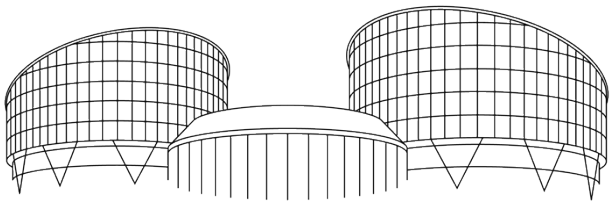

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF MEDVEDYEV AND OTHERS v. FRANCE

(Application no. 3394/03)

JUDGMENT

STRASBOURG

29 March 2010

In the case of Medvedyev and Others v. France,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Nicolas Bratza, *President*,
Jean-Paul Costa,
Christos Rozakis,
Françoise Tulkens,
Josep Casadevall,
Giovanni Bonello,
Corneliu Bîrsan,
Boštjan M. Zupančič,
Lech Garlicki,
Elisabet Fura,
Khanlar Hajiyev,
Dean Spielmann,
Ján Šikuta,
George Nicolaou,
Nona Tsotsoria,
Ann Power,
Mihai Poalelungi, *judges*,

and Michael O'Boyle, *Deputy Registrar*,

Having deliberated in private on 6 May 2009 and 3 February 2010,

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

PROCEDURE

1. The case originated in an application (no. 3394/03) against the French Republic lodged with the Court on 19 December 2002 under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Mr Oleksandr Medvedyev and Mr Borys Bilenikin, Ukrainian nationals, Mr Nicolae Balaban, Mr Puiu Dodica, Mr Nicu Stelian Manolache and Mr Viorel Petcu, Romanian nationals, Mr Georgios Boreas, a Greek national, and Mr Sergio Cabrera Leon and Mr Guillermo Luis Eduar Sage Martínez, Chilean nationals ("the applicants").

2. The applicants were represented by Mr P. Spinosi, of the *Conseil d'Etat* and Court of Cassation Bar. The French Government ("the Government") were represented by their Agent, Mrs E. Belliard, Director of Legal Affairs at the Ministry of Foreign Affairs.

3. The applicants alleged that they had been arbitrarily deprived of their liberty following the boarding of their ship by the French authorities and

complained that they had not been brought "promptly" before a judge or other officer authorised by law to exercise judicial power.

4. The application was allocated to the Fifth Section of the Court (Rule 52 § 1 of the Rules of Court). On 10 July 2008, after a hearing on the admissibility and merits (Rule 54 § 3), a Chamber of that Section, composed of Peer Lorenzen, President, Jean-Paul Costa, Karel Jungwiert, Renate Jaeger, Mark Villiger, Isabelle Berro-Lefèvre, Mirjana Lazarova Trajkovska, judges, and Claudia Westerdiek, Section Registrar, declared the application admissible and delivered a judgment in which the Court held by a majority that there had been a violation of Article 5 § 1 of the Convention and no violation of Article 5 § 3. The partly dissenting opinion of Judge Berro-Lefèvre joined by Judges Lorenzen and Lazarova Trajkovska was annexed to the judgment.

5. On 9 and 10 October 2008 respectively the applicants and the Government requested that the case be referred to the Grand Chamber, in accordance with Article 43 of the Convention. A panel of five judges of the Grand Chamber accepted that request on 1 December 2008.

6. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

7. The applicants and the Government each filed observations on the merits.

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 6 May 2009 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mrs E. BELLIARD, Director of Legal Affairs,
Ministry of Foreign Affairs, *Agent*,
Mr J.-C. MARIN, public prosecutor in Paris,
Mr L. DI GUARDIA, Principal Advocate-General,
Court of Cassation,
Ms A.-F. TISSIER, Deputy Director for Human Rights,
Legal Affairs Department, Ministry of Foreign Affairs,
Ms M. MONGIN-HEUZÉ, *magistrat*, on secondment to the
Ministry of Foreign Affairs,
Mr T. POCQUET DU HAUT JUSSE, Deputy to the Director
of Civil Affairs and Pardons (DACG), Ministry of Justice,
Mr J.-C. GRACIA, Head of Litigation Department,
Ministry of Justice,
Ms D. MERRI, *chargée d'études*, Legal Affairs Department,
Ministry of Defence, *Advisers*;

(b) *for the applicants*

Mr P. SPINOSI, member of the *Conseil d'Etat* and
Court of Cassation Bar, *Counsel.*

The Court heard addresses by Mr Spinosi and Mrs Belliard.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicants were crew members on a merchant ship named the *Winner*, registered in Cambodia. The ship had attracted the attention of the American, Spanish and Greek anti-drug services when the Central Office Against Illegal Drug Trafficking *(l'Office Central de Répression du Trafic Illicite des Stupéfiants* – "the OCRTIS"), a ministerial body attached to the Central Police Directorate of the French Ministry of the Interior, requested authorisation to intercept it. The OCRTIS suspected the ship of carrying large quantities of drugs, with the intention of transferring them to speedboats off the Canary Islands for subsequent delivery to the coasts of Europe.

10. In a diplomatic note dated 7 June 2002, in response to a request from the French embassy in Phnom Penh, the Cambodian Minister for Foreign Affairs and International Cooperation gave his government's agreement for the French authorities to take action, in the following terms:

> "The Ministry of Foreign Affairs and International Cooperation presents its compliments to the French embassy in Phnom Penh and, referring to its note no. 507/2002 dated 7 June 2002, has the honour formally to confirm that the royal government of Cambodia authorises the French authorities to intercept, inspect and take legal action against the ship *Winner*, flying the Cambodian flag XUDJ3, belonging to 'Sherlock Marine' in the Marshall Islands.
>
> The Ministry of Foreign Affairs and International Cooperation takes this opportunity to renew its assurance of its high esteem."

11. In a diplomatic telegram dated the same day, the French embassy in Phnom Penh passed on the information to the Ministry of Defence in Paris.

12. The commander of the French frigate *Lieutenant de vaisseau Le Hénaff*, which lay at anchor in Brest harbour and had been assigned a mission off the coast of Africa, was instructed by the French naval authorities to locate and intercept the *Winner*. The frigate left Brest harbour the same day to search for and intercept the *Winner*, with the French navy commando unit *Jaubert*, a special forces team specialised in boarding

vessels at sea, on board for the duration of the mission. On 10 June 2002, during a technical stopover in Spain, three experts from the OCRTIS also boarded the frigate.

13. On 13 June 2002, at 6 a.m., the French frigate spotted a merchant ship travelling at slow speed through the waters off Cape Verde, several thousand kilometres from France. It was not flying a flag, but was identified as the *Winner*. The merchant ship suddenly changed course and began to steer a course that was dangerous both for the frigate and for members of the armed forces who had boarded a speedboat. While the *Winner* refused to answer the attempts of the commander of the frigate to establish radio contact, its crew jettisoned a number of packages into the sea; one of the packages, containing about 100 kilos of cocaine, was recovered by the French seamen. After several warnings and warning shots fired under orders from France's maritime prefect for the Atlantic went unheeded, the French frigate fired a shot directly at the *Winner*. The merchant ship then answered by radio and agreed to stop. When they boarded the *Winner*, the French commando team used their weapons to open certain locked doors. When a crew member of the *Winner* refused to obey their commands, a "warning shot" was fired at the ground, but the bullet ricocheted and the crew member was wounded. He was immediately evacuated onto the French frigate, then transferred to Dakar hospital, where he died a week later.

14. Under orders from the maritime prefect and at the request of the public prosecutor in Brest, a tug with a military doctor on board was sent from Brest to tow the *Winner* back to Brest harbour, escorted by the frigate *Commandant Bouan.* Because of its poor state of repair and the weather conditions, the ship was incapable of speeds faster than 5 knots.

15. The crew of the *Winner* were confined to their quarters under military guard. The Government submit that when the crew had calmed down they were allowed to move about the ship under the supervision of the French forces. According to the applicants, the coercive measures were maintained throughout the voyage, until they arrived in Brest.

16. On 13 June 2002, at 11 a.m., the Brest public prosecutor referred the case to OCRTIS for examination under the *flagrante delicto* procedure. It emerged that the Greek coastguard had had the *Winner* under observation in connection with international drug trafficking involving Greek nationals.

17. On 24 June 2002 the Brest public prosecutor's office opened an investigation into charges, against persons unknown, of leading a group with the aim of producing, making, importing, exporting, transporting, holding, supplying, selling, acquiring or illegally using drugs and conspiring to import and export drugs illegally. Two investigating judges were appointed.

18. On 26 June 2002, at 8.45 a.m., the *Winner* entered Brest harbour under escort. The crew were handed over to the police, acting under instructions dated 25 June 2002 from one of the investigating judges, who

immediately notified the persons concerned that they were being placed in police custody and informed them of their rights.

19. On the same day, the applicants were presented to an investigating judge at the police station in Brest, to determine whether or not their police custody should be extended. The reports submitted to the Grand Chamber by the Government show that certain applicants met one of the investigating judges (R. André) at 5.05 p.m. (Mr Cabrera Leon), 5.10 p.m. (Mr Sage Martínez), 5.16 p.m. (Mr Balaban), 5.25 p.m. (Mr Manolache), 5.34 p.m. (Mr Petcu) and 5.40 p.m. (Mr Dodica), and the other applicants (Mr Medvedyev, Mr Bilenikin and Mr Boreas) were heard by the second investigating judge (B. Simier) at an unspecified time. The applicants were presented to the same investigating judges again the following day, 27 June 2002 (Mr Sage Martínez at 5.05 p.m., Mr Cabrera Leon at 5.10 p.m., Mr Manolache at 5.20 p.m., Mr Balaban at 5.28 p.m., Mr Dodica at 5.35 p.m. and Mr Petcu at 5.40 p.m.; the times for the other three applicants are not known).

20. On 28 and 29 June 2002 the applicants were charged and remanded in custody pending trial (Mr Petcu, Mr Dodica, Mr Balaban and Mr Manolache on 28 June, and Mr Medvedyev, Mr Bilenikin, Mr Boreas, Mr Cabrera Leon, Mr Sage Martínez and two other crew members – Mr Litetski and Mr Theophanous – on 29 June).

21. The applicants applied to the Investigation Division of the Rennes Court of Appeal to have the evidence disallowed, submitting that the French authorities had acted *ultra vires* in boarding the *Winner*, as the ship had been under Cambodian jurisdiction and Cambodia was not party to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances signed in Vienna on 20 December 1988, and also that they had not been brought "promptly" before a judge, as required under Article 5 § 3 of the Convention, when the *Winner* was intercepted.

22. In a judgment of 3 October 2002, the court dismissed their appeal and held that there were no grounds for disallowing the evidence. After retracing the details of the operations, including the fact that "on 13 June at 6 a.m. the French frigate spotted a merchant ship – first on its radar, then visually – travelling at slow speed and flying no flag, and identified it as the *Winner*", it pronounced judgment in the following terms:

> "Considering that the international effort to combat drug trafficking is governed by three conventions: the United Nations Single Convention on Narcotic Drugs of 30 March 1961, the United Nations Convention on the Law of the Sea, signed at Montego Bay on [10] December 1982, and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, signed in Vienna on 20 December 1988; while France has signed and ratified all three conventions, Cambodia has not signed the Vienna Convention, Article 17 § 3 of which provides for derogations from the traditional principle of the 'law of the flag State'.

Considering that the applicants wrongly suggest in this case that in keeping with the traditional rule codified in Article 92 of the Montego Bay Convention, the authority of a State on ships on the high seas flying its flag is both full and exclusive and that coercion may be used to ensure that the rules of international law and the State's own law are respected as Article 108 of that Convention, on 'Illicit traffic in narcotic drugs or psychotropic substances', stipulates:

1. *All States shall cooperate in the suppression of illicit traffic in narcotic drugs* and psychotropic substances engaged in by ships on the high seas contrary to international conventions.

2. Any State which has reasonable grounds for believing that a ship flying its flag is engaged in illicit traffic in narcotic drugs or psychotropic substances *may request the cooperation of other States* to suppress such traffic.

Considering that, based on that text and 'with reference' to the earlier United Nations Convention of 30 March 1961 against international drug trafficking, the French authorities were within their rights to request Cambodia's cooperation with a view to obtaining that country's authorisation to intercept the *Winner* in order to put a stop to the drug trafficking in which all or part of its crew was suspected of being involved; that as the provisions of the Vienna Convention do not apply to Cambodia, it was for that State to ask the French authorities for all the relevant information concerning the alleged drug trafficking to enable it to assess the merits of the request using its unfettered discretion; that the diplomatic telegram sent by the French embassy on 7 June 2002, which actually mentions the reasoned request submitted by the OCRTIS, suffices to establish the existence of an agreement given without restrictions or reservations by the government of Cambodia for the planned interception and all its consequences, and is authoritative until proven otherwise; that on this point the applicants cannot contend that the document does not meet the formal requirements of Article 17 § 3 of the Vienna Convention concerning bilateral agreements between parties, when they are also arguing that the Vienna Convention is not applicable to Cambodia because it has not signed it; and that the value of the diplomatic document is not affected by the fact that the accused did not know the exact status of the person who signed the message or the person who transmitted the Cambodian government's agreement to the French embassy.

Considering, on the other hand, that in proceeding to intercept the *Winner* it was the duty of the French authorities to comply with the procedures provided for both in the Vienna Convention signed by France – in particular to 'take due account of the need not to endanger the safety of life at sea, the security of the vessel and its cargo' – and in the Law of 15 July 1994, as amended by the Law of 29 April 1996 adapting French law to Article 17 of the Vienna Convention, Articles 12 et seq. of which define the sphere of competence of commanders of naval vessels and the procedures for the search, reporting, prosecution and judgment in the French courts of drug trafficking offences committed at sea.

Considering that the reports drawn up by the commander of the *Lieutenant de vaisseau Le Hénaff*, duly authorised by the maritime prefect for the Atlantic, which are authoritative until proven otherwise, state that when the frigate drew within sight of the *Winner*, off the Cape Verde islands, the merchant ship was flying no flag and its captain not only failed to answer the requests to identify his ship, in breach of the rules of international law, and to stop his ship, but responded aggressively with a series of dangerous manoeuvres that jeopardised the safety of the French frigate and

the lives of the sailors on board the speedboat; that it was also reported that the crew of the *Winner* were seen to be throwing suspicious parcels overboard, one of which was recovered and found to contain a large quantity of cocaine; that all these elements together amounted to reasonable grounds for the commander of the frigate to suspect that he was in the presence of drug traffickers who had jettisoned their cargo before attempting to escape; and that by using force to board the *Winner* and taking appropriate coercive measures to control the crew and confine them to their cabins and to take over and sail the ship, the commander of the frigate acted in strict compliance with:

– the provisions of Article 17 § 4 of the Vienna Convention under which, if evidence of involvement in illicit traffic is found after a ship has been boarded and searched, appropriate action may be taken with respect to the vessel and the persons and cargo on board,

– the provisions of the Law of 15 July 1994 as supplemented by the Law of 29 April 1996, which, in its general provisions (Articles 1 to 10) regulates recourse to coercive measures comprising, if necessary, the use of force in the event of refusal by a ship to submit to control and also, in the particular case of the fight against drug trafficking (Articles 12 to 14), makes provision for the implementation of the control and coercion measures provided for under international law.

Considering that, regard being had to the distinctly aggressive conduct of the captain of the *Winner* in attempting to evade inspection by the French naval authorities, and to the attitude of the crew members, who took advantage of the time thus gained to eliminate any traces of the drug trafficking by deliberately throwing the evidence overboard, the members of the commando unit who boarded the ship found themselves in the presence of large-scale international trafficking and were likely at any moment to come up against a hostile and potentially dangerous crew who could threaten the security of their mission; that they were obliged to use their weapons in response to the resistance put up by one of the ship's crew; that it cannot be claimed that Article 13 of the Law of 15 July 1994 as amended provides only for administrative assistance measures and excludes any form of coercion in respect of people when it stipulates in general terms that the competent maritime authorities are authorised to carry out or have carried out 'the inspection and coercion measures provided for in international law', and Article 17 § 4 (c) of the Vienna Convention against Illicit Traffic in Narcotic Drugs [and Psychotropic Substances] expressly mentions taking 'appropriate action with respect to the persons on board'; that although the nature of these measures is not specified, the text at least provides for the possibility for the competent naval authorities to limit, if necessary, the freedom of the boarded ship's crew to come and go, otherwise the provision would be meaningless and the safety of the men taking over control of the ship would be seriously jeopardised; that it cannot be ruled out in the course of such operations against international drug traffickers on the high seas that the crew may have weapons hidden away and may seek to regain control of the ship by force; that consequently, confining the members of the crew of the *Winner* – all but the wounded man, who was transferred to the frigate – to their cabins under the guard of the commando unit, so that the ship could be safely taken over and rerouted, fell within the appropriate measures provided for in Article 17 § 4 (c) of the Vienna Convention.

Considering that the Law of 15 July 1994 necessarily requires some departure from ordinary criminal procedure to allow for the specific needs of the effort to combat drug trafficking by ships on the high seas, in keeping with the rules of international

law, and for the fact that it is impossible in practice, bearing in mind the time needed to sail to the new port of destination, to apply the ordinary rules governing detention and the right to be brought promptly before a judge; and, that being so, that the restrictions placed on the movements of the boarded ship's crew, as authorised in such cases by the United Nations Convention signed in Vienna on 20 December 1988, were not at variance with Article 5 § 3 of the European Convention on Human Rights and did not amount to unlawful detention; and that it should be noted that as soon as the *Winner* docked in Brest, its crew were handed over to the police, immediately informed of their rights and placed in custody, then brought before the investigating judge.

Considering also that the French courts have jurisdiction under the Law of 15 July 1994 as amended.

... the grounds of nullity must accordingly be rejected [and] there is no reason to disallow any other documents from the proceedings, which are lawful."

23. In a judgment of 15 January 2003, the Court of Cassation dismissed an appeal lodged by the applicants in the following terms:

"... in so far as Cambodia, the flag State, expressly and without restriction authorised the French authorities to stop the *Winner* and, in keeping with Article 17 of the Vienna Convention, only appropriate action was taken against the persons on board, who were lawfully taken into police custody as soon as they landed on French soil, the Investigation Division has justified its decision."

24. On 28 May 2005, the Ille-et-Vilaine Special Assize Court found three applicants – Mr Boreas, Mr Sage Martínez and Mr Cabrera Leon – and one other crew member, S.T., guilty of conspiracy to illegally attempt to import narcotics and sentenced them respectively to twenty years', ten years', three years' and eighteen years' imprisonment. However, Mr Boreas and S.T. were acquitted of the charge of leading or organising a gang for the purposes of drug trafficking. The Assize Court acquitted the other six applicants and O.L., another crew member, of the charges against them.

25. In a judgment of 6 July 2007, the Loire-Atlantique Assize Court, examining an appeal lodged by Mr Boreas, Mr Sage Martínez and S.T., upheld the conviction and sentenced them respectively to twenty, twelve and seventeen years' imprisonment. On 9 April 2008 the Court of Cassation dismissed an appeal on points of law lodged by S.T. and Mr Boreas.

26. In a note of 9 September 2008, in reply to a request submitted by the French embassy in Phnom Penh on 3 September 2008, the Ministry of Foreign Affairs and International Cooperation of Cambodia confirmed that its diplomatic note of 7 June 2002 had "indeed authorised the French authorities to intercept and carry out all necessary operations for the inspection, seizure and legal proceedings against the ship *Winner*, flying the Cambodian flag, but also against all the members of its crew".

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW

A. The United Nations Single Convention on Narcotic Drugs, 1961

27. The relevant provisions of the United Nations Single Convention on Narcotic Drugs of 30 March 1961, to which France is a party, read as follows:

Article 35 – Action against the Illicit Traffic

"Having due regard to their constitutional, legal and administrative systems, the Parties shall:

(a) Make arrangements at the national level for coordination of preventive and repressive action against the illicit traffic; to this end they may usefully designate an appropriate agency responsible for such coordination;

(b) Assist each other in the campaign against the illicit traffic in narcotic drugs;

(c) Cooperate closely with each other and with the competent international organisations of which they are members with a view to maintaining a coordinated campaign against the illicit traffic;

(d) Ensure that international cooperation between the appropriate agencies be conducted in an expeditious manner; and

(e) Ensure that where legal papers are transmitted internationally for the purposes of a prosecution, the transmittal be effected in an expeditious manner to the bodies designated by the Parties; this requirement shall be without prejudice to the right of a Party to require that legal papers be sent to it through the diplomatic channel;

(f) Furnish, if they deem it appropriate, to the Board and the Commission through the Secretary-General, in addition to information required by Article 18, information relating to illicit drug activity within their borders, including information on illicit cultivation, production, manufacture and use of, and on illicit trafficking in, drugs; and

(g) Furnish the information referred to in the preceding paragraph as far as possible in such manner, and by such dates as the Board may request; if requested by a Party, the Board may offer its advice to it in furnishing the information and in endeavouring to reduce the illicit drug activity within the borders of that Party."

B. The United Nations Convention on the Law of the Sea, signed at Montego Bay on 10 December 1982

28. The relevant provisions of the United Nations Convention on the Law of the Sea ("the Montego Bay Convention") (to which Cambodia is not a party) read as follows:

Article 108: Illicit traffic in narcotic drugs or psychotropic substances

"1. All States shall cooperate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas contrary to international conventions.

2. Any State which has reasonable grounds for believing that a ship flying its flag is engaged in illicit traffic in narcotic drugs or psychotropic substances may request the cooperation of other States to suppress such traffic."

Article 110: Right of visit

"1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with Articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that:

(a) the ship is engaged in piracy;

(b) the ship is engaged in the slave trade;

(c) the ship is engaged in unauthorised broadcasting and the flag State of the warship has jurisdiction under Article 109;

(d) the ship is without nationality; or

(e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

2. In the cases provided for in paragraph 1, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.

4. These provisions apply mutatis mutandis to military aircraft.

5. These provisions also apply to any other duly authorised ships or aircraft clearly marked and identifiable as being on government service."

C. The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, signed in Vienna on 20 December 1988

29. The relevant provisions of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances ("the Vienna

Convention") (to which France is a party but not Cambodia) read as follows:

Article 17 – Illicit traffic by sea

"1. The Parties shall cooperate to the fullest extent possible to suppress illicit traffic by sea, in conformity with the international law of the sea.

2. A Party which has reasonable grounds to suspect that a vessel flying its flag or not displaying a flag or marks of registry is engaged in illicit traffic may request the assistance of other Parties in suppressing its use for that purpose. The Parties so requested shall render such assistance within the means available to them.

3. A Party which has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law, and flying the flag or displaying marks of registry of another Party is engaged in illicit traffic may so notify the flag State, request confirmation of registry and, if confirmed, request authorisation from the flag State to take appropriate measures in regard to that vessel.

4. In accordance with paragraph 3 or in accordance with treaties in force between them or in accordance with any agreement or arrangement otherwise reached between those Parties, the flag State may authorise the requesting State to, *inter alia*:

(a) Board the vessel;

(b) Search the vessel;

(c) If evidence of involvement in illicit traffic is found, take appropriate action with respect to the vessel, persons and cargo on board.

5. Where action is taken pursuant to this Article, the Parties concerned shall take due account of the need not to endanger the safety of life at sea, the security of the vessel and the cargo or to prejudice the commercial and legal interests of the flag State or any other interested State.

6. The flag State may, consistent with its obligations in paragraph 1 of this Article, subject its authorisation to conditions to be mutually agreed between it and the requesting Party, including conditions relating to responsibility.

7. For the purposes of paragraphs 3 and 4 of this Article, a Party shall respond expeditiously to a request from another Party to determine whether a vessel that is flying its flag is entitled to do so, and to requests for authorisation made pursuant to paragraph 3. At the time of becoming a Party to this Convention, each Party shall designate an authority or, when necessary, authorities to receive and respond to such requests. Such designation shall be notified through the Secretary-General to all other Parties within one month of the designation.

8. A Party which has taken any action in accordance with this Article shall promptly inform the flag State concerned of the results of that action.

9. The Parties shall consider entering into bilateral or regional agreements or arrangements to carry out, or to enhance the effectiveness of, the provisions of this Article.

10. Action pursuant to paragraph 4 of this Article shall be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorised to that effect.

11. Any action taken in accordance with this Article shall take due account of the need not to interfere with or affect the rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea."

D. Council of Europe Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, done at Strasbourg on 31 January 1995 and which entered into force on 1 May 2000 ("the Council of Europe Agreement of 31 January 1995")

30. The relevant provisions of this agreement, signed by twenty-two member States of the Council of Europe (but not by France) and ratified by thirteen, read as follows:

"The member States of the Council of Europe, having expressed their consent to be bound by the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, done at Vienna on 20 December 1988, hereinafter referred to as 'the Vienna Convention',

Considering that the aim of the Council of Europe is to bring about a closer union between its members;

Convinced of the need to pursue a common criminal policy aimed at the protection of society;

Considering that the fight against serious crime, which has become an increasingly international problem, calls for close cooperation on an international scale;

Desiring to increase their cooperation to the fullest possible extent in the suppression of illicit traffic in narcotic drugs and psychotropic substances by sea, in conformity with the international law of the sea and in full respect of the principle of right of freedom of navigation;

Considering, therefore, that Article 17 of the Vienna Convention should be supplemented by a regional agreement to carry out, and to enhance the effectiveness of the provisions of that Article,

Have agreed as follows:

...

Section 3 – Rules governing action

Article 9 – Authorised actions

1. Having received the authorisation of the flag State, and subject to the conditions or limitations, if any, made under Article 8, paragraph 1, the intervening State may take the following actions:

i.

a. stop and board the vessel;

b. establish effective control of the vessel and over any person thereon;

c. take any action provided for in sub-paragraph ii of this Article which is considered necessary to establish whether a relevant offence has been committed and to secure any evidence thereof;

d. require the vessel and any persons thereon to be taken into the territory of the intervening State and detain the vessel there for the purpose of carrying out further investigations;

ii. and, having established effective control of the vessel:

a. search the vessel, anyone on it and anything in it, including its cargo;

b. open or require the opening of any containers, and test or take samples of anything on the vessel;

c. require any person on the vessel to give information concerning himself or anything on the vessel;

d. require the production of documents, books or records relating to the vessel or any persons or objects on it, and make photographs or copies of anything the production of which the competent authorities have the power to require;

e. seize, secure and protect any evidence or material discovered on the vessel.

2. Any action taken under paragraph 1 of this Article shall be without prejudice to any right existing under the law of the intervening State of suspected persons not to incriminate themselves.

Article 10 – Enforcement measures

1. Where, as a result of action taken under Article 9, the intervening State has evidence that a relevant offence has been committed which would be sufficient under its laws to justify its either arresting the persons concerned or detaining the vessel, or both, it may so proceed.

...

Article 11 – Execution of action

1. Actions taken under Articles 9 and 10 shall be governed by the law of the intervening State ..."

E. Agreement Concerning Cooperation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area, signed at San José on 10 April 2003

31. This agreement between continental and island States of the Caribbean area (Costa Rica, the Dominican Republic, France, Guatemala, Haiti, Honduras, the Netherlands, Nicaragua and the United States of America) in respect of the Vienna Convention, lays down the conditions of the battle against trafficking in narcotic drugs in the area by introducing broad cooperation and providing for States to be able to consent in advance to intervention by the other States Parties on ships flying their flags.

32. It allows a State Party to take coercive action, even in the territorial waters of another State Party, by delegation of the latter State. There are three possibilities:

– systematic authorisation;

– authorisation if no answer is received from the flag State within four hours of another Party submitting a request for intervention;

– express authorisation for the intervention, which corresponds to the current legal situation under the Vienna Convention.

33. The draft law thus allows the States to consent in advance to the intervention of other Parties on a ship flying their flag or located within their territorial waters.

F. Domestic legislation

Law no. 94-589 of 15 July 1994 on conditions governing the exercise by the State of its powers to carry out checks at sea

34. The relevant provisions of Law no. 94-589 of 15 July 1994 on conditions governing the exercise by the State of its powers to carry out checks at sea, as amended by Law no. 96-359 of 29 April 1996 on drug trafficking at sea and adapting French legislation to Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances signed in Vienna on 20 December 1988, read as follows (version applicable at the material time):

"Part II: Special provisions adapting French legislation to Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, signed in Vienna on 20 December 1988.

Section 12

The investigation and establishment of drug trafficking offences committed at sea, and prosecution and trial therefor shall be governed by the provisions of Part I of the present Law and by the following provisions. These provisions shall apply not only to ships flying the French flag, but also:

– to ships flying the flag of a State Party to the Vienna Convention of 20 December 1988 other than France, or lawfully registered in such a State, at the request or with the agreement of the flag State;

– to ships displaying no flag or having no nationality.

Section 13

Where there exist reasonable grounds to suspect that one of the vessels referred to in section 12 and sailing outside territorial waters is engaged in illicit drug trafficking, commanders of State vessels and of aircraft responsible for surveillance at sea shall have the power – under the authority of the maritime prefect, who shall inform the public prosecutor's office – to carry out, or have carried out the inspection and coercion measures provided for under international law and under this Law."

35. In the version amended by Law no. 2005-371 of 22 April 2005, which was not applicable at the material time, section 12 also refers to ships flying the flag of a State which is not party to the Vienna Convention:

Section 12

"The investigation and establishment of drug trafficking offences committed at sea, and prosecution and trial therefor shall be governed by the provisions of Part II of Book V of the first part of the Defence Code and by the provisions of the present Part of this Law. These provisions shall apply not only to the ships mentioned in Article L. 1521-1 of the Defence Code, but also:

– to ships flying the flag of a State which has requested intervention by France or agreed to its request for intervention;

– to ships displaying no flag or having no nationality."

36. In order to allow for the period of transit subsequent to a decision to reroute a vessel, Law no. 2005-371 of 22 April 2005 amended Article L. 1521-5 of the Defence Code, in the chapter on "Exercise of the State's law enforcement powers at sea", by adding the following final sentence:

Article L. 1521-5

"During transit subsequent to rerouting, the officers mentioned in Article L. 1521-2 may take the necessary and appropriate coercion measures to ensure the safety of the ship and its cargo and of the persons on board."

37. In its report on the draft of this Law, the Foreign Affairs Committee stated (extract from Report no. 280 (2004-05), dated 6 April 2005):

"B. THE DRAFT LAW

1. Secure the procedures

(a) Delete the reference to the Vienna Convention on drug trafficking

In the case involving the *Winner*, a ship flying the Cambodian flag that was stopped by the French navy off the coast of West Africa, the Court of Cassation did not deem it necessary to rely on the Vienna Convention, to which Cambodia was not party, to find that the stopping of the ship with the consent of the flag State in the particular case of drug trafficking had been lawful. It found it sufficient to rely on Article 108 of the Montego Bay Convention, which provides: 'Any State which has reasonable grounds for believing that a ship flying its flag is engaged in illicit traffic in narcotic drugs or psychotropic substances may request the cooperation of other States to suppress such traffic.' On the other hand, when carrying out the interception, a State Party to the Vienna Convention which stops such a ship – in this case, France – must comply with the rules laid down therein and may thus rely on the provisions of Article 17 of the Vienna Convention, concerning coercion measures. In this case the Court found that the jurisdiction of the flag State was not exclusive when it assented to a request to intervene.

It appears preferable, however, to delete the reference to the Vienna Convention**,** in so far as inspection and coercion measures may be carried out on the strength of other international instruments, including the regional cooperation agreements concluded on the basis of the Vienna Convention, such as the San José Agreement of 10 April 2003 when it enters into force.

(b) State exactly what the coercion measures involve

The draft law also says that during transit subsequent to rerouting, the duly authorised officers of the State may take the necessary and appropriate coercion measures to ensure the safety of the ship and its cargo and of the persons on board."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

38. The applicants claimed that they had been arbitrarily deprived of their liberty after the ship was boarded by the French authorities. They relied on Article 5 § 1 of the Convention, the relevant parts of which provide:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> ..."

A. The Chamber judgment

39. The Chamber disagreed with the French courts' approach in so far as they referred to international conventions to which Cambodia was not party and relied on legal provisions which, at the material time, provided for extraterritorial intervention by the French authorities only on French ships, "ships flying the flag of a State Party to the Vienna Convention of 20 December 1988 [which Cambodia has not ratified, as mentioned previously] ... or lawfully registered in such a State, at the request or with the agreement of the flag State", and on ships flying no flag or having no nationality. In addition to the fact that the *Winner* did not fit into any of those categories, it noted that the Law of 15 July 1994 had been amended, *inter alia*, so that it no longer referred only to States Parties to the Vienna Convention. It also considered that the Government's argument concerning the applicability of and compliance with the legal provisions concerned was based on a contradiction, as they had submitted that at the time of the interception the *Winner* had been flying no flag, while at the same time asserting that the French authorities had previously sought confirmation from the Cambodian authorities that the ship was registered in their country

and that the ship had been identified as the *Winner* before the operations commenced.

40. The Chamber nevertheless agreed that, regard being had to Article 108 of the Montego Bay Convention, the Cambodian authorities' diplomatic note of 7 June 2002 could be considered to have provided a legal basis for the interception and boarding of the *Winner* by the French authorities, although this did not apply to the thirteen days' deprivation of liberty imposed on the crew on board the ship. It further found that neither French law nor Article 17 of the Vienna Convention made any more specific provision for deprivation of liberty of the type and duration of that to which the applicants were subjected.

41. In the Chamber's opinion, the legal provisions relied on by the Government did not afford sufficient protection against arbitrary violations of the right to liberty: firstly, none of those provisions referred specifically to depriving the crew of the intercepted ship of their liberty or regulated the conditions of deprivation of liberty on board the ship; secondly, they neglected to place the detention under the supervision of a judicial authority. On this last point the Chamber noted that although measures taken under the Law of 15 July 1994 were taken under the supervision of the public prosecutor, the public prosecutor was not a "competent legal authority" within the meaning the Court's case-law gave to that notion (see *Schiesser v. Switzerland*, 4 December 1979, §§ 29-30, Series A no. 34).

42. It accordingly found that the applicants had not been deprived of their liberty "in accordance with a procedure prescribed by law", within the meaning of Article 5 § 1.

B. The parties' submissions before the Grand Chamber

1. The applicants

43. The applicants, who shared the analysis followed by the Chamber in its judgment, considered that the action taken by the French authorities on the high seas and their detention on board the *Winner* had no legal basis. They submitted that there was no legal basis for the boarding of the *Winner* either in international conventions to which Cambodia was not a party, be it the Montego Bay Convention or the Vienna Convention, or in the diplomatic note of the Ministry of Foreign Affairs of 7 June 2002.

44. They argued that Article 108 of the Montego Bay Convention was not applicable in this case because, in their submission, it was not Cambodia, the flag State, that had requested the cooperation of France, but France that had taken the initiative of requesting authorisation to stop a ship flying the Cambodian flag. The fact that Cambodia granted that request could not be likened to a request for cooperation within the meaning of Article 108 of the Montego Bay Convention. As to Article 110 of that

Convention, they submitted that the Government were proposing an interpretation which distorted its meaning, as the *Winner* had not been without nationality and had not had the same nationality as the French warship.

45. The applicants also considered that Law no. 94-589 of 15 July 1994 was not applicable, particularly because it referred to international conventions to which Cambodia was not a party.

46. They considered it established that domestic and international law failed to afford effective protection against arbitrary interference when it did not provide for the possibility of contacting a lawyer or family member but did, according to the Government, authorise thirteen days' detention.

47. Concerning the diplomatic note of 7 June 2002, the applicants also challenged the Government's legal interpretation. They maintained that it could not be considered as a delegation of jurisdiction to France. Even assuming, for argument's sake, that such an *ad hoc* agreement did justify French intervention in keeping with the principle of public international law that a State could relinquish part of its sovereignty other than by a convention, they alleged that the limits of such an exceptional transfer of power had been considerably exceeded in the present case. According to the Government's own submissions, the agreement had merely concerned a "request to intercept", while the Cambodian government had only authorised the "stopping" of the ship ("*arraisonnement*" in French). Strictly speaking, this consisted solely in stopping the ship at sea or on arrival in port to make certain verifications (concerning its identity and its nationality, for example): it did not extend to searches or arrests on board the ship. Yet that was what had happened in this case: the applicants had been arrested and confined to their cabins for thirteen days. Their detention on board the *Winner* and their judgment in another country had not been authorised by Cambodia. The applicants thus challenged the existence of any *ad hoc* agreement justifying the stopping of the *Winner* and considered that even if there had been such an agreement, it did not justify the detention of the crew following the French military operation.

48. The applicants further submitted that the production before the Grand Chamber of a diplomatic note dated 9 September 2008, sent by the Cambodian authorities at the request of the French Government seven years after the events and two months after the Fifth Section of the Court had pronounced judgment in their favour, was "very late and quite astounding". They requested that the note, which had never been produced in the proceedings before the domestic courts and the Fifth Section of the Court, as it had not existed at the time and amounted to a reinterpretation of the facts after the event, be disallowed as evidence.

2. The Government

49. In their preliminary observations the Government stressed that the events in this case had taken place on the high seas, so that it was necessary to take into account the specificities of the maritime environment and of navigation at sea. In the Government's submissions this had two specific consequences. First of all, the Convention was completely silent about maritime matters and the Government argued that it was possible to draw a parallel with the solution adopted by the Court in cases concerning the handing over of persons by one State to another in the context of extradition (see *Öcalan v. Turkey* [GC], no. 46221/99, ECHR 2005-IV; *Freda v. Italy*, no. 8916/80, Commission decision of 7 October 1980, Decisions and Reports (DR) 21, p. 254; *Altmann (Barbie) v. France*, no. 10689/83, Commission decision of 4 July 1984, DR 37, p. 230; and *Sánchez Ramirez v. France*, no. 28780/95, Commission decision of 24 June 1996, DR 86-A, p. 155). The Government considered that "the same reasoning, *mutatis mutandis*, could be applied in this case" for want of any provision in the Convention concerning arrangements for rerouting ships, or specific provisions concerning maritime matters, which made the Convention inapplicable *ratione materiae*.

50. Secondly, they submitted that freedom to come and go on board a ship had more restrictive limits, which were the confines of the ship itself: the lawful rerouting of a ship therefore necessarily authorised restrictions on the movements of the people on board; the specificities and the risks of navigation at sea justified the extensive powers enjoyed by ships' captains. The Government inferred that the applicants had not been deprived of their liberty within the meaning of Article 5 but had been subjected to restrictions of liberty that were justified, restrictions they were challenging on a purely formalistic and litigious basis. The Government submitted that Article 5 of the Convention was not applicable in the present case.

51. In the alternative, on the merits, the Government submitted that the deprivation of liberty imposed on the applicants for the thirteen days during which the *Winner* had been rerouted had been lawful, and disputed the findings of the Chamber.

52. The lawfulness of the measure had to be examined from two points of view, that of public international law and that of domestic law.

53. With regard to public international law, the Government pointed out that the *Winner* had been flying no flag and had refused to identify itself. The ship's crew had therefore deliberately placed itself in the situation provided for in Article 110 of the Montego Bay Convention, which provided expressly for a warship to be able to stop a ship that is "refusing to show its flag", a principle unanimously accepted under the law of the sea.

54. The Government considered in any event that the agreement given by Cambodia to the French authorities by diplomatic note had made the intervention of the French navy perfectly lawful from the international law

perspective. The Montego Bay Convention well illustrated the signatory States' aim of "cohabitation" in what belonged to all and yet to none, by strictly defining the conditions in which a State could interfere with another State's sovereignty by having a naval vessel inspect a ship flying a foreign flag. And although Cambodia was not a party to the Vienna Convention, the agreement which that sovereign State had given by diplomatic note had been self-sufficient with regard to the principles of public international law and the law of the sea. The diplomatic note of 7 June 2002 had authorised the stopping of the ship and all "its consequences", as confirmed by the Cambodian authorities in their note of 9 September 2008. In such circumstances the agreement concerned had provided a legal basis for the rerouting of the *Winner* and its crew.

55. The Government submitted in addition that the agreement concerned had been fully in compliance with the requirements of public international law. The damage caused by drug trafficking in democratic societies explained why Article 108 of the Montego Bay Convention of 1982, the Vienna Convention of 1988 and the Council of Europe Agreement of 31 January 1995 all provided for the requisite cooperation between States to put a stop to the traffic. As the sea could be a "safe haven" (see *Öcalan*, cited above, § 88) for traffickers, international law had provided for the flag State to be able to delegate its power to combat this type of crime. The Government further noted that in *Rigopoulos v. Spain* ((dec.), no. 37388/97, ECHR 1999-II), the Court had found that the verbal agreement given to Spain by Panama had been sufficient to make the operations lawful under public international law.

56. With regard to domestic law, the Government contested the Chamber's analysis, pointing out that according to the Court's case-law it was first and foremost for the domestic authorities to interpret and apply their country's law, especially when, as in this case, what was in question was not the substance of the law but its scope. They submitted that in any event the Investigation Division had not based its findings solely on Article 17 of the Vienna Convention, but also on the general provisions of Law no. 94-589 of 15 July 1994, which empowered commanders of naval vessels responsible for surveillance at sea to carry out, or have carried out "inspection and coercion measures". They accordingly considered that that part of the law had provided a legal basis for the measures complained of, because the ship was suspected of drug trafficking and because it had been flying no flag, had refused to identify itself and had responded aggressively by making dangerous manoeuvres.

57. The Government set great store by two factors. First, a State not party to a convention could, by special agreement, in given circumstances, consent to the application of provisions of the convention concerned, and the French courts had thus been able to find that French law should apply.

Secondly, French law applied because the *Winner* had been flying no flag and had refused to identify itself.

58. As to the quality of the legal basis, which the Chamber had questioned, the Government maintained that the specificity of the law of the sea had to be taken into consideration to appreciate the precise meaning of the legal standards; the French Law of 15 July 1994, in conjunction with Cambodia's agreement in conformity with the provisions of Article 17 § 4 of the Vienna Convention and the Montego Bay Convention, had authorised the rerouting of the ship. So, as the law provided for the ship to be rerouted, it also provided for restriction of the freedom of movement of those on board, as the two were inseparable. According to the Government, the rerouting was nevertheless to be considered as a preliminary to the suspects being brought before the judicial authorities.

59. In any event, the unpredictability of navigation and the vastness of the oceans made it impossible to provide in detail for every eventuality when ships were rerouted. The Government considered that the allegation that it had not been possible for the applicants to contact a relative or a lawyer was unfounded, as the technical conditions for such contact were not always available; besides, as the applicants had not established that they had been in contact with their families or their lawyers prior to the interception by the French navy, their practical situation had not been altered by the rerouting of their ship. The Government also pointed out that the length of the voyage had merely been a material contingency and that the applicants had not been questioned during the thirteen days spent on board, naval personnel having no power to take such action. Accordingly, the Government considered that the right to contact a lawyer or a family member would have been theoretical and illusory.

60. The Government then broached the matter of supervision by the public prosecutor. They argued that the Chamber judgment confused the notions referred to in Article 5 §§ 1 (c) and 3 of the Convention, while noting that the applicants were to be presented, when they arrived in Brest, not to the public prosecutor but to an investigating judge.

61. They saw the fact that the rerouting of the ship had been carried out under the supervision of the public prosecutor as a guarantee against arbitrary treatment, arguing that in view of the guarantees of independence public prosecutors offered, they should be considered judicial authorities. On this last point the Government developed arguments demonstrating the guarantees of the independence of public prosecutors in terms of their status, the way they were recruited, their powers and their institutional role. They pointed out, in particular, that Article 64 of the French Constitution enshrined the independence of the "judicial authority" and that the Constitutional Council had found that the said judicial authority included both judges and public prosecutors.

C. The Court's assessment

1. Article 1 of the Convention

62. The Court considers that the first question to be decided in this case is whether the events in dispute, from the stopping of the *Winner* on the high seas and throughout the thirteen days of alleged deprivation of liberty until the ship reached Brest, brought the applicants within the jurisdiction of France for the purposes of Article 1 of the Convention, which reads as follows:

> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention."

63. Article 1 sets a limit, notably territorial, on the reach of the Convention. In particular, the engagement undertaken by a Contracting State is confined to "securing" ("*reconnaître*" in the French text) the listed rights and freedoms to persons within its own "jurisdiction". Further, the Convention does not govern the actions of States not parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States (see *Soering v. the United Kingdom*, 7 July 1989, § 86, Series A no. 161, and *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, § 66, ECHR 2001-XII).

64. In keeping with the essentially territorial notion of jurisdiction, the Court has accepted only in exceptional cases that acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them for the purposes of Article 1 of the Convention (see *Banković and Others*, cited above, § 67, and *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 314, ECHR 2004-VII). In its first *Loizidou* judgment (preliminary objections), for example, the Court found that bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party might also arise when as a consequence of military action – whether lawful or unlawful – it exercised effective control of an area outside its national territory (see *Loizidou v. Turkey* (preliminary objections), 23 March 1995, § 62, Series A no. 310). This excluded situations, however, where – as in the *Banković and Others* case – what was at issue was an instantaneous extraterritorial act, as the provisions of Article 1 did not admit of a "cause and effect" notion of "jurisdiction" (cited above, § 75).

65. Additionally, the Court notes that other recognised instances of the extraterritorial exercise of jurisdiction by a State include cases involving the activities of its diplomatic or consular agents abroad and on board aircraft and ships registered in, or flying the flag of, that State. In these specific situations, customary international law and treaty provisions have clearly

recognised and defined the extraterritorial exercise of jurisdiction by the relevant State (ibid., § 73).

66. In the instant case, the Court notes that a French warship, the frigate *Lieutenant de vaisseau Le Hénaff*, was specially instructed by the French naval authorities to intercept the *Winner*, and that the frigate sailed out of Brest harbour on that mission carrying on board the French navy commando unit *Jaubert*, a special forces team specialised in boarding vessels at sea. When the *Winner* was spotted off Cape Verde on 13 June 2002, the frigate issued several warnings and fired warning shots, before firing directly at the merchant ship, under orders from France's maritime prefect for the Atlantic. When they boarded the *Winner*, the French commando team were obliged to use their weapons to defend themselves, and subsequently kept the crew members under their exclusive guard and confined them to their cabins during the journey to France, where they arrived on 26 June 2002. The rerouting of the *Winner* to France, by a decision of the French authorities, was made possible by sending a tug out of Brest harbour to tow the ship back to the French port, escorted by another warship, the frigate *Commandant Bouan*, all under orders from the maritime prefect and at the request of the Brest public prosecutor.

67. That being so, the Court considers that, as this was a case of France having exercised full and exclusive control over the *Winner* and its crew, at least *de facto*, from the time of its interception, in a continuous and uninterrupted manner until they were tried in France, the applicants were effectively within France's jurisdiction for the purposes of Article 1 of the Convention (contrast *Banković and Others*, cited above).

2. The Government's preliminary observations

68. The Court notes at the outset that the Government contended for the first time before the Grand Chamber, in their preliminary observations, that the applicants' complaints were incompatible *ratione materiae* with the provisions of Article 5 of the Convention, their observations on the merits being submitted only "in the alternative".

69. The Grand Chamber reiterates that it is not precluded from deciding in appropriate cases questions concerning the admissibility of an application under Article 35 § 4 of the Convention, as that provision enables the Court to dismiss applications it considers inadmissible "at any stage of the proceedings" (see *Odièvre v. France* [GC], no. 42326/98, § 22, ECHR 2003-III; *Azinas v. Cyprus* [GC], no. 56679/00, § 32, ECHR 2004-III; *Yumak and Sadak v. Turkey* [GC], no. 10226/03, § 72, ECHR 2008; and *Mooren v. Germany* [GC], no. 11364/03, § 57, 9 July 2009). Under Rule 55 of the Rules of Court, any plea of inadmissibility must, in so far as its character and the circumstances permit, be raised by the respondent Contracting Party in its observations on the admissibility of the application submitted as provided in Rule 54 (compare *N.C. v. Italy* [GC],

no. 24952/94, § 44, ECHR 2002-X; *Azinas*, cited above, §§ 32 and 37; *Sejdovic v. Italy* [GC], no. 56581/00, § 41, ECHR 2006-II; and *Mooren*, cited above). Only exceptional circumstances, such as the fact that the grounds for the objection of inadmissibility came to light late in the day, can dispense a government from the obligation to raise their objection in their observations on the admissibility of the application before the adoption of the Chamber's admissibility decision (see *N.C. v. Italy*, cited above, § 44; *Sejdovic*, cited above, § 41; and *Mooren*, cited above).

70. In the instant case, the Court notes that, in the written observations on admissibility which they submitted to the Chamber, the Government did not argue that the complaints were incompatible *ratione materiae* with the provisions of Article 5 of the Convention, and the Court can discern no exceptional circumstance capable of dispensing the Government from raising that objection in their observations to the Chamber on admissibility.

71. The Government are accordingly estopped from raising a preliminary objection of incompatibility *ratione materiae* at this stage in the proceedings. In spite of this estoppel, however, the Court must examine this question, which goes to its jurisdiction, the extent of which is determined by the Convention itself, in particular by Article 32, and not by the parties' submissions in a particular case (see *Demir and Baykara v. Turkey* [GC], no. 34503/97, ECHR 2008).

72. First of all, referring also to its finding that the applicants were within the jurisdiction of France for the purposes of Article 1 of the Convention, the Court considers that the preliminary observations on the applicability of Article 5 actually concern the merits of the application.

73. As to the observations concerning the existence or otherwise of the deprivation of liberty, the Court reiterates that Article 5 – paragraph 1 of which proclaims the "right to liberty" – is concerned with a person's physical liberty. Its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion. In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5 the starting-point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question (see *Amuur v. France*, 25 June 1996, § 42, *Reports of Judgments and Decisions* 1996-III). The difference between deprivation of and restriction upon liberty is merely one of degree or intensity, and not one of nature or substance (see *Guzzardi v. Italy*, 6 November 1980, Series A no. 39, and *Amuur*, cited above).

74. In the Court's opinion, while it is true that the applicants' movements prior to the boarding of the *Winner* were already confined to the physical boundaries of the ship, so that there was a *de facto* restriction on their freedom to come and go, it cannot be said, as the Government submitted, that the measures taken after the ship was boarded merely placed a restriction on their freedom of movement. The crew members were placed

under the control of the French special forces and confined to their cabins during the voyage. True, the Government maintained that during the voyage the restrictions were relaxed. In the Court's view that does not alter the fact that the applicants were deprived of their liberty throughout the voyage as the ship's course was imposed by the French forces.

75. Accordingly, the Court concludes that the applicants' situation on board the *Winner* after it was boarded, because of the restrictions endured, amounted in practice to a deprivation of liberty, and that Article 5 § 1 applies to their case.

3. Article 5 § 1 of the Convention

(a) The general principles

76. The Court reiterates that Article 5 of the Convention protects the right to liberty and security. This right is of the highest importance "in a democratic society" within the meaning of the Convention (see, among many other authorities, *De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, § 65, Series A no. 12, and *Winterwerp v. the Netherlands*, 24 October 1979, § 37, Series A no. 33).

77. All persons are entitled to the protection of this right, that is to say, not to be deprived, or continue to be deprived, of their liberty (see *Weeks v. the United Kingdom*, 2 March 1987, § 40, Series A no. 114), save in accordance with the conditions specified in paragraph 1 of Article 5.

78. The list of exceptions to the right to liberty secured in Article 5 § 1 is an exhaustive one (see *Quinn v. France*, 22 March 1995, § 42, Series A no. 311, and *Labita v. Italy* [GC], no. 26772/95, § 170, ECHR 2000-IV), and only a narrow interpretation of those exceptions is consistent with the aim of that provision (see *Engel and Others v. the Netherlands*, 8 June 1976, § 58, Series A no. 22, and *Amuur*, cited above, § 42).

79. The Court further reiterates that where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law but also, where appropriate, to other applicable legal standards, including those which have their source in international law. In all cases it establishes the obligation to conform to the substantive and procedural rules of the laws concerned, but it also requires that any deprivation of liberty be compatible with the purpose of Article 5, namely, to protect the individual from arbitrariness (see, among many other authorities, *Bozano v. France*, 18 December 1986, § 54, Series A no. 111; *Amuur*, cited above, § 50; *Assanidze v. Georgia* [GC], no. 71503/01, § 171, ECHR 2004-II; *Ilaşcu and Others*, cited above, § 461; *McKay v. the United Kingdom* [GC], no. 543/03, § 30, ECHR 2006-X; and *Mooren*, cited above, § 76).

80. The Court stresses that where deprivation of liberty is concerned it is particularly important that the general principle of legal certainty be

satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic and/or international law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of "lawfulness" set by the Convention, a standard which requires that all law be sufficiently precise to avoid all risk of arbitrariness and to allow the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances of the case, the consequences which a given action may entail (see, among other authorities, *Amuur*, cited above; *Steel and Others v. the United Kingdom*, 23 September 1998, § 54, *Reports* 1998-VII; *Baranowski v. Poland*, no. 28358/95, §§ 50-52, ECHR 2000-III; and *Jėčius v. Lithuania*, no. 34578/97, § 56, ECHR 2000-IX**)**.

81. Lastly, the Grand Chamber shares the view of the Government and the Chamber that it must be borne in mind that the measures taken by the French authorities against the *Winner* and its crew were taken in the context of France's participation in the effort to combat international trafficking in drugs. As it has pointed out on numerous occasions, in view of the ravages drugs cause it can see in particular why the authorities of the Contracting States are so firm towards those who contribute to the spread of this scourge, and it is fully aware of the need to combat drug trafficking and, accordingly, to secure fruitful cooperation between States in this area. Nevertheless, the special nature of the maritime environment relied upon by the Government in the instant case cannot justify an area outside the law where ships' crews are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction, any more than it can provide offenders with a "safe haven".

(b) Application of the above principles

82. The Court notes first of all that it is not disputed that the purpose of the deprivation of liberty to which the applicants were subjected on board the *Winner* while it was being escorted to France was to bring them "before the competent legal authority" within the meaning of Article 5 § 1 (c) of the Convention. In this case, the Court notes that the parties disagree as to whether the facts of the case had a "legal basis" under public international law and domestic law.

83. The Court notes at the outset that in cases concerning drug trafficking on the high seas public international law upholds the principle that the flag State – in this case Cambodia – has jurisdiction. It also notes that Cambodia is party neither to the Montego Bay Convention nor to the Vienna Convention.

84. The Government subscribe to the Court of Cassation's view that the intervention of the French authorities found justification in Article 108 § 2 of the Montego Bay Convention. However, Article 108 § 2 specifically authorises "a State which has reasonable grounds for believing that a ship

flying its flag is engaged in illicit traffic in drugs" to request the cooperation of other States. It does not provide in general for States to request cooperation whenever they suspect a ship not flying their flag of such trafficking. The Court considers that Article 108 does not provide any legal basis for the action taken by the French authorities in this case. As Cambodia is not party to the Montego Bay Convention, it cannot have been acting under that Convention when it sent its diplomatic note of 7 June 2002. Nor did France's request for cooperation from the Cambodian authorities fall within the scope of Article 108, as it was not based on France's suspicion that a ship flying the French flag was engaged in drug trafficking.

85. This lacuna in Article 108 of the Montego Bay Convention *vis-à-vis* the fight against illicit trafficking in drugs is also reflected in the rest of the text: not only are the provisions concerning the fight against drug trafficking minimal – in comparison with those concerning piracy, for example, on which there are eight Articles, which lay down, *inter alia*, the principle of universal jurisdiction as an exception to the rule of the exclusive jurisdiction of the flag State – but fighting drug trafficking is not among the offences, listed in Article 110, suspicion of which gives rise to the right to board and inspect foreign vessels. Lastly, while the provisions of the Montego Bay Convention concerning illegal drug trafficking on the high seas appear to suggest that the issue was not a part of customary law when that Convention was signed, the Government have not shown that there has since been any constant practice on the part of the States capable of establishing the existence of a principle of customary international law generally authorising the intervention of any State which has reasonable grounds for believing that a ship flying the flag of another State is engaged in illicit traffic in drugs.

86. According to the Government, Article 110 of the Montego Bay Convention, which provides for a warship to be able to board a ship which refuses to fly its flag, is applicable in the instant case.

87. The Court notes that if at all, Article 110 would only be relevant to the present case in so far as paragraph 1 (d) refers to a ship "without nationality". The case of a ship "refusing to show its flag" provided for in paragraph 1 (e) refers only to a ship that "is, in reality, of the same nationality as the warship", which is not the case here.

88. Furthermore, as regards the nationality of the ship, the Court shares the view of the Chamber and the applicants that the Government's arguments are based on a contradiction. It is an undisputed fact that the meeting of the frigate *Lieutenant de vaisseau Le Hénaff* and the *Winner* owed nothing to chance. The *Winner* was under the observation of the American, Spanish and Greek drug control agencies when the Central Office Against Illegal Drug Trafficking ("the OCRTIS"), which suspected it of transporting a large quantity of drugs for the European market, requested

authorisation to intercept it. The ship's nationality being known in fact as early as 7 June 2002, the French embassy requested Cambodia's consent to the French authorities' intervention; that agreement was given in a diplomatic note of 7 June 2002 and the Ministry of Defence in Paris was immediately informed. Thus, by 7 June 2002 at the latest the *Winner* had been precisely identified as a ship flying the Cambodian flag, as expressly stated in the diplomatic note sent by the Cambodian authorities. As to the frigate *Lieutenant de vaisseau Le Hénaff*, it had been at anchor in Brest harbour, and had already been assigned another mission off the African coast when, instead, it was specially instructed to set sail immediately to intercept the *Winner*. In order to carry out this clearly defined mission it took on board a French navy special forces team specialised in boarding vessels at sea, as well as three experts from the OCRTIS.

89. In view of these elements, the Government cannot reasonably argue that the situation provided for in Article 110 of the Montego Bay Convention, concerning the possibility for a warship to board a ship if it has reasonable grounds to suspect that that ship is without nationality (see paragraph 28 above), applies to the present case. The circumstances of the case do not support such an assertion. Moreover, the judgment of the Investigation Division of the Rennes Court of Appeal states quite plainly that the merchant ship spotted on 13 June 2002 at 6 a.m. was identified as the *Winner* (see paragraph 22 above).

90. Concerning the relevant French law, apart from the fact that its main purpose was to transpose the international treaties, and in particular the Vienna Convention, into domestic law, it cannot override the treaties concerned, or the principle of the exclusive jurisdiction of the flag State. Thus, as Cambodia was not a party to the conventions transposed into domestic law, and as the *Winner* was not flying the French flag and none of its crew members were French nationals – even assuming that the nationality of the crew members could be pleaded as an alternative to the principle of the flag State –, there were no grounds for French law to be applied.

91. The Court further notes that French law has since been amended: the reference limiting its scope to States Parties to the Vienna Convention has been deleted – in spite of the position of the Court of Cassation in the *Medvedyev* case – and the content of the coercion measures has been specified (see paragraphs 34-37 above).

92. Nor could it be argued that French law satisfied the general principle of legal certainty, as it failed to meet the requisite conditions of foreseeability and accessibility: it is unreasonable to contend that the crew of a ship on the high seas flying the Cambodian flag could have foreseen – even with appropriate advice – that they might fall under French jurisdiction in the circumstances of the case. Furthermore, although the purpose of the Montego Bay Convention was, *inter alia*, to codify or consolidate the

customary law of the sea, its provisions concerning illicit traffic in narcotic drugs on the high seas – like those of the complementary Vienna Convention, organising international cooperation without making it mandatory – reflect a lack of consensus and of clear, agreed rules and practices in the matter at the international level.

93. The Court notes, however, that independently of the Montego Bay and Vienna Conventions, and of French law, Cambodia consented in a diplomatic note to the intervention of the French authorities, a fact which, according to the Government, attested to the existence of an *ad hoc* agreement between the two countries on the interception of the *Winner* and the subsequent events.

94. The question is therefore whether the diplomatic note of the Ministry of Foreign Affairs of Cambodia dated 7 June 2002 provided a legal basis for the impugned measures.

95. In the Court's opinion, although the provisions of Article 108 § 2 of the Montego Bay Convention do not apply to the present case, as Cambodia has not ratified that instrument, they do not prevent States from envisaging other forms of collaboration to combat drug trafficking at sea. The United Nations Single Convention on Narcotic Drugs, 1961 (see paragraph 27 above, Article 35 (c)) and the Montego Bay and Vienna Conventions (see paragraphs 28-29 above, Article 108 § 1 and Article 17 § 1 respectively) all provide expressly for cooperation between States on this matter. Such cooperation may take various forms, particularly in view of the vague wording of the provisions of Article 17 § 4 (c), which merely refers to "appropriate action", and give rise, for example, to regional agreements, like the Council of Europe Agreement of 31 January 1995 implementing Article 17 of the Vienna Convention (see paragraph 30 above) and the San José Agreement of 10 April 2003 on regional cooperation in the Caribbean (see paragraphs 31-33 above), or to the bilateral treaties referred to in Article 17 § 9 of the Vienna Convention.

96. Moreover, diplomatic notes are a source of international law comparable to a treaty or an agreement when they formalise an agreement between the authorities concerned, a common stance on a given matter or even, for example, the expression of a unilateral wish or commitment.

97. The Court accordingly considers, like the Government, that the diplomatic note issued by the Cambodian authorities on 7 June 2002 officialised Cambodia's agreement to the interception of the *Winner*, Cambodia having the right to engage in cooperation with other countries outside the framework of the Montego Bay and Vienna Conventions.

98. However, the existence of an *ad hoc* agreement does not solve the problem of its scope, which it is for the Court to appreciate in order to determine whether or not the diplomatic note authorised the arrest and detention of the crew members on board the ship and their transfer to France.

99. On this point the Court observes first of all that the text of the diplomatic note mentions "the ship *Winner*, flying the Cambodian flag", the sole object of the agreement, confirming the authorisation to intercept, inspect and take legal action against it (see paragraph 10 above). Evidently, therefore, the fate of the crew was not covered sufficiently clearly by the note and so it is not established that their deprivation of liberty was the subject of an agreement between the two States that could be considered to represent a "clearly defined law" within the meaning of the Court's case-law. As to the explanatory diplomatic note produced by the Cambodian authorities on 9 September 2008 in response to a request from the French authorities of 3 September 2008 and submitted by the respondent Government for the first time to the Grand Chamber, after the Chamber pronounced its finding of a violation of Article 5 § 1 of the Convention and more than six years after the events, the applicants having had no opportunity at the material time to familiarise themselves with the explanations given, the Court does not consider it decisive.

100. Secondly, the Court considers that the diplomatic note did not meet the "foreseeability" requirement either. Nor have the Government demonstrated the existence of any current and long-standing practice between Cambodia and France in the battle against drug trafficking at sea in respect of ships flying the Cambodian flag; on the contrary, the use of an *ad hoc* agreement by diplomatic note, in the absence of any permanent bilateral or multilateral treaty or agreement between the two States, attests to the exceptional, one-off nature of the cooperation measure adopted in this case. Added to the fact that Cambodia had not ratified the relevant conventions, this shows that the intervention of the French authorities on the basis of an *ad hoc* agreement cannot reasonably be said to have been "foreseeable" within the meaning of the Court's case-law, even with the help of appropriate advice. In any event, the Court considers that the foreseeability, for an offender, of prosecution for drug trafficking should not be confused with the foreseeability of the law pleaded as the basis for the intervention. Otherwise, any activity considered criminal under domestic law would release the States from their obligation to pass laws having the requisite qualities, particularly with regard to Article 5 § 1 of the Convention and, in so doing, deprive that provision of its substance.

101. It is regrettable, in the Court's view, that the international effort to combat drug trafficking on the high seas is not better coordinated bearing in mind the increasingly global dimension of the problem. The fact remains that when a flag State, like Cambodia in this case, is not a party to the Montego Bay or Vienna Conventions, the insufficiency of such legal instruments, for want of regional or bilateral initiatives, is of no real consequence. In fact, such initiatives are not always supported by the States in spite of the fact that they afford the possibility of acting within a clearly defined legal framework. In any event, for States that are not parties to the

Montego Bay and Vienna Conventions one solution might be to conclude bilateral or multilateral agreements, like the San José Agreement of 2003, with other States. Having regard to the gravity and enormity of the problem posed by illegal drug trafficking, developments in public international law which embraced the principle that all States have jurisdiction as an exception to the law of the flag State would be a significant step in the fight against illegal trade in narcotics. This would bring international law on drug trafficking into line with what has already existed for many years now in respect of piracy.

102. In view of the above and of the fact that only a narrow interpretation is consistent with the aim of Article 5 § 1 of the Convention (see paragraph 78 above), the Court accordingly finds that the deprivation of liberty to which the applicants were subjected between the boarding of their ship and its arrival in Brest was not "lawful" within the meaning of Article 5 § 1, for lack of a legal basis of the requisite quality to satisfy the general principle of legal certainty.

103. There has, therefore, been a violation of Article 5 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION

104. The applicants also complained that they had not been brought "promptly" before a judge or other officer authorised by law to exercise judicial power after their ship was intercepted. They relied on Article 5 § 3 of the Convention, which provides:

> "3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

A. The Chamber judgment

105. The Chamber found no violation of Article 5 § 3 of the Convention, considering that the instant case had a lot in common with the *Rigopoulos* case (cited above) and that, here too, it had not been materially possible to bring the applicants "physically" before a "legal authority" any sooner. Having regard to the evidence in its possession, the Government having produced no information concerning the exact details of the police custody in Brest and the relevant reports (see paragraph 64 of the judgment), it also found that two or three days in police custody after thirteen days at sea were justified under the circumstances. The Chamber considered that the duration of the deprivation of liberty suffered by the applicants was justified by

"wholly exceptional circumstances", in particular the time it inevitably took to get the *Winner* to France.

B. The parties' submissions before the Grand Chamber

1. The applicants

106. The applicants argued that the case-law of the Court has always emphasised the importance of the provisions of Article 5 § 3 of the Convention and the need for the Contracting States to have a legal framework that offers sufficient guarantees against arbitrary deprivation of liberty. They submitted that the "exceptional circumstances" found in the *Rigopoulos* case (cited above) had not been established in their case: inevitable duration of the sea voyage, deprivation of liberty under the supervision of a "judge or other officer authorised by law to exercise judicial power" within the meaning of Article 5 § 3 of the Convention and immediate presentation before a judge upon landing.

107. They contended that exceptional circumstances could justify failure to bring a person promptly before a judge only if the detention was supervised and controlled by a legal authority, which was not the case here. The applicants considered that the reasons given by the Chamber in its judgment (paragraph 68) were insufficient and left some important questions unanswered. They objected to the argument concerning "the time it inevitably took the *Winner* to reach France" in so far as they could have been repatriated on the French frigate instead of the *Winner*, which was in a deplorable state of repair.

108. The applicants further complained that after thirteen days of detention at sea they had been held in police custody for two or three days before being presented before a judge or other officer authorised by law to exercise judicial power, and finally all placed under investigation and remanded in custody, regardless of their degree of involvement in the traffic.

109. As well as disputing the fact that police custody helped to protect individual freedoms and the rights of the defence, because they had had no access to the case file and had been unable to consult a lawyer before the seventy-second hour, they complained that they had not been brought before the liberties and detention judge as soon as they arrived in Brest. On this point they noted that the interception had been planned for several weeks and the investigation opened no later than 24 June 2002: the two or three extra days in police custody had therefore been unnecessary. In view of the thirteen days' deprivation of liberty on board the *Winner*, those two or three extra days were not in compliance with the requirement of promptness enshrined in Article 5 § 3.

110. In any event, the circumstances of the present case differed from the "exceptional circumstances" that justified the *Rigopoulos* decision. While noting that the Spanish authorities had acted legally in boarding a ship flying a Panamanian flag, Spain and Panama being Parties to the Vienna Convention of 1988, the applicants objected to the fact that their detention on the ship had not been under the supervision of a "judge or other officer authorised by law to exercise judicial power" but under that of the public prosecutor, who was not such an officer according to the Court's case-law (see *Schiesser*, cited above; *Huber v. Switzerland*, 23 October 1990, Series A no. 188; and *Brincat v. Italy*, 26 November 1992, Series A no. 249-A), in particular because of his lack of independence *vis-à-vis* the executive. They maintained that the purely formal criterion relied on by the Government was ineffective in the light of the functional criterion developed by the Court in its case-law, as confirmed in the Chamber judgment. Thus, unlike the Spanish authorities in the *Rigopoulos* case, where the deprivation of liberty had been decided by the Central Investigating Court, an officer authorised by law to exercise judicial power within the meaning of Article 5 § 3 of the Convention, by means of a promptly issued, duly reasoned detention order, the French authorities had made no attempt to regularise the applicants' situation. Yet their ship was not an "area outside the law", especially considering that an investigating judge could have been contacted by radio, and the crew could have been informed of their rights and allowed to contact a lawyer and alert a family member. In addition to the resulting alleged violation of Article 5 § 3, the applicants, referring to the partially dissenting opinion expressed by three of the Chamber judges, pointed out that they had had to wait another two or three days to be brought before the liberties and detention judge.

2. The Government

111. The Government denied that the applicants had had to wait two or three days after arriving in Brest before they were brought before a judge or other officer authorised by law to exercise judicial power within the meaning of Article 5 § 3. They contended – producing the official reports for the first time before the Grand Chamber – that the applicants had in fact all been presented that very day, only hours after their arrival in Brest, to an investigating judge who had the power to order their release. They further argued that in any event the initial application to the Court concerned only the period of thirteen days it took to reroute the ship to France.

112. The Government reiterated that the notion of promptness had been clarified in the case of *Brogan and Others v. the United Kingdom* (29 November 1988, Series A no. 145-B), and confirmed recently in *McKay* (cited above, § 30). They contended, *inter alia*, that in the *Rigopoulos* case the Court had found that it was necessary to examine each case with reference to its particular characteristics in order to determine whether the

authorities had complied with the requirement of promptness, while pointing out that it had been materially impossible to bring the applicant before the investigating judge any sooner and that the applicant had been presented to the investigating judge the day after his arrival on Spanish soil.

113. The Government also considered that in its *McKay* judgment the Court had accepted derogations from the principle of the automatic nature of the review.

114. Concerning the characteristics and powers of the officer concerned, the Government maintained that although the Court had found that a public prosecutor or other judicial officer appearing for the prosecution could not be considered a "judge" for the purposes of Article 5 § 3 (see *Huber*, cited above), the same could not be said of an investigating judge. Investigating judges were fully independent judges whose job was to seek evidence both for and against the accused party, without participating in the prosecution or the judgment of the cases they investigated. In France the investigating judge supervised all custodial measures taken in the cases under his responsibility – be it police custody or detention pending trial – and could terminate them at any time. Although he had to apply to the liberties and detention judge when contemplating remanding a suspect in custody, he had full power to release people or place them under court supervision. The Government pointed out that the Court had already ruled that the investigating judge fulfilled the conditions laid down in Article 5 § 3 (see *A.C. v. France* (dec.), no. 37547/97, 14 December 1999).

115. The Government affirmed that the applicants had been brought before the investigating judges, without having had to ask, the same day they arrived in Brest, as soon as had been possible.

116. Lastly, the Government considered that the public prosecutor was a legal authority independent of the executive, and that his supervision while the *Winner* was rerouted to Brest had provided the protection against arbitrariness which Article 5 of the Convention was meant to guarantee.

C. The Court's assessment

1. General principles

117. The Court reiterates that Article 5 of the Convention is in the first rank of the fundamental rights that protect the physical security of an individual, and that three strands in particular may be identified as running through the Court's case-law: the exhaustive nature of the exceptions, which must be interpreted strictly and which do not allow for the broad range of justifications under other provisions (Articles 8 to 11 of the Convention in particular); the repeated emphasis on the lawfulness of the detention, procedurally and substantively, requiring scrupulous adherence to the rule

of law; and the importance of the promptness or speediness of the requisite judicial controls under Article 5 §§ 3 and 4 (see *McKay*, cited above, § 30).

118. The Court also notes the importance of the guarantees afforded by Article 5 § 3 to an arrested person. The purpose of this provision is to ensure that arrested persons are physically brought before a judicial officer promptly. Such automatic expedited judicial scrutiny provides an important measure of protection against arbitrary behaviour, incommunicado detention and ill-treatment (see, among other authorities, *Brogan and Others*, cited above, § 58; *Brannigan and McBride v. the United Kingdom*, 26 May 1993, §§ 62-63, Series A no. 258-B; *Aquilina v. Malta* [GC], no. 25642/94, § 49, ECHR 1999-III; *Dikme v. Turkey*, no. 20869/92, § 66, ECHR 2000-VIII; and *Öcalan*, cited above, § 103).

119. Article 5 § 3, as part of this framework of guarantees, is structurally concerned with two separate matters: the early stages following an arrest, when an individual is taken into the power of the authorities, and the period pending any trial before a criminal court, during which the suspect may be detained or released with or without conditions. These two limbs confer distinct rights and are not on their face logically or temporally linked (see *T.W. v. Malta* [GC], no. 25644/94, § 49, 29 April 1999).

120. Taking the initial stage under the first limb, which is the only one at issue here, the Court's case-law establishes that there must be protection, through judicial control, of an individual arrested or detained on suspicion of having committed a criminal offence. Such control serves to provide effective safeguards against the risk of ill-treatment, which is at its greatest in this early stage of detention, and against the abuse of powers bestowed on law enforcement officers or other authorities for what should be narrowly restricted purposes and exercisable strictly in accordance with prescribed procedures. The judicial control must satisfy the following requirements (see *McKay*, cited above, § 32):

(a) Promptness

121. The judicial control on the first appearance of an arrested individual must above all be prompt, to allow detection of any ill-treatment and to keep to a minimum any unjustified interference with individual liberty. The strict time constraint imposed by this requirement leaves little flexibility in interpretation, otherwise there would be a serious weakening of a procedural guarantee to the detriment of the individual and the risk of impairing the very essence of the right protected by this provision (see *Brogan and Others*, cited above, § 62, where periods of four days and six hours in detention without appearance before a judge were held to be in violation of Article 5 § 3, even in the special context of terrorist investigations).

(b) Automatic nature of the review

122. The review must be automatic and not depend on the application of the detained person; in this respect it must be distinguished from Article 5 § 4, which gives a detained person the right to apply for release. The automatic nature of the review is necessary to fulfil the purpose of that paragraph, as a person subjected to ill-treatment might be incapable of lodging an application asking for a judge to review their detention; the same might also be true of other vulnerable categories of arrested person, such as the mentally frail or those ignorant of the language of the judicial officer (see *Aquilina*, cited above).

(c) The characteristics and powers of the judicial officer

123. Since Article 5 § 1 (c) forms a whole with Article 5 § 3, "competent legal authority" in paragraph 1 (c) is a synonym, of abbreviated form, for "judge or other officer authorised by law to exercise judicial power" in paragraph 3 (see, among other authorities, *Lawless v. Ireland (no. 3)*, 1 July 1961, Series A no. 3, and *Schiesser*, cited above, § 29).

124. The judicial officer must offer the requisite guarantees of independence from the executive and the parties, which precludes his subsequent intervention in criminal proceedings on behalf of the prosecuting authority, and he or she must have the power to order release, after hearing the individual and reviewing the lawfulness of, and justification for, the arrest and detention (see, among many other authorities, *Assenov and Others v. Bulgaria*, 28 October 1998, §§ 146 and 149, *Reports* 1998-VIII). As regards the scope of that review, the formulation which has been at the basis of the Court's long-established case-law dates back to the early *Schiesser* case (cited above, § 31):

> "In addition, under Article 5 para. 3 (art. 5-3), there is both a procedural and a substantive requirement. The procedural requirement places the 'officer' under the obligation of hearing himself the individual brought before him (see, *mutatis mutandis*, the above-mentioned *Winterwerp* judgment, p. 24, para. 60); the substantive requirement imposes on him the obligations of reviewing the circumstances militating for or against detention, of deciding, by reference to legal criteria, whether there are reasons to justify detention and of ordering release if there are no such reasons (above-mentioned *Ireland v. the United Kingdom* judgment, p. 76, para. 199)."

Or, in other words, "Article 5 § 3 requires the judicial officer to consider the merits of the detention" (see *T.W. v. Malta*, and *Aquilina*, both cited above, § 41 and § 47 respectively).

125. The initial automatic review of arrest and detention accordingly must be capable of examining lawfulness issues and whether or not there is a reasonable suspicion that the arrested person has committed an offence; in other words, whether detention falls within the permitted exceptions set out in Article 5 § 1 (c). When the detention does not, or is unlawful, the judicial officer must then have the power to release (see *McKay*, cited above, § 40).

126. The Court has noted on several occasions that the investigation of terrorist offences undoubtedly presents the authorities with special problems (see *Brogan and Others*, cited above, § 61; *Murray v. the United Kingdom*, 28 October 1994, § 58, Series A no. 300-A; and *Aksoy v. Turkey*, 18 December 1996, § 78, *Reports* 1996-VI). This does not mean, however, that the investigating authorities have carte blanche under Article 5 to arrest suspects for questioning, free from effective control by the domestic courts and, ultimately, by the Convention supervisory institutions, whenever they choose to assert that terrorism is involved (see *Öcalan*, cited above, § 104). The same approach applies to the fight against drug trafficking on the high seas, the importance of which the Court has acknowledged in paragraph 81 above and which also undoubtedly presents special problems.

2. Application of the above principles

127. The Court notes that the arrest and detention of the applicants began with the interception of the ship on the high seas on 13 June 2002. The applicants were not placed in police custody until 26 June 2002, after arriving in Brest. Before the Grand Chamber, and for the first time since the proceedings began – which the Court can only find regrettable – the Government submitted substantiated information concerning the presentation of the applicants, at the end of the day, to the investigating judges in charge of the case (see paragraph 19 above).

128. The fact remains that the applicants were not brought before the investigating judges – who may certainly be described as "judge[s] or other officer[s] authorised by law to exercise judicial power" within the meaning of Article 5 § 3 of the Convention – until thirteen days after their arrest.

129. The Court points out that in the *Brogan and Others* case it held that a period of detention in police custody amounting to four days and six hours without judicial review fell outside the strict constraints permitted by Article 5 § 3, even though it was designed to protect the community as a whole from terrorism (see *Brogan and Others*, cited above, § 62). It also found a period of seven days without being brought before a judge incompatible with Article 5 § 3 (see *Öcalan*, cited above, §§ 104-05).

130. The Court observes, however, that it did accept, in the *Rigopoulos* decision (cited above), which concerned the interception on the high seas by the Spanish customs authorities, in the context of an international drug trafficking investigation, of a ship flying the Panamanian flag and the detention of its crew for as long as it took to escort their ship to a Spanish port, that a period of sixteen days was not incompatible with the notion of "promptness" required under Article 5 § 3 of the Convention, in view of the existence of "wholly exceptional circumstances" that justified such a delay. In its decision, the Court noted that the distance to be covered was "considerable" (the ship was 5,500 km from Spanish territory when it was intercepted), and that a forty-three-hour delay caused by resistance put up

by the ship's crew "could not be attributed to the Spanish authorities". It concluded that it had been "materially impossible to bring the applicant physically before the investigating judge any sooner", while taking into account the fact that once he had arrived on Spanish soil the applicant had been immediately transferred to Madrid by air and brought before the judicial authority on the following day. Lastly, the Court considered "unrealistic" the applicant's suggestion that, under an agreement between Spain and the United Kingdom to prevent illicit traffic in narcotic drugs, instead of being diverted to Spain the ship could have been taken to Ascension Island, which was approximately 1,600 km from where it was intercepted.

131. In the present case, the Court notes that at the time of its interception the *Winner* was also on the high seas, off the coast of the Cape Verde islands, and therefore a long way from the French coast, comparable to the distance in the *Rigopoulos* case. There was nothing to indicate that it took any longer than necessary to escort it to France, particularly in view of the weather conditions and the poor state of repair of the *Winner*, which made it impossible for it to travel any faster. In addition, the applicants did not claim that they could have been handed over to the authorities of a country nearer than France, where they could have been brought promptly before a judicial authority. As to the idea of transferring them to a French naval vessel to make the journey faster, it is not for the Court to assess the feasibility of such an operation in the circumstances of the case, particularly as it has not been established that the frigate was capable of accommodating all the crew members in sufficiently safe conditions.

132. The Court notes, lastly, that the applicants were placed in police custody at 8.45 a.m. on 26 June 2002 and effectively brought before an investigating judge at the police station in Brest, according to the reports produced by the Government, between 5.05 and 5.45 p.m. in the case of the first judge and at undocumented times in the case of the second judge (see paragraph 19 above), it being understood that the applicants do not dispute the fact that the meetings with the second judge took place at about the same time. This means that after arriving in France the applicants spent only about eight or nine hours in police custody before they were brought before a judge.

133. That period of eight or nine hours was perfectly compatible with the concept of "brought promptly" enshrined in Article 5 § 3 of the Convention and in the Court's case-law.

134. Accordingly, there has been no violation of Article 5 § 3 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

135. 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

136. The applicants claimed 10,000 euros (EUR) each in respect of non-pecuniary damage.

137. The Government did not express an opinion on this matter.

138. Ruling on an equitable basis as required by Article 41 of the Convention, the Court awards each of the applicants EUR 5,000 under this head.

B. Costs and expenses

139. The applicants claimed EUR 10,000 for the costs and expenses incurred before the Court. They submitted two requests for payment on account, dated 24 April and 6 December 2008, each for EUR 5,000, concerning the successive proceedings before the Chamber and the Grand Chamber of the Court.

140. The Government did not comment.

141. The Court notes that the applicants have produced vouchers in support of their claim. It considers reasonable the sum of EUR 10,000 claimed by the applicants and awards it to them jointly.

C. Default interest

142. 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

1. *Holds*, unanimously, that the applicants were within the jurisdiction of France for the purposes of Article 1 of the Convention;

2. *Holds*, unanimously, that the Government are estopped from raising a preliminary objection of incompatibility of the application and that Article 5 § 1 applies to the present case;

3. *Holds*, by ten votes to seven, that there has been a violation of Article 5 § 1 of the Convention;

4. *Holds*, by nine votes to eight, that there has been no violation of Article 5 § 3 of the Convention;

5. *Holds*, by thirteen votes to four,
(a) that the respondent State is to pay the applicants, within three months, the following amounts:
(i) EUR 5,000 (five thousand euros) each in respect of non-pecuniary damage plus any tax that may be chargeable on this amount;
(i) EUR 10,000 (ten thousand euros) jointly for costs and expenses plus any tax that may be chargeable to the applicants on this amount;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount[s] at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses*, unanimously, the remainder of the applicants' claims for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 29 March 2010.

Michael O'Boyle
Deputy Registrar

Nicolas Bratza
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) joint partly dissenting opinion of Judges Costa, Casadevall, Bîrsan, Garlicki, Hajiyev, Šikuta and Nicolaou;

(b) joint partly dissenting opinion of Judges Tulkens, Bonello, Zupančič, Fura, Spielmann, Tsotsoria, Power and Poalelungi.

N.B.
M.O'B.

JOINT PARTLY DISSENTING OPINION OF JUDGES COSTA, CASADEVALL, BÎRSAN, GARLICKI, HAJIYEV, ŠIKUTA AND NICOLAOU

(Translation)

1. We did not vote for a violation of Article 5 § 1 of the Convention and we should like to explain why.

2. The analysis of the majority of our colleagues is developed in paragraphs 82 to 103 of the judgment. The majority begin by admitting that the purpose of the deprivation of liberty to which the applicants were subjected on board the *Winner* after it was boarded and while it was being escorted to France was to bring them "before the competent legal authority" within the meaning of Article 5 § 1 (c) of the Convention, and that the parties did not dispute this (see paragraph 82). The majority also acknowledge, implicitly but necessarily as Article 5 § 1 (c) is applicable, that there was "reasonable suspicion" that the applicants had committed one or more offences. This too was not disputed and, indeed, some of the accused were given prison sentences for conspiracy to illegally attempt to import narcotics (see paragraphs 24 and 25).

3. What was at issue, therefore, was whether the deprivation of liberty suffered by the applicants had a "legal basis" under public international law and domestic law, as stated in paragraph 82 of the judgment. The majority of our colleagues found that "a legal basis of the requisite quality to satisfy the general principle of legal certainty" was lacking (paragraph 102 *in fine*). This is where the disagreement lies.

4. The boarding of the *Winner* and the subsequent loss of liberty of its crew during the voyage to Brest (where the applicants were presented before two investigating judges, placed under investigation and remanded in custody, before being tried by a Special Assize Court) had their origin in an international agreement: the diplomatic note of 7 June 2002 or, more precisely, the exchange of two notes on that date, one from the French Republic and the other from the Kingdom of Cambodia. We believe that our Court, which operates in the field of general public international law, should take the existence of that agreement into account, and presume it to be valid unless there is evidence to the contrary (none was adduced in this case).

5. It is explained in the "Facts" part of the judgment that the *Winner*, a ship registered in Cambodia, had attracted the attention of the anti-drug services of three States (Greece, Spain and the United States of America) when the French Central Office for the Repression of Drug Trafficking ("the OCRTIS"), suspecting it of carrying drugs, requested authorisation to intercept it (see paragraph 9).

6. The request to intercept the *Winner*, made by the French embassy in Phnom Penh by diplomatic note of 7 June 2002, was thus set in the dual

framework of international cooperation and the fight against international drug trafficking. It was in that same framework that the Ministry of Foreign Affairs of Cambodia, the flag State, replied by diplomatic note on the same day. It is important to remember the wording used in that note (quoted in paragraph 10):

> "The Ministry of Foreign Affairs and International Cooperation ... has the honour formally to confirm that the royal government of Cambodia authorises the French authorities to intercept, inspect and take legal action against the ship *Winner*, flying the Cambodian flag ..."

The message is very clear, for both States.

7. It can, of course, be argued that Cambodia's diplomatic note did not explicitly mention the fate of the ship's crew; this is pointed out in paragraph 99 of the judgment. It would not be logical, however, to interpret this note so narrowly as to exclude the possibility for the French authorities to take control of the ship and its crew were the inspection to reveal (as it did) the presence of a consignment of drugs. A less literal interpretation was not only confirmed by Cambodia in an explanatory note in 2008 – which there is no reason to believe was mendacious or spurious – but it also seems to be the most reasonable in our opinion, in the context of cooperation between States in the fight against drug trafficking. Besides, it is scarcely possible to dissociate the crew from the ship itself when a ship is boarded and inspected on the high seas. The actions expressly authorised by Cambodia (interception, inspection, legal action) necessarily concerned the crew members.

8. The notion of international cooperation is very important in the Court's case-law (see, *mutatis mutandis*, *Öcalan v. Turkey* [GC], no. 46221/99, §§ 97-99, ECHR 2005-IV). It may be too soon to affirm that new principles of customary international law exist in the field of international drug trafficking (see paragraph 85 of the judgment). But all civilised nations clearly agree that drug trafficking is a scourge, that States must work together to combat it, and that offenders must be arrested and punished, at least where the applicable domestic law so provides, which is evidently the case here. Cambodia's diplomatic note reflects this will to cooperate and to take legal action against a ship flying its flag but sailing a long way from its coastline (off Cape Verde).

9. It may still be said, it is true, that the diplomatic note did not meet all the conditions laid down in the case-law regarding the quality of the "law" (in particular that of accessibility). But an exchange of diplomatic notes is usually confidential, and must be so if it is to be effective in circumstances such as those in the present case. Nor can foreseeability be appraised in the ordinary manner. The attitude of the *Winner* (described in paragraph 13), shows that the crew, or at least their leaders, knew the risks they were running in view of the cargo they were carrying: the ship was flying no flag; it suddenly changed course and began steering a course that was dangerous

for the French vessel and armed forces; attempts to contact it by radio received no reply; a number of packages were thrown overboard, one of which was recovered and found to contain about 100 kilos of cocaine; and finally, the resistance put up by the crew obliged the French forces to use their weapons. In such conditions, how is it possible to say that the interception, boarding and inspection of the *Winner*, and the confinement of the crew to their quarters, were unforeseeable?

10. Basically, it is necessary to be realistic in such exceptional circumstances. Cambodia was not party to the United Nations Convention on the Law of the Sea ("the Montego Bay Convention") and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances ("the Vienna Convention"); but that did not prevent it from concluding, as it did, a bilateral agreement with France, as acknowledged in paragraphs 97 and 98 of the judgment. That being so, and bearing in mind that under domestic law the offences of which the applicants were suspected were punishable offences, and that it was not in dispute that the applicants were punished in the proper legal manner, is it necessary to apply the same criteria of "lawfulness" to the legal basis provided by the diplomatic note as are applied in much less exceptional situations? We think not. We believe that the deprivation of liberty imposed on the applicants was not arbitrary, which is, of course, what Article 5 requires above all (see, for example, *Winterwerp v. the Netherlands*, 24 October 1979, § 39, Series A no. 33, among many other authorities). We believe that the requirement of legal certainty, which was decisive in the finding reached in the judgment (see, by analogy, *Baranowski v. Poland*, no. 28358/95, § 56, ECHR 2000-III) was, in the circumstances, construed too narrowly. Lastly, is it necessary to point out that although the *Winner* – with the agreement of the flag State – was undeniably within the jurisdiction of France for the purposes of Article 1 of the Convention, that is no reason to draw conclusions that stretch logic? When there is sufficient concurring evidence to suspect that a ship on the high seas, thousands of miles from the State thus authorised to board it, is engaged in international trafficking to which all countries want to put a stop, it is without a doubt legitimate not to place as narrow an interpretation on the legal basis as one would inside the territory of the State concerned.

JOINT PARTLY DISSENTING OPINION OF JUDGES TULKENS, BONELLO, ZUPANČIČ, FURA, SPIELMANN, TSOTSORIA, POWER AND POALELUNGI

1. We disagree with the majority's view that there has been no violation of Article 5 § 3 of the Convention. The applicants complained that they had not been brought "promptly" before a judge or other officer authorised by law to exercise judicial power after their vessel had been intercepted by the French authorities. Since the Court has already held that the applicants' arrest and detention until their arrival in Brest had no legal basis and was, therefore, in violation of Article 5 § 1 of the Convention, it could have decided that there was no need to examine, separately, the applicants' complaint under Article 5 § 3 in respect of the period concerned[1]. This, however, it chose not to do.

2. At the outset, we emphasise that we are as opposed to the scourge inflicted upon society by those involved in illegal drug trafficking as is the majority. Where we differ is in our unwillingness to endorse *unnecessary* abridgements of fundamental human rights in the fight against that scourge. Such abridgements add nothing to the efficacy of the battle against narcotics but subtract, substantially, from the battle against the diminution of human rights protection.

3. It is undisputed that the applicants were not brought before the investigating judges until thirteen days after their arrest. The Government's argument that the rerouting of the ship under the supervision of the Brest public prosecutor should be regarded as being a sufficient guarantee against arbitrariness within the meaning of Article 5 § 1 is not convincing, as such supervision cannot be considered to meet the requirements of either Article 5 § 1 or Article 5 § 3 of the Convention in the light of the principles set out in the judgment itself (see paragraphs 123 et seq.) and the jurisprudence of the Court[2].

4. In *Brogan and Others v. the United Kingdom* (29 November 1998, § 62, Series A no. 145-B) the Court held that a period of detention in police custody amounting to four days and six hours without judicial review fell outside the strict constraints permitted by Article 5 § 3, notwithstanding the fact that it was aimed at protecting the community as a whole from terrorism. It has also found in *Öcalan v. Turkey* ([GC], no. 46221/99, ECHR 2005-IV) that a period of seven days' detention without being brought before a judge was incompatible with Article 5 § 3.

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1. *Paladi v. Moldova* [GC], no. 39806/05, § 76, 10 March 2009.

2. *Baranowski v. Poland*, no. 28358/95, § 57, ECHR 2000-III, *Goral v. Poland*, no. 38654/97, § 57, 30 October 2003, and *Ciszewski v. Poland*, no. 38668/97, § 30, 13 July 2004.

5. We acknowledge that the Court in *Rigopoulos v. Spain* ((dec.), no. 37388/97, ECHR 1999-II) found that a period of sixteen days was not incompatible with the notion of "promptness" as required under Article 5 § 3 of the Convention in view of the "wholly exceptional circumstances" that were involved therein. In that case, the Spanish customs authorities, in the context of an international drug trafficking investigation, intercepted on the high seas a vessel flying the Panamanian flag and its crew was detained for as long as it took to escort the vessel to a Spanish port. In our view, however, the facts in *Rigopoulos* are entirely distinguishable from those of the instant case. Most significantly, in *Rigopoulos*, there was an independent Central Investigating Court and not a public prosecutor supervising the proceedings on board the ship on the day of interception. The very next day its crew members were informed of their situation and advised of their rights. Within two days the court had ordered the crew to be remanded in custody. On the following day they were apprised of that decision and invited to name the persons they wanted to have informed of their detention. This information was communicated to the respective embassies of the States of which the crew members were nationals. Three days after the boarding, the independent investigating court issued an order regularising the crew's situation in accordance with the Spanish Code of Criminal Procedure. One week after the interception, the applicant had access to the services of a lawyer. Finally, it must be noted that the *lawfulness* of the detention with regard to Article 5 § 1 was never in issue in the *Rigopoulos* case.

6. We do not exclude the possibility that there may, at times, exist "wholly exceptional circumstances" which might justify a period that is, in principle, at variance with the provisions of Article 5 § 3. However, in our view, such circumstances would need to be established, clearly, and to be more than simply "special" or "exceptional". The notion of "wholly exceptional circumstances" connotes, if not "insurmountable" or "insuperable", then, at least, circumstances in which the authorities could not reasonably envisage or execute any other measures in order to comply with their obligations under the Convention.

7. The Government argued that the weather conditions at the relevant time and the poor state of repair of the *Winner* accounted for the very slow speed of the vessel and, thus, for the protracted period of time that passed before its crew was brought before a judge. Such factors may explain the delay involved, but they do not justify it. There was no evidence adduced before the Court that the French authorities had even considered, let alone examined, any other options which would have enabled the applicants to have been brought promptly before a judge.

8. In our view, it seems that various possibilities were open to the French authorities which they might have considered as a means of ensuring respect for and vindication of the applicants' rights under Article 5 § 3. For

example, from the moment the frigate *Lieutenant de vaisseau Le Hénaff* set out from Brest to intercept the *Winner* (which had been under observation by the American, Greek and Spanish authorities on suspicion of transporting illegal drugs, thus leading to a request by the Central Office for the Repression of Drug Trafficking ("the OCRTIS") for authorisation to intercept), it was reasonably foreseeable that the services of a judicial officer would be required during the course or in the immediate follow-up to the planned interception. In such circumstances, some consideration might have been given to having a judge join the frigate in Brest, or even later in Spain, when the OCRTIS experts went on board.

9. Alternatively, some consideration might have been given to transporting the crew back to Brest on board a naval vessel. (We note that, having left Brest, it took the *Lieutenant de vaisseau Le Hénaff* only six days to reach the location of the *Winner*). Having regard to the state of repair of the intercepted vessel, it is surprising that the authorities decided to keep its crew on board when they must have known that, as a result, it would take a long time to bring them before a judge. Nor, indeed, would it appear that any thought was given to airlifting those deprived of their liberty to France. This option has been used by the French authorities in cases of piracy on the high seas and it might also have been considered in this one.

10. The above examples, which are not exhaustive, demonstrate that there were, at least, other possibilities open to the French authorities which, if pursued or even explored, might have enabled them to comply with their Convention obligations. Such alternative measures as outlined herein may be considered as extraordinary or far-reaching but when fundamental human rights are at stake exceptional circumstances may, indeed, call for exceptional measures. In this case, far from doing *everything possible* to bring the applicants promptly before a judge, there is no evidence at all that the above or any alternative measures were even contemplated. Rather, notwithstanding the vessel's poor state of repair and its incapacity to travel at speed, the crew was simply detained on board the *Winner* while it made its way, slowly, back to Brest. Thus, it seems to us that the least favourable measure (in terms of travel time) was chosen by the authorities and that any other option would have been preferable in order to ensure compliance with the requirement of promptness contained in Article 5 § 3 of the Convention.

11. We could have accepted a dilution of the protection of personal liberty had it been the result of some material impossibility on the part of the authorities to respect the requirements of Article 5 § 3. We cannot accept it when the authorities had within their power alternative ways to ensure respect for fundamental rights but chose, rather, to do next to nothing about it. Had the French authorities invested a fraction of the resources used to ensure the success of the operation in order to ensure its *legality*, then this complaint would not have arisen.

12. We cannot follow the majority's apparent reliance on the subsequent conviction of some of the applicants (not all of them) as a justification for the delay in bringing those detained before a judge. We do not subscribe to the view that respect by the State for the fundamental rights of the individual is dependent upon reciprocity of respect on the part of the individual for the State's criminal law. What is required at the prologue to a criminal trial hardly depends upon its epilogue.

13. In conclusion, we cannot agree that, in the circumstances of this case, it was necessary to keep the applicants in detention for thirteen days, without any proper legal framework, before bringing them before a judge or other officer authorised by law to exercise judicial power. The French authorities, very laudably, made every effort to place on board the *Lieutenant de vaisseau Le Hénaff* impressive technical and military manpower to ensure the capture and detention of the suspects. It is regrettable that they made no effort at all to place the proceedings under some form of judicial control which would have ensured that the capture and detention of the suspects was as legitimate as it was successful.