oil, if necessary by relying on appropriate legal advice, which had been readily available to them.

In view of the above considerations in particular, the Court was satisfied that the offence of which the applicant companies had been found guilty had had, "at the time it was committed", a relevant legal basis "in national law", but also that this offence had been defined with sufficient clarity to satisfy the requirement of foreseeability for the purposes of Article 7 of the Convention. It considered that the domestic courts' interpretation of the provisions of Article 435-3 of the Criminal Code had not been expansive and that its outcome had been consistent with the substance of the offence and reasonably foreseeable.

The Court found that the law applicable at the time the acts were committed had been accessible and sufficiently foreseeable for the applicant companies to have known that by paying secret commissions, or so-called "surcharges", in the context of Iraqi oil-trading transactions and in contravention of the UN "oil-for-food" programme, they were likely to incur criminal liability under Article 435-3 of the Criminal Code, taken both separately and in conjunction with the rules of international law then in force.

There had therefore been no violation of Article 7 of the Convention.

*The judgment is available only in French.*

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**The European Court of Human Rights** was set up in Strasbourg by the Council of Europe member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.