ISLAMIC REPUBLIC OF IRAN SHIPPING LINES v TURKEY

BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

APPLICATION NO.40998/98

(The President, Judge Zupančič; Judges Bîrsan, Türmen, Gyulumyan, Myjer, Ziemele and Berro-Lefèvre)

(2008) 47 E.H.R.R. 24

December 13, 2007

LT Fair balance; Non-governmental organisations; Proportionality; Protection of property; Time limits; Turkey

H1 The applicant was an Iranian shipping company and the case concerned the seizure by the Turkish authorities of a Cypriot-owned vessel chartered by the company. On October 22, 1991, while transiting the Bosphorous, the ship was boarded and seized by Turkish authorities who suspected that it was carrying arms to Cyprus from where they would be smuggled into Turkey. On October 28, 1991, a judge of Istanbul State Security Court approved the arrest of the vessel and the detention of its crew, noting that the "smuggled weapons could be used against the security of the Republic of Turkey". An objection filed on behalf of the vessel and its Master was dismissed on November 4, 1991. The following day, the Public Prosecutor indicted the Master, first officer and radio operator, charging them with organised transportation of firearms and shells. He considered that Turkey was at war with Cyprus and that the vessel's seizure was justified under the Montreux Convention.

H2 In November and December 1991, the Iranian Government sought the vessel's release through diplomatic representations. On November 13, the applicant's lawyer requested the Istanbul State Security Court to ask the Turkish Ministry of Foreign Affairs whether Turkey was at war with Cyprus. In letters dated December 13 and 26, 1991, the Ministry of Foreign Affairs responded that Turkey and Cyprus were not in a state of war and that the Montreux Convention allowed commercial vessels free passage through the Bosphorus.

H3 On December 16, 1991, the State Security Court released the vessel's Master on bail but ordered the seizure and confiscation of the vessel and its cargo. On January 10, 1992, the Public Prosecutor reiterated that the vessel and cargo should be seized and the Master imprisoned. The applicant applied successfully to be joined as an intervening party in the proceedings. In February, the Prime Minister issued a certificate confirming that Turkey was not in a state of war with any country. On

March 12, 1992, the State Security Court convicted the Master of importing arms into Turkey without permission but acquitted the first officer and radio operator. It ordered that the arms cargo be confiscated and that the remainder of the cargo be returned to the applicant, but the non-arms cargo was not returned.

H4 On June 3, 1992 the Court of Cassation quashed the State Security Court's judgment, holding that there was no evidence that the arms would have been unloaded in Turkey and referring to the letters of the Prime Minister and the Foreign Ministry. The case was remitted to the State Security Court for retrial. Pending the retrial, the applicant sought removal of the lien which had been imposed over the cargo but in September 1992 the Court of Commerce refused the applicant's request for removal of the lien. Later that month, the Master was acquitted. The Court of Cassation dismissed the Public Prosecutor's appeal and the vessel left Turkey on December 8, 1992.

H5 The applicant instituted compensation proceedings before the Court of Commerce, arguing that the seizure and detention of the vessel and its cargo had been unjustified. However, the claim for compensation was dismissed as was the applicant's appeal. In accordance with the charter-party, a dispute between the applicant and the vessel's owner concerning the hire charges and other expenses was referred to arbitration in London. On September 20, 1995, the arbitration panel decided that the charter-party had been frustrated by the State Security Court's decision of March 12, 1992. The applicant was therefore able to recover from the owner the hire charges and other expenses paid in respect of the period after that date. However, it could not recover the money paid in respect of the period between the vessel's seizure and the State Security Court's judgment.

H6 Relying upon Art.1 of Protocol No.1, in particular, the applicant company complained that the seizure of the vessel and its cargo had amounted to an unjustified control of use of its property. It claimed just satisfaction under Art.41 of the Convention.

H7 **Held** unanimously:

(1) that the complaint under Art.1 of Protocol No.1 was admissible and the remainder of the application inadmissible;

(2) that there had been a violation of Art.1 of Protocol No.1;

(3) that the State was required to pay the applicant €35,000 for costs and expenses, plus any tax chargeable.

1. Admissibility: "non-governmental organisation"; six month rule; "victim" (Articles 34 and 35(1))

H8 (a) A legal entity:

> "[C]laiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention and the Protocols thereto",

could submit an application to the Court, provided that it was a "non-governmental organisation" within the meaning of Art.34. [78]

H9 (b) The term "governmental organisations", as opposed to "non-governmental organisations" within the meaning of Art.34, included legal entities which participated in the exercise of governmental powers or ran a public service under

government control. In order to determine whether any given legal person other than a territorial authority fell within that category, account had to be taken of its legal status and, where appropriate, the rights which that status gave it, the nature of the activity it carried out and the context in which it was carried out, and the degree of its independence from the political authorities. [79]

H10 (c) The applicant was a corporate body which carried out commercial activities subject to the ordinary law of the Republic of Iran. It neither participated in the exercise of governmental powers nor had a public-service role or a monopoly in a competitive sector. Although at the relevant time it was wholly owned by the State and an important part of its shares still belonged to the State and a majority of the members of the board of directors were appointed by the State, it was legally and financially independent of the State. [80]

H11 (d) Governmental bodies or public corporations under the strict control of a state were not entitled to bring an application under Art.34, the point being to prevent a contracting party acting both as applicant and as respondent before the Court. The circumstances of the case were different from those cited by the Government. The fact that the applicant was incorporated in a state which was not party to the Convention made no difference. Furthermore, the applicant company was governed essentially by company law, did not enjoy any powers beyond those conferred by ordinary law in the exercise of its activities and was subject to the jurisdiction of the ordinary courts. It was run as a commercial business and there was nothing to suggest that the application had effectively been brought by Iran. Accordingly, the applicant was entitled to bring an application under Art.34. [81]–[82]

H12 (e) Since the proceedings were of a civil nature and the applicant had lodged its application within six months of the service of the Court of Cassation's final decision, it had complied with the six month rule. [83]

H13 (f) The complaint based on Art.1 of Protocol No.1 was not manifestly ill-founded nor inadmissible on any other grounds. It was therefore admissible. [84]

H14 (g) Article 34 required that an individual applicant should claim to have been directly and actually affected by the violation alleged. [108]

H15 (h) The criminal proceedings had been brought against only the crew of the vessel, not against the applicant itself. Furthermore, the applicant had successfully appealed to the Court of Cassation and secured the release of the cargo belonging to it. Accordingly, it could not claim to be a victim of a violation of Art.6. This part of the application was therefore incompatible *ratione personae* with the Convention. [109]–[110]

2. Protection of property: interference; control of use; fair balance; proportionality; denial of compensation (Article 1 Protocol No.1)

H16 (a) The matters complained of constituted an interference with the peaceful enjoyment of the applicant's possessions. [85]

H17 (b) Article 1 of Protocol No.1 comprised three distinct rules. The first, set out in the first sentence of the first paragraph, was of a general nature and enunciated the principle of the peaceful enjoyment of property. The second, contained in the second sentence of the first paragraph, covered deprivation of possessions and

subjected it to certain conditions. The third, stated in the second paragraph, recognised that states were entitled to control the use of property in accordance with the general interest, by enforcing such laws as they deemed necessary for that purpose. The second and third rules were concerned with particular instances of interference with the right to peaceful enjoyment of property and had to be construed in the light of the general principle enunciated in the first rule. [86]

H18 (c) There had been neither a confiscation nor a forfeiture, as the applicant company had regained possession of the cargo following a temporary detention of the vessel. There had been control of the use of property. Accordingly, the second paragraph of Art.1 applied. [87]

H19 (d) The Montreux Convention was *lex specialis* for the transit regime through the Bosphorus. While the Court noted the parties' conflicting interpretation of the Convention, it was not its role to pronounce on the interpretation and application of the Montreux regime by Turkey since there had been an arbitrary interference with the applicant's property rights. [93]

H20 (e) An interference had to strike a "fair balance" between the demands of the general interest and the requirements of the protection of the individual's fundamental rights. There had to be a reasonable relationship of proportionality between the means employed and the aim pursued. The State enjoyed a wide margin of appreciation with regard to choosing the means of enforcement and ascertaining whether the consequences of enforcement were justified in the general interest for the purpose of achieving the object of the law in question. [94]

H21 (f) In order to assess the proportionality of the interference, it was necessary to examine the degree of protection from arbitrariness afforded by the proceedings and whether a total lack of compensation was justifiable. [96]

H22 (g) The vessel and its cargo should have been released, at the latest, on March 12, 1992, when the State Security Court had issued its decision. Their detention from that date onwards was arbitrary since there had been no basis for suspecting an offence of arms smuggling or any general power to seize the ship due to a state of war between Turkey and Cyprus. [98]

H23 (h) The compensation proceedings were also material when assessing whether the interference had respected the requisite fair balance and, notably, whether it had imposed a disproportionate burden on the applicant. The arbitrary control of use of property for a prolonged period of time without justification would normally constitute a disproportionate interference and a total lack of compensation could be considered unjustifiable under Art.1 of Protocol No.1. [99]

H24 (i) The applicant's claim for compensation had been dismissed by the Court of Commerce. However, the Court of Cassation had already found that there was no offence of arms smuggling and that Art.6(1) of the Montreux Convention did not apply. Accordingly, even though the civil courts were not bound by the findings of the criminal courts, the reasons given by the Court of Commerce could not justify its decision to deny the applicant compensation for the damage suffered from March 12, 1992. Thus, the interference with the applicant's rights was disproportionate and had not struck a fair balance between the competing interests. Accordingly, there had been a violation of Art.1 of Protocol No.1. [100]–[103]

3. Just satisfaction: damage; costs and expenses; default interest (Article 41)

H25 (a) There had to be a clear causal link between the damage claimed by the applicant and the violation of the Convention. [114]

H26 (b) The applicant company had suffered damage as a result of disproportionate interference with its rights under Art.1 of Protocol No.1. However, it had already recovered the losses sustained in respect of the period after March 12, 1992. Its claim for damages related only to the period between the date of the vessel's arrest and March 12, 1992. The Court had found that the vessel and its cargo should have been released by March 12, 1992 and that their detention from that date onwards was arbitrary. Accordingly, no award could be made for the period before that date and the applicant's claims for pecuniary damage were therefore dismissed. [115]

H27 (c) An applicant was entitled to reimbursement of costs and expenses only in so far as it was shown that they had been actually and necessarily incurred and were reasonable as to quantum. The Court was not satisfied that all the costs and expenses claimed had been necessarily and actually incurred. [118]

H28 (d) Default interest was based on the marginal lending rate of the European Central Bank, plus 3 percentage points. [119]

H29 **The following cases are referred to in the Court's judgment:**

1. *AGOSI v United Kingdom* (1987) 9 E.H.R.R. 1
2. *Agrotexim v Greece* (1996) 21 E.H.R.R. 250
3. *Air Canada v United Kingdom* (1995) 20 E.H.R.R. 150
4. *Barberà v Spain* (1987) 9 E.H.R.R. CD101
5. *Holy Monasteries v Greece* (1995) 20 E.H.R.R. 1
6. *Ireland v United Kingdom* (1979–80) 2 E.H.R.R. 25
7. *Papachelas v Greece* (2000) 30 E.H.R.R. 923
8. *Radio France v France* (2005) 40 E.H.R.R. 29
9. Application No.15090/89, *Ayuntamiento de M v Spain*, January 7, 1991
10. Application No.35216/97, *RENFE v Spain*, September 8, 1997
11. Application No.38788/97, *Société Faugyr Finance SA v Luxembourg*, March 23, 2000
12. Application No.39706/98, *Tahsin İpek v Turkey*, November 7, 2000
13. Application No. 35841/02, *Österreichischer Rundfunk v Austria*, December 7, 2006
14. Application Nos 5767/72, 5922/72, 5929–5931/72, 5953–5957/72, 5984–5988/73 and 6011/73, *16 Austrian Communes and some of their Councillors v Austria*

H30 **The following domestic cases are referred to in the Court's judgment:**

15. Decision No.978/8-189–245, *Vassoula*, June 19, 1978

THE FACTS

I. The circumstances of the case

5 The facts of the case, as submitted by the parties, may be summarised as follows.

A. Background to the case

6 By a charter dated September 12, 1991 the applicant company chartered a Cypriot-owned vessel called the *Cape Maleas* (the vessel). The charter-party was on an amended New York Produce Exchange time-charter form, and was for a time-charter trip to the South Iranian ports. The voyage duration was stated to be 50 days and the intended service for the carriage of general cargo, steels and commercial containers.

7 By agreement between the parties, namely the applicant company and the owner of the vessel, Seabeach Shipping Ltd, on September 18, 1991 the charter-party became subject to "Addendum No.1". This provided that the applicant charterer could load 2,500 cubic metres of "IMCO 1" cargo. The "IMCO 1" denotes cargoes which fall within "Class 1—Explosives" category of the International Maritime Dangerous Goods Code.

8 The applicant ordered the vessel to proceed to the port of Bourgas in Bulgaria and, on October 8, 1991, further cargo commenced loading. This consisted of a general cargo but also included a cargo of arms, ammunition and military spare parts which fell within the "IMCO Class 1" category (The arms cargo).

9 The applicant's agent in Bourgas drew up bills of lading in respect of the cargo, including the arms cargo (The Bills of Lading). These Bills of Lading described the arms cargo as "special equipment", followed by a reference to a numbered contract. The port of discharge for the "special equipment" was specified as Tartous Sar in Syria. The shipper was stated to be "Socotrade" and the consignee as "to order".

10 The applicant's agent in Bourgas also prepared a manifest of cargo. Like the Bills of Lading, this described the arms cargo as "special equipment", and gave the port of discharge as Tartous Sar. The applicant at all times intended that the arms cargo should be discharged at the port of Bandar Abbas in Iran. The vessel sailed from Bourgas at 19.00 on October 21, 1991 and was ordered to proceed to Setubal in Portugal in order to load further cargo. In order to reach Setubal from Bourgas, the vessel had to transit through the Bosphorus.

B. The seizure of the vessel

11 On October 22, 1991 at about 15.30, the vessel was about to commence transit through the Bosphorus. Before entering the Straits, the Master of the vessel requested the assistance of a pilot for navigation through the Bosphorus. The vessel was flying the international signal flag to indicate that it carried dangerous cargo.

12 As a result of information received by the Turkish customs authorities from a Turkish vessel, which had recently arrived from Bulgaria, the Turkish authorities believed that the arms cargo on board the vessel was bound for Cyprus, from where it would be smuggled into Turkey.

13 According to the Turkish authorities, the vessel was first sighted when it was 10 miles outside the Straits. After the vessel had entered the Straits, a pilot went on board and invited the Master to declare any hazardous materials which were on

board. The Master duly did so, and the vessel proceeded for a few minutes through the Straits, before the pilot instructed the Master to stop the engine of the vessel.

14 The Turkish coast guard and other Turkish authorities boarded and seized the vessel. Since the waters were rough at the point where the vessel was stopped, it was towed by a military boat to the Turkish port of Büyükdere. All parties to the case subsequently proceeded on the basis that the seizure of the vessel had taken place in the Straits governed by the Montreux Convention of July 20, 1936.

15 At Büyükdere the vessel was searched, and the Bills of Lading and Manifest of Cargo examined. The Turkish authorities discovered the arms cargo and questioned the Master of the vessel. The statement entitled "Protocol of Facts", in which the Turkish authorities summarised their allegations and the actions which they had taken in respect of the vessel, was prepared and signed by all the officials who were present at the seizure and search of the vessel. The Master, the first officer and the radio operator of the vessel were taken into custody by the Turkish authorities.

16 On October 24, 1991 statements were taken from the Master and first officer in the form of affidavits. These formed part of the file which was submitted by the Public Prosecutor to a single judge of the Istanbul State Security Court.

C. The proceedings before the Istanbul State Security Court

17 On October 28, 1991, having examined the file and citing, inter alia, Arts 5 and 6 of the Montreux Convention, a single judge of the Istanbul State Security Court, approved the arrest of the vessel and the detention of its crew, i.e. the Master, the first officer and radio operator. The judge referred in his decision to "systematic weapon smuggling" and stated that the "evidence confirmed that the aforementioned smuggled weapons could be used against the security of the Republic of Turkey".

18 On October 30, 1991 this decision was served on the lawyer instructed on behalf of the vessel and the Master. The following day, the lawyer filed an objection against the above decision, setting out the relevant provisions of the Montreux Convention and noting that Turkey was not in any state of war with any country within the meaning of the provisions of its Constitution and that there was neither threat of war, nor such a risk.

19 On November 4, 1991 the Istanbul State Security Court dismissed this objection.

20 On November 5, the Chief Public Prosecutor at the Istanbul State Security Court indicted the Master, the first officer and the radio officer of the vessel, charging them with organised transportation of firearms and shells. In the Public Prosecutor's view, Turkey was at war with Cyprus. He cited various decrees of the Turkish Parliament which had authorised the sending of troops to Cyprus, and stated that:

> "[N]otwithstanding the cease-fire achieved through the efforts of the United Nations Organisation putting an end to the armed conflict, no treaty having yet been signed, the state of war is ongoing from a legal point of view.

Consequently, it becomes necessary to enforce Article 5 of the Montreux Convention. (...)

Pursuant to [Article 5 of the Montreux Convention], the commercial vessels of countries at war with Turkey shall not enjoy free passage through the Straits. Therefore, there being no right of unrestricted passage through the Straits of a ship flying the Cypriot flag and laden with weapons, the Turkish Government may exercise, for its own security and based on its sovereign rights and Article 5 of the said Convention, control over this ship and the weapons contained therein."

21 Since the vessel was registered as a Cypriot ship and flew the Cypriot flag, the Turkish authorities concluded that they had been entitled under Art.5 of the Montreux Convention to seize the vessel and to launch proceedings for arms smuggling.

22 During November and December 1991 the Government of the Islamic Republic of Iran sought the release of the vessel and its cargo through high-level diplomatic meetings. The issue was raised at presidential level and, on November 11, 1991, the Iranian Ambassador to Turkey visited the Deputy Foreign Minister to deliver copies of one of the Bills of Lading and of the Montreux Convention. This was intended to establish that the arms cargo was indeed being carried on behalf of the Iranian State.

23 By a letter dated November 12, 1991 the Foreign Minister of Turkey wrote to the Ministry of Justice giving an account of the meetings which had taken place, enclosing copies of the Bill of Lading and the Montreux Convention and offering to obtain further information on the "special equipment" listed on the Bill of Lading.

24 By a petition dated November 13, 1991 the lawyer acting on behalf of the owners of the vessel and the Master, pointed out to the Istanbul State Security Court that the assumption according to which Turkey and Cyprus were at war with each other was the "crucial point" of the case. He requested the Istanbul State Security Court to enquire immediately of the Ministry of Foreign Affairs as to whether a state of war existed. He also submitted that the Presidency of the Parliament should be asked whether there had been a declaration of war.

25 On November 18, 1991 the lawyer filed another petition with the court reiterating that Turkey was not at war with any country (Cyprus included) and seeking the release of the Master on bail.

26 On November 25, 1991 the lawyer submitted a petition to the Istanbul State Security Court asking the court to rephrase the question which it had put to the Turkish Ministry of Foreign Affairs. He objected to the question which had been put, namely "whether the peace operations in Cyprus have ended with a treaty of peace", and submitted that the proper question to be asked was "whether the Republic of Turkey is in a state of war or not with the State of Cyprus".

27 Under cover of a petition dated November 29, 1991 the applicant's lawyer sent to the Istanbul State Security Court translations of the charter-party and the Bills of Landing. He explained that the nature of a time-charter was similar to a lease, and that the applicant charterers had control over the cargo and its documentation.

28 The Turkish Ministry of Foreign Affairs responded to the questions posed by the Istanbul State Security Court in two letters dated December 13 and 26, 1991. The letters stated:

> "[A]s there is no 'state of war' between Turkey and any other country, including the Greek Cypriot Administration, it is obvious that the seizure of the ship cannot be based on Articles 5 and 6 of the Montreux Convention. In fact, ships carrying the flag of the Greek Cypriot Administration have always traversed the Straits freely.
>
> 2. In the Note sent to our Ministry by the Iranian Embassy in Ankara, it was stated that the arms found on the ship belonged to Iran. This had been certified by the Iranian authorities on several occasions.
>
> On the other hand, Bulgarian authorities stated that the said arms had officially been sold to Iran by an agreement signed between Bulgaria and Iran in 1989 and that the arms had been loaded in Bourgas.
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> 3. Except for the limitations set out in Articles 4 and 5 of the Montreux Convention on the 'state of war', commercial ships flying foreign flags enjoy full freedom of transit passage at times of peace, whatever their flag and cargo may be. As stated above, it is impossible to invoke the 'state of war' provisions of the Montreux Convention in this case because no state of war with the Greek Cypriot Administration exists. Moreover, in accordance with customary international and treaty laws, ships have the 'right of innocent passage' through the territorial waters of other countries."

29 On December 16, 1991 the Istanbul State Security Court issued a decision for the release of the Master on bail, but ordered the seizure and confiscation of the vessel and its cargo used for commission or preparation of a crime.

30 On January 10, 1992 the Public Prosecutor filed his written observations on the merits. He maintained his earlier position, relying upon Art.5 of the Montreux Convention, contending that the vessel and the arms cargo should be seized and the Master imprisoned.

31 By January 1992 the applicant had concluded that attempts to secure the release of the vessel and its cargo through diplomatic negotiations were unlikely to succeed. The applicant applied through its Turkish lawyer, Mr Aydin, to intervene in the proceedings before the Istanbul State Security Court. In its application, the applicant set out its interest in the case as the owner of the cargo and stressed that the arms cargo was being carried as part of a normal and legal commercial transaction and that Turkey was not at war with any country. He therefore asked for the unconditional release of the vessel and its cargo. The court ordered that the applicant be joined as intervening party in the proceedings.

32 On February 22, 1992 the then Prime Minister of Turkey, Mr Süleyman Demirel, issued a certificate which stated, "[t]he Republic of Turkey is not in a state of war with any country, Southern Cyprus included".

33 By a judgment of March 12, 1992 the Istanbul State Security Court acquitted the first officer and the radio operator, but convicted the Master of the vessel of importing arms into Turkey without official permission. It therefore sentenced him to five years' imprisonment and a fine of 50,000 Turkish lira (TRL). The court ordered that the arms cargo and the vessel be confiscated pursuant to the final

paragraph of Art.12 of Law 6136, that the cargo other than the arms be returned to the applicant and that the Master bear the costs of the court hearing. With reference to a judgment of the Court of Cassation in a similar case,[1] the Istanbul State Security Court held that in the present case there was bad faith on the part of the applicant since the Bill of Lading gave inaccurate information as to the contents of the cargo and the route of the vessel. It noted that there was no justification for not informing the Turkish authorities of Iranian weapons passing through the Straits. The court further considered the following in relation to the Montreux Convention:

> "The second question is whether the Turkish authorities were entitled to seize the munitions and weapons. Pursuant to the relevant Article of the Montreux Convention, passage of ships carrying firearms and owned by any state with which Turkey is in a state of war is forbidden.
>
> The other important issue is whether Turkey is in a state of war with the Greek Cypriot State, or in other words, whether a peace agreement has been reached after the war. It is known that Turkey has engaged in war with the Greek Cypriot State, as a result of which Cyprus has been divided into two sections, that the Turkish Republic of Northern Cyprus has been established, that the Greek Cypriot State has not recognised the Turkish Republic of Northern Cyprus, and that until now, no agreement could be reached, and that the interstate negotiations are in progress.
>
> Therefore, the letter of the Ministry for Foreign Affairs ... and the letter of the Prime Ministry ... were disregarded."

34 The judgment went on to refer to the *Vassoula* case,[2] concerning another vessel, and concluded that "the existence of the state of war has been confirmed".

35 Following the judgment of the Istanbul State Security Court, the applicant paid the hire and expenses due to the owner and the charter-party amounting to US $1,161,374.50. Although the judgment of the Istanbul State Security Court had ordered the return of the non-arms cargo to the applicant, it was not returned and by order dated May 29, 1992 the Istanbul Court of Commerce granted an injunction to the owner of the vessel which imposed a lien of TRL 4,111,168,608 over the cargo to secure unpaid hire. The owner of the vessel, the Seabeach Shipping Ltd, then commenced enforcement proceedings for encashment of the lien over the cargo which belonged to the applicant.

D. The appeal

36 On March 13, 1992 the applicant appealed against the judgment of the Istanbul State Security Court. The applicant disputed the court's conclusion that a state of war existed between Turkey and Cyprus. The ground of appeal also questioned the legitimacy of the reliance which the court had placed upon the earlier *Vassoula* case, and pointed out that the arms cargo had only been in transit through the Straits.

[1] By decision Decision No.978/8-189–245, "*Vassoula*" case, June 19, 1978, the General Criminal Panel of the Court of Cassation held that the state of war had not yet ended following the Cyprus Peace Operation which started on July 20, 1974.

[2] Decision No.978/8-189–245, "*Vassoula*" case, June 19, 1978.

37 By a decision of June 3, 1992 the Court of Cassation quashed the Istanbul State Security Court's judgment. It held that there was no material evidence in the file indicating that the arms would be discharged from the vessel in Turkey. As regards the applicability of the provisions of the Montreux Convention, the Court of Cassation held:

> "[T]hat the state of war mentioned in Article 4 of the Convention did not exist as also evidenced by the letters of the Foreign Ministry and the Prime Minister which explicitly state that 'Turkey is not in war with any country, including the Southern Greek Cyprus Administration' (. . .) and that there is no room for application of Article 6 of the Montreux Convention."

38 The case was remitted to the State Security Court for retrial.

39 By a petition of September 3, 1992, pending the re-trial of the Master of the vessel before the Istanbul State Security Court, the applicant sought removal of the lien, which had been imposed by the Istanbul Court of Commerce over the cargo.

40 On September 8, 1992 the Istanbul Court of Commerce refused the applicant's request and therefore, on September 18, 1992, the applicant agreed to pay to the owner some of the hire charges, without prejudice as to liability. In return, the owner agreed to relinquish its lien on the non-arms cargo. Under this agreement, the applicant had to pay 80 per cent of the hire in respect of the period from March 14, 1992 to September 13, 1992 inclusive (US $1,118,074.40). The applicant also agreed to pay 100 per cent of future charges, as and when the payments fell due. The owner provided to the applicant a guarantee to repay the sum of US $1,118,074.40. The applicant considered that it was obliged to pay the hire due, otherwise the Istanbul Court of Commerce and the owner would not have released the vessel and its cargo.

41 On September 30, 1992 the Istanbul State Security Court acquitted the Master on re-trial. The Public Prosecutor's appeal against this judgment was dismissed by the Court of Cassation's decision of November 12, 1992, which was approved on November 13, 1992.

42 On November 18, 1992 the Istanbul State Security Court ordered that the vessel and the arms cargo should be released. The vessel left Turkey on December 8, 1992 and was re-delivered to the owner by the applicant under the terms of the charter-party on March 9, 1993.

E. The compensation proceedings

43 By a written petition dated July 22, 1993 the applicant brought an action before the Istanbul Court of Commerce claiming TRL 38,087,249,964 (equivalent to US $3,386,598.98) plus interest against the Ministry of Finance and Customs, with reference to the Ministry of the Interior and the Ministry of Defence. The applicant based its claim upon Art.41 of the Code of Obligations and submitted that the seizure and detention of the vessel and its cargo was unjustified. It argued in this connection that the arms and ammunition belonged to the Islamic Republic of Iran, that as a result of these tortious acts the vessel had been released after 413 days and 2 hours and 30 minutes, which required it to pay US $3,263,522.92 to the owner and US $81,978.86 for fuel charges and US $41,097.20 in harbour fees.

44 The petition went on to refer to and to distinguish the *Vassoula* case, and to explain the circumstances in which the applicant was forced to pay the hire charges and other expenses to the owner of the vessel.

45 On September 28, 1994 a first expert report was submitted to the Court of Commerce following its interlocutory order of March 9, 1994. The experts advised that the applicant's claim should be declared inadmissible, principally on the basis that the applicant had chosen voluntarily and without legal compulsion to pay the hire charges under the charter-party.

46 The applicant objected to the first report and the Court of Commerce ordered the preparation of a second expert's report on November 11, 1994.

47 On April 3, 1995 the second expert report was submitted to the court with the conclusion that the applicant's claim should be rejected. This second panel of experts considered that the owner of the vessel, but not the applicant, could in appropriate circumstances claim compensation from the Turkish State. They expressed the opinion that the applicant's claim might succeed in relation to dock and fuel expenses incurred, as well as supplementary losses under Art.105 of the Code of Obligations, but that the claim in respect of hire charges should fail.

48 On June 13, 1995 the applicant filed an objection against the second report and requested the court to rule on the case without obtaining a further report, or alternatively to obtain a third expert report.

49 By a decision dated September 20, 1995 the Istanbul Court of Commerce dismissed the applicant's claim for compensation, holding that the vessel was not a merchant vessel since it was carrying, in part, a cargo of arms. It considered that the security authorities had only carried out their statutory duty to investigate the serious allegations of arms smuggling. The court therefore ruled that there had been no breach of the Montreux Convention or of Turkish law, in particular Art.41 of the Code of Obligations.

50 On November 6, 1995 the applicant appealed.

51 On December 27, 1996 the Court of Cassation dismissed the appeal and upheld the judgment of the Istanbul Court of Commerce. The applicant's request for rectification of this decision was rejected by the Court of Cassation's further decision of May 22, 1997. The latter decision was served on the applicant on June 22, 1997.

F. The London arbitration

52 The charter-party provided, inter alia, that any dispute arising under it should be referred to arbitration in London. As a result of the seizure and subsequent detention of the vessel and its cargo by the respondent Government, a dispute arose between the applicant and the owner of the vessel concerning the hire charges and other expenses paid by the applicant.

53 Following arbitration proceedings in London, on September 20, 1995, the arbitration panel decided that the charter-party had been frustrated by the Istanbul State Security Court's decision of March 12, 1992. The applicant therefore recovered from the owner of the vessel the hire charges and other expenses which had been paid in respect of the period after March 12, 1992, but was unable to

recover US $1,300,403.83 which it had paid or which it thereupon had to pay to the owner in respect of the period between the seizure on October 22, 1991 and March 12, 1992.

G. The proceedings instituted by the owner of the vessel and the cargo receiver

54 Meanwhile, the owner of the vessel, Seabeach Shipping Ltd, brought an action in the Beyoğlu Commercial Court in Istanbul claiming lien on the cargo for the hire charges. In a decision of May 29, 1992 the Beyoğlu Commercial Court accepted the owner's claim on the ground that it was owed freight charges.

55 The cargo receiver, the Mobarakeh Steel Complex, also brought an action in the Beyoğlu Commercial Court claiming US $2,236,208 for damages from the Ministry of the Finance on behalf of the Ministry of the Interior and the Ministry of Defence. It submitted that it had lost profit as a result of the detention of its merchandise carried on the vessel and that new commercial goods had been purchased in order to replace the seized merchandise.

56 In a judgment dated January 17, 2000 the Beyoğlu Commercial Court dismissed this claim on the grounds that the seizure of the vessel had been lawful since the arms cargo was not clearly indicated in the Bill of Lading. On appeal by the plaintiff, the Court of Cassation quashed the judgment. Relying on the outcome of the criminal proceedings, the Court of Cassation noted that the goods in question were not contraband or of a kind requiring them to be confiscated. On that account, it held that the defendant must be liable for the damage resulting from wrongful confiscation of the goods.

57 In a judgment of December 15, 2000 the Beyoğlu Commercial Court persisted in its earlier judgment and held that the plaintiff's claim must be dismissed on the grounds that the seizure and detention of the vessel complied with the domestic law and the Montreux Convention governing the Straits. Taking into account the facts that the vessel was sailing under the Cypriot flag and that there was an inconsistency between the cargo and the documents, the court considered that there was no unlawfulness in seizing the vessel. The court further noted that the State of Turkey had acted with the aim of preventing activities designed to undermine it. The plaintiff again appealed against this judgment.

58 On November 21, 2000 the Court of Cassation sitting in full civil court upheld the judgment of the Beyoğlu Commercial Court and dismissed the action. It considered that, while under the Montreux Convention merchant ships were entitled to innocent passage, this did not outweigh Turkey's sovereign rights. This being so, any arms trafficking would adversely affect Turkey and would thus mean that that passage was no longer innocent. It further stated the following:

> "On the other hand, the bill of lading described the 2,131 boxes opened as containing 'Special Equipment'. The Turkish Commercial Code specifies in Articles 1,098 and 1,114 the points to be included in the bill of lading. The cargo received or loaded onto the vessel for transportation must be described on the bill of lading in order for the acknowledgement of receipt and the delivery contract to be complete ... This description, which is an essential element of the bill of lading, must be such as to allow the cargo to be distinguished at all times from the other cargoes on the vessel and must be

complete. The carrier is obliged to indicate on the bill of lading the amount, brand and external appearance and characteristics of the cargo . . . Clearly, as is apparent from the bills of lading in the case-file, these indications, some of which are mandatory, were not included on the bill of lading and invited suspicion.

A country may purchase the arms it needs for its defence from another country, or may secure them by means such as aid or donations. In other words, arms-trading between states is a normal and lawful procedure. Transportation of these arms is also normal and lawful. Arms purchased and transported must be indicated clearly, as they are, on the bill of lading and other documents, in accordance with international rules. There should be no need to conceal them or make use of other channels. The file did not include a sales contract to the effect that the party sending these arms had purchased them lawfully, nor did it include any evidence to the effect that a letter of credit had been opened by banks. Given the manner in which the arms were loaded onto the vessel, it was essential from the point of view of Turkey's security to inspect the vessel. In the matter of innocent passage, the coastal state has the right to impose sanctions on the vessel and cargo in accordance with the rule on the prevention of non-innocent passage which stems from customary law and the Montreux Convention. The Montreux Convention, customary law and the principle of *ex aequo et bono* do not prevent Turkey from exercising this right. For these reasons, the trial court's decision to dismiss the action must be upheld on the grounds that it is in conformity with the law and with statutory procedure."

II. Relevant domestic legal materials and domestic law

A. The Montreux Convention of December 11, 1936

59 The former signatories to the Treaty of Lausanne (1923) together with Yugoslavia and Australia, met at Montreux, Switzerland, in 1936 and abolished the International Straits Commission, returning the Straits zone to Turkish military control. Turkey was authorised to close the Straits to warships of all countries when it was at war or threatened by aggression. Merchant ships were to be allowed free passage during peacetime and, except for countries at war with Turkey, during wartime. The convention was ratified by Turkey, Great Britain, France, the USSR, Bulgaria, Greece, Germany, and Yugoslavia, and—with reservations—by Japan. The preamble of the Convention stated that the desire of the [parties] was to regulate transit and navigation in the Straits of the Dardanelles, the Sea of Marmara and the Bosphorus comprised under the general term "Straits" in such manner as to safeguard, within the framework of Turkish security and of the security, in the Black Sea, of the riparian states, [pursuant to] the principle enshrined in Art.23 of the Treaty of Peace signed at Lausanne on July 24, 1923.

"Article 1

The High Contracting Parties recognise and affirm the principle of freedom of transit and navigation by sea in the Straits.

The exercise of this freedom shall henceforth be regulated by the provisions of the present Convention.

Article 2(1) and (2)

In time of peace, merchant vessels shall enjoy complete freedom of transit and navigation in the Straits, by day and by night, under any flag and with any kind of cargo, without any formalities, except as provided in Article 3 below.

In order to facilitate the collection of these taxes or charges merchant vessels passing through the Straits shall communicate to the officials at the stations referred to in Article 3 their name, nationality, tonnage, destination and last port of call (provenance).

Article 3

All ships entering the Straits by the Aegean Sea or by the Black Sea shall stop at a sanitary station near the entrance to the Straits for the purposes of the sanitary control prescribed by Turkish law within the framework of international sanitary regulations. This control, in the case of ships possessing a clean bill of health or presenting a declaration of health testifying that they do not fall within the scope of the provisions of the second paragraph of the present Article, shall be carried out by day and by night with all possible speed, and the vessels in question shall not be required to make any other stop during their passage through the Straits.

Vessels which have on board cases of plague, cholera, yellow fever exanthemic typhus or smallpox, or which have had such cases on board during the previous seven days, and vessels which have left an infected port within less than five times twenty-four hours shall stop at the sanitary stations indicated in the preceding paragraph in order to embark such sanitary guards as the Turkish authorities may direct. No tax or charge shall be levied in respect of these sanitary guard and they shall be disembarked at a sanitary station on departure from the Straits.

Article 4 (1)

In time of war, Turkey not being belligerent, merchant vessels, under any flag or with any kind of cargo, shall enjoy freedom of transit and navigation in the Straits subject to the provisions of Articles 2 and 3.

Article 5(1)

In time of war, Turkey being belligerent, merchant vessels not belonging to a country at war with Turkey shall enjoy freedom of transit and navigation in the Straits on condition that they do not in any way assist the enemy.

Article 6(1)

Should Turkey consider herself to be threatened with imminent danger of war, the provisions of Article 2 shall nevertheless continue to be applied except that vessels must enter the Straits by day and their transit must be

effected by the route which shall, in each case, be indicated by the Turkish authorities.

Article 24

The functions of the International Commission set up under the Convention relating to the regime of the Straits of the 24th July, 1923, are hereby transferred to the Turkish Government.

The Turkish Government undertake to collect statistics and to furnish information concerning the application of Article 11,12, 14 and 18 of the present Convention.

They will supervise the execution of all the provisions of the present Convention relating to the passage of vessels of war through the Straits.

As soon as they have been notified of the intended passage through the Straits of a foreign naval force the Turkish Government shall inform the representatives at Angora of the High Contracting Parties of the composition of that force, its tonnage, the date fixed for its entry into the Straits, and, if necessary, the probable date of its return.

The Turkish Government shall address to the Secretary-General of the League of Nations and to the High Contracting Parties an annual report giving details regarding the movements of foreign vessels of war through the Straits and furnishing all information which may be of service to commerce and navigation, both by sea and by air, for which provision is made in the present Convention.

Article 25

Nothing in the present Convention shall prejudice the rights and obligations of Turkey, or of any of the other High Contracting Parties members of the League of Nations, arising out of the Covenant of the League of Nations."

B. The United Nations Convention on the Law of the Sea of December 10, 1982

60 Relevant provisions provide as follows:

"Article 35—Scope of this Part

Nothing in this Part affects:

a) any areas of internal waters within a strait, except where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such;
(b) the legal status of the waters beyond the territorial seas of States bordering straits as exclusive economic zones or high seas; or
(c) the legal regime in straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits.

Article 37

This section applies to straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.

Article 38—Right of transit passage

1. In straits referred to in article 37, all ships and aircraft enjoy the right of transit passage, which shall not be impeded; except that, if the strait is formed by an island of a State bordering the strait and its mainland, transit passage shall not apply if there exists seaward of the island a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics.

2. Transit passage means the exercise in accordance with this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. However, the requirement of continuous and expeditious transit does not preclude passage through the strait for the purpose of entering, leaving or returning from a State bordering the strait, subject to the conditions of entry to that State.

3. Any activity which is not an exercise of the right of transit passage through a strait remains subject to the other applicable provisions of this Convention.

Article 39—Duties of ships and aircraft during transit passage

1. Ships and aircraft, while exercising the right of transit passage, shall:

(a) proceed without delay through or over the strait;
(b) refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering the strait, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
(c) refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by force majeure or by distress;
(d) comply with other relevant provisions of this Part.

2. Ships in transit passage shall:

(a) comply with generally accepted international regulations, procedures and practices for safety at sea, including the International Regulations for Preventing Collisions at Sea;
(b) comply with generally accepted international regulations, procedures and practices for the prevention, reduction and control of pollution from ships."

C. The Code of Obligations

61 This provides as relevant:

"Article 41

Every person who causes damage to another in an unjust manner, whether wilfully, or negligently and carelessly or imprudently is obliged to compensate that damage."

62 The civil courts are not bound by either the findings or the verdict of the criminal court.[3]

D. Law 6136 of July 15, 1953 (as amended by Laws 2249 and 2478 of June 12, 1979 and June 23, 1981 respectively)

63 Article 12 makes it an offence to smuggle, to attempt to smuggle or to assist in smuggling firearms or bullets into the country.

E. Article 36 of the now defunct Turkish Criminal Code

64 Article 36 of the Turkish Criminal Code, which was in force at the relevant time prescribed, the seizure and confiscation of objects which were used for commission or preparation of a crime.

F. Article 90(5) of the Turkish Constitution

65 Relevant parts of Art.90(5) provide:

"International agreements duly put into effect bear the force of law . . . In case of a conflict between international agreements in the area of fundamental freedoms and rights duly put into effect and the domestic laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail."

JUDGMENT

I. Alleged violation of Article 1 of Protocol No.1 to the Convention

66 The applicant complained that the seizure by the Turkish authorities of the vessel and its cargo had constituted an unjustified control of use of property within the meaning of Art.1 of Protocol No.1, which reads as follows:

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

[3] Code of Conduct Art.53.

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

A. Admissibility

1. The Government's submissions

67 The Government alleged that the applicant company did not have *locus standi* and that it therefore was not entitled to lodge an application under Art.34 of the Convention. They contended, in the alternative, that the applicant had failed to comply with the six month rule in respect of these complaints.

68 The Government submitted that the applicant company was a state-owned corporation which could not be considered to be, de jure or de facto, distinct from the Government of the Islamic Republic of Iran. At the time this application was lodged, the total shares of the applicant company had been owned by the State.

69 However, in January 2000, 51 per cent of the company's shares had been transferred to the Social Security Organisation and the State Pension Fund, which were public-sector organisations under the control of the State. According to Arts 9, 10 and 13 of the Memorandum of Association of the applicant company, 3/5ths of the members of the board of directors were appointed by the State, which owned class A shares. Any class A share conferred the right of vote, which was equal to two votes of class B shares (owned by the Social Security Institution and the State Pension Fund) in the extraordinary general assembly held for the modification of the Memorandum of Association. Furthermore, Art.18 of the Memorandum provided that all decisions of the board should be taken by a majority of the attending members. Thus, bearing in mind that three members of the board were representatives of the State, it was impossible to pass an adverse resolution against the instructions of the State. Accordingly, the present application was lodged by a state which is not a party to the Convention.

70 Furthermore, the established case law of the Convention institutions indicate that public corporations were not entitled to bring an application under Art.34 of the Convention.[4]

71 The Government finally asserted that the applicant did not file these complaints within six months of the deposition of the final decision with the registry of the Istanbul Court of Commerce. Referring to the Court's decision in the case of *Tahsin İpek v Turkey*,[5] they claimed that six months had started to run from June 12, 1997, the date on which the Court of Cassation's final decision was deposited with the registry of the Beyoğlu Commercial Court, and that these complaints had been introduced on December 18, 1997, which was more than six months later.

72 In sum, given that the applicant company lacked *locus standi* as a government corporation, the application should be declared inadmissible as being incompatible

[4] See, *Radio France v France* (2005) 40 E.H.R.R. 29; App. No.15090/89, *Ayuntamiento de M v Spain*, January 7, 1991; and App. Nos 5767/72, 5922/72, 5929–5931/72, 5953–5957/72, 5984–5988/73 and 6011/73, *16 Austrian Communes and some of their Councillors v Austria*.

[5] App. No.39706/98, *Tahsin İpek v Turkey*, November 7, 2000.

ratione personae. Alternatively, it should be declared inadmissible for failure to comply with the six month rule.

2. The applicant's arguments

73 The applicant disputed the Government's submissions. It claimed that it was a company limited by shares, with a salaried board of directors and articles of association. It was at all material times registered as an independent entity under the applicable Iranian trade law. It was run as a commercial business and operated in a sector that was open to competition. In no sense did it have a monopoly or a special position in that sector. Thus, just as in the *Radio France* case,[6] the applicant was essentially subject to the legislation on incorporated companies, exercised no powers which were not subject to the ordinary law in the exercise of its activities and was subject to the ordinary courts. It is therefore in law and in fact a separate legal entity distinct from the Government of Iran as provided by Art.3 of the Memorandum of Association. Since January 2000, 51 per cent of the shares in the applicant had been owned by private shareholders.

74 Furthermore, the fact that the applicant was incorporated in Iran, a state which was not a party to the Convention, was of no relevance. There was no requirement that an applicant should be a citizen of the respondent State or indeed of any Council of Europe Member State.

75 As regards the Government's reliance on cases concerning the standing of communes and municipalities, the applicant pointed out that it was in no sense such an organ of local or central government. Rather, it was a separate corporate body at the time of the unlawful and unjustified arrest of the vessel.

76 In view of the above, the applicant claimed that it was not, at the time of the arrest of the vessel or subsequent court proceedings, a "governmental organisation" in the relevant sense. It has accordingly *locus standi* to bring an application under Art.34 of the Convention.

77 Finally, the applicant submitted that the Court of Cassation's final decision had been served on its lawyer on June 22, 1997 and that the application was lodged on December 18, 1997. Therefore, these complaints had been introduced within six months' time-limit.

3. The Court's considerations

78 As regards the first limb of the Government's objections, the Court observes that a legal entity:

> "[C]laiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention and the Protocols thereto",

may submit an application to it,[7] provided that it is a "non-governmental organisation" within the meaning of Art.34 of the Convention.[8]

79 The term "governmental organisations", as opposed to "non-governmental organisations" within the meaning of Art.34, includes legal entities which

[6] *Radio France* (2005) 40 E.H.R.R. 29.
[7] See, for example, *Agrotexim v Greece* (1996) 21 E.H.R.R. 250, and App. No.38788/97, *Société Faugyr Finance SA v Luxembourg*, March 23, 2000.
[8] See App. No.35216/97, *RENFE v Spain*, September 8, 1997.

participate in the exercise of governmental powers or run a public service under government control. In order to determine whether any given legal person other than a territorial authority falls within that category, account must be taken of its legal status and, where appropriate, the rights that status gives it, the nature of the activity it carries out and the context in which it is carried out, and the degree of its independence from the political authorities.[9]

80 In the light of the above principles, the Court notes that the applicant is a corporate body which carries out commercial activities subject to the ordinary law of the Republic of Iran. It neither participates in the exercise of governmental powers nor has a public-service role or a monopoly in a competitive sector.[10] Although at the time of the events giving rise to the present application, the applicant company was wholly owned by the State and currently an important part of its shares still belong to the State and a majority of the members of the board of directors are appointed by the State, it is legally and financially independent of the State as transpires from Art.3 of the Memorandum of Association. In this respect the Court recalls that in the *Radio France* case, which was relied on by the Government, it found that the national company Radio France was a "non-governmental organisation" within the meaning of Art.34 of the Convention despite the facts that the State held all of the capital in Radio France; its memorandum and articles of association were approved by decree; its resources were to a large extent public; it performed "public-service missions in the general interest"; and it was obliged to comply with terms of reference and to enter into a contract with the State setting out its objectives and means. Therefore, it follows that public-law entities can have the status of "non-governmental organisation" in so far as they do not exercise "governmental powers", were not established "for public-administration purposes" and are completely independent of the state.[11]

81 That being so, it is true that governmental bodies or public corporations under the strict control of a state are not entitled to bring an application under Art.34 of the Convention.[12] However, the idea behind this principle is to prevent a contracting party acting both as an applicant and respondent party before the Court. The circumstances of the present case are therefore different from those cited by the Government and the fact that the applicant was incorporated in a state which is not party to the Convention makes no difference in this respect. Furthermore, the Court finds that the applicant company is governed essentially by company law, does not enjoy any powers beyond those conferred by ordinary law in the exercise of its activities and is subject to the jurisdiction of the ordinary rather than the administrative courts. Having regard to the foregoing, the Court considers that the applicant company is run as a commercial business and that therefore there is nothing to suggest that the present application was effectively brought by the State of the Islamic Republic of Iran which is not a party to the Convention.

[9] See *Radio France* (2005) 40 E.H.R.R. 29.
[10] See, in this respect, *Holy Monasteries v Greece* (1995) 20 E.H.R.R. 1 at [49]; and more recently, App. No. 35841/02, *Österreichischer Rundfunk v Austria*, December 7, 2006 at [48]–[54].
[11] See *Holy Monasteries v Greece* (1995) 20 E.H.R.R. 1 at [49].
[12] See *Radio France* (2005) 40 E.H.R.R. 29; App. No.15090/89, *Ayuntamiento de M*, January 7, 1991; App. Nos 5767/72, 5922/72, 5929–5931/72, 5953–5957/72, 5984–5988/73 and 6011/73, *16 Austrian Communes*; App. No.35216/97, *RENFE*, September 8, 1997.

82 It follows that the applicant is entitled to bring an application under Art.34 of the Convention and that therefore the first part of the Government's objections should be dismissed.

83 As regards the second limb of the Government's objection, namely the alleged failure of the applicant to comply with the six month rule, the Court notes that the Government relied on its decision in the *Tahsin İpek* case which concerned the failure of the applicant to procure the judgment of the Court of Cassation for more than six months after it had been deposited with the registry of the assize court. In this connection, it recalls that its findings in the *Tahsin İpek* case applied solely to criminal proceedings since, according to the established practice of the Court of Cassation, the latter's decisions in criminal cases are not served on the defendants. In civil law cases, however, the Court of Cassation's decisions are served on the parties upon payment of the postage fee having been made in advance. Given that the proceedings in the instant case are of a civil nature and that the applicant lodged its application within six months of the service of the Court of Cassation's final decision, it must be considered to have complied with the six month rule laid down in Art.35(1) of the Convention.

84 Accordingly, the Government's objection concerning the alleged failure to observe the six month rule must also be dismissed. The Cour finds furthermore that this part of the application is not manifestly ill-founded within the meaning of Art.35(3) of the Convention, and that it is not inadmissible on any other grounds. This complaint must therefore be declared admissible.

B. Merits

85 The Court notes that the parties did not contest that the matters complained of constituted an interference with the peaceful enjoyment of the applicant's possessions. Accordingly, it must next determine the applicable rule in the instant case.

1. The applicable rule

86 The Court reiterates that Art.1 of Protocol No.1 comprises three distinct rules. The first rule, which is set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property. The second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions. The third rule, stated in the second paragraph, recognises that the contracting states are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose. However, the rules are not "distinct" in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule.[13]

87 The Court notes that the parties did not comment on the rule applicable to the case. It considers that in this case there was neither a confiscation nor a forfeiture,

[13] See *AGOSI v United Kingdom* (1987) 9 E.H.R.R. 1 at [48].

as the applicant company regained the possession of the cargo following a temporary detention of the vessel. It therefore amounted to control of the use of property. Accordingly, the second paragraph of Art.1 is applicable in the present case.[14]

2. Compliance with the conditions in the second paragraph

88 It remains to be decided whether the interference with the applicant's property rights was in conformity with the state's right under the second paragraph of Art.1 of Protocol No.1 "to enforce such laws as it deems necessary to control the use of property in accordance with the general interest".

(a) Lawfulness and object of the interference

(i) The Government's arguments

89 The Government submitted that the authorities had searched the vessel on suspicion of organised arms smuggling into Turkey. The arms cargo had thus been seized in accordance with Art.12 of Law 6136 and Art.36 of the now defunct Turkish Criminal Code as well as Arts 2 and 25 of the Montreux Convention and Arts 19(2) and 39 of the United Nations Convention on the Law of the Sea of December 10, 1982 (UNCLOS). The aforementioned provisions of the Montreux Convention and UNCLOS empowered the Government to limit the transit passage of the commercial vessels through the Straits if the vessels posed a threat to the sovereignty, territorial integrity or political independence of the state or in any other manner violated the principles of international law embodied in the Charter of the United Nations. In this connection, arms smuggling was a threat to international peace and order and in violation of the principles of international law and customs. Thus, the provisional seizure of the arms cargo was necessary for prevention of crime and protection of public safety in accordance with the general interest.

(ii) The applicant's arguments

90 The applicant contended that the arrest and detention of the vessel and its cargo were unjustified since there was no evidence indicating that an offence had been committed or would be committed. The impugned measures were also *not* in accordance with the principles of international law within the meaning of Art.1 of Protocol No.1. The Montreux Convention, which was *lex specialis* in the instant case, conferred in its Arts 1 to 3 complete freedom of transit and navigation on merchant vessels in the Straits. In particular, Art.3 made it clear that merchant vessels should not be required to make any stop during their passage through the Straits, with the exception of sanitary control which might be imposed by Turkish law within the framework of international sanitary regulations.

91 As regards the Government's reliance on the UNCLOS, the applicant pointed out that Turkey was not a party to it and that, in any event, it could not have any application to the Bosphorus or the Dardanelles, passage through which was

[14] See *Air Canada v United Kingdom* (1995) 20 E.H.R.R. 150 at [34].

regulated by the Montreux Convention. The latter convention was incorporated into the domestic law of Turkey. In view of the Court of Cassation's ruling that there was no evidence to the effect that the arms were to be introduced into Turkey and unloaded there and that the Turkish authorities' reliance on Arts 5 and 6 of the Montreux Convention was wholly erroneous, the seizure of the vessel and its cargo was contrary to the domestic law of Turkey.

(iii) The Court's considerations

92 The Court notes that the parties admitted that there was some legal basis for the interference with the control of use of the applicant's property; they however disagreed on the exact meaning and scope of the applicable law. It further notes that during various stages of the national proceedings also the views differed on the scope of applicability of the Montreux Convention, rules of customary international law governing the transit passage through straits and provisions of national law prohibiting arms smuggling. Although at the early stages of the proceedings the national courts relied on Art.5 of the Montreux Convention in justifying Turkey's right to seize the arms cargo because of the continuing state of war with Cyprus, in its observations before the Court, the Government's arguments hinged upon the application of the legislation prohibiting arms smuggling, which undermines international peace.

93 The Court accepts that the Montreux Convention is *lex specialis* as concerns the transit regime through the Bosphorus. In this connection, it notes the points of conflicting interpretation of the Convention raised by the parties. The Court considers however that it is not its role in the circumstances of this case to pronounce on the interpretation and application of the Montreux regime by Turkey, since in the view of the Court, there was an arbitrary interference with the applicant's property rights for the following reasons.

(b) Proportionality of the interference

94 The Court reiterates that an interference, particularly one falling to be considered under the second paragraph of Art.1 of Protocol No.1, must strike a "fair balance" between the demands of the general interest and the requirements of the protection of the individual's fundamental rights. The concern to achieve this balance is reflected in the structure of Art.1 as a whole, and therefore also in its second paragraph. There must be a reasonable relationship of proportionality between the means employed and the aim pursued. In determining whether this requirement is met, the Court recognises that the state enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question.[15]

95 The Court notes that neither the applicant nor the Government commented on the proportionality of the interference. They limited themselves to comments on the lawfulness and purpose of the interference.

[15] See *Air Canada* (1995) 20 E.H.R.R. 150 at [48].

96 Be that as it may, in order to assess the proportionality of the interference, the Court has to examine the degree of protection from arbitrariness that is afforded by the proceedings in this case and whether a total lack of compensation can be considered justifiable under Art.1 of Protocol No.1.

97 In the present case, the vessel carrying the cargo belonging to the applicant was arrested on October 22, 1991 and detained until December 8, 1992, i.e. the date on which the vessel left Turkey by the order of the Istanbul State Security Court. As noted above, the authorities' suspicion that the vessel was involved in international arms smuggling provided the justification for the arrest of the vessel. However, that suspicion was dispelled by the Minister of Foreign Affairs' letter of November 12, 1991, which informed the Istanbul State Security Court via the Ministry of Justice that the arms cargo belonged to the Islamic Republic of Iran.[16] The prosecuting authorities however also attached fundamental importance to the fact that there was an ongoing state of war between Turkey and Cyprus and that therefore the vessel was not entitled to free passage through the Straits within the meaning of Art.5 of the Montreux Convention.[17] Yet this assertion was also refuted by the Ministry of Foreign Affairs, which responded to the Istanbul State Security Court's questions in letters dated December 13 and 26, 1991, and the then Prime Minister's certificate dated February 11, 1992.[18] Despite this information, the Istanbul State Security Court instead relied on an old, and isolated precedent, the *Vassoula* case which had been decided in 1978 and which concerned very different circumstances, in concluding that there was a state of war between Turkey and Cyprus and that, therefore, the detention of the vessel and arms cargo should be continued.[19] It gave no reasons for rejecting the statements and certification from the relevant State officials and representatives on the non-existence of a state of war.

98 In view of the above, the Court considers that the vessel and its cargo should have been released, at the latest, on March 12, 1992, when the State Security Court issued its decision, and that their detention from the aforementioned date onwards was arbitrary since there was no basis for suspecting an offence of smuggling of arms or any general power to seize the ship due to a state of war between Turkey and Cyprus.

99 Furthermore, the Court observes that the compensation proceedings are also material to the assessment whether the contested interference in this case respected the requisite fair balance and, notably, whether it imposed a disproportionate burden on the applicant. In this connection, the arbitrary control of use of a property for a prolonged period of time without justification will normally constitute a disproportionate interference and a total lack of compensation can be considered unjustifiable under Art.1 of Protocol No.1.[20]

100 In that regard, the Court notes that the applicant's claim for compensation of the damage it had sustained was dismissed by the Beyoğlu Court of Commerce, which held that the vessel was not a merchant vessel since it was carrying, in part, a cargo

[16] See [22] and [23] above.
[17] See [20] above.
[18] See [28] and [32] above.
[19] See [33]–[35] above.
[20] See, *mutatis mutandis*, *Holy Monasteries* (1995) 20 E.H.R.R. 1 at [70]–[71]; and *Papachelas v Greece* (2000) 30 E.H.R.R. 923 at [48].

of arms and that its passage was therefore not innocent within the meaning of the Montreux Convention.[21]

101 The Court recalls that the Court of Cassation had already found that there was no offence of arms smuggling and that Art.6(1) of the Montreux Convention did not apply.[22] Accordingly, even though the civil courts were not bound by the findings of the criminal courts,[23] the reasons given by the Beyoğlu Court of Commerce were not capable of justifying its decision to deprive the applicant of its claims for compensation for damage suffered as from March 12, 1992.[24]

102 The foregoing considerations are sufficient to enable the Court to conclude that the authorities' interference with the applicant's rights is disproportionate and unable to strike a fair balance between the interests at stake.

103 There has accordingly been a violation of Art.1 of Protocol No.1 to the Convention.

II. Alleged violation of Article 6(1) of the Convention

104 The applicant also complained that the initial seizure and subsequent detention of the vessel "Cape Maleas" and the exercise of criminal jurisdiction over the officers and the vessel had constituted an infringement of public international law, the Montreux Convention and Turkish law. It relied on Art.6(1) of the Convention which provides, "[i]n the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal".

105 The Government contended that these complaints had been introduced out of six months since the criminal proceedings had become final by the Istanbul State Security Court's judgment of November 13, 1992 and the application had been introduced on December 18, 1997.

106 The applicant contested the Government's submissions. It argued that the harm suffered by the applicant as a result of the initial seizure and detention of the vessel was potentially compensatable in damages. Accordingly, the applicant brought compensation proceedings before the Turkish courts and the application had been lodged only after the conclusion of those proceedings.

107 The Court notes that it is not required to determine whether the applicant complied with the six month rule since this part of the application is inadmissible for the following reasons.

108 It reiterates that, according to Art.34 of the Convention, it may receive applications from any person claiming to be the victim of a violation by one of the high contracting parties of the rights set forth in the Convention or the Protocols thereto. This provision requires that an individual applicant should claim to have been directly and actually affected by the violation he alleges.[25]

109 The Court notes that in the circumstances of the present case, the criminal proceedings were brought against only the crew of the vessel. The applicant has not demonstrated that any criminal proceedings were brought against it. Furthermore, the applicant has successfully appealed to the Court of Cassation and

[21] See [49] and [58] above.
[22] See [37] above.
[23] See [60] above.
[24] See [99] above.
[25] See, *Ireland v United Kingdom* (1979–80) 2 E.H.R.R. 25 at [239]–[240].

secured the release of the cargo, which belonged to it. Accordingly, the applicant cannot claim to be a victim, within the meaning of Art.34 of the Convention, of a violation of the Convention provision it invokes.

110 This part of the application is therefore incompatible *ratione personae* with the provisions of the Convention and must be rejected pursuant to Art.35(3) of the Convention.

III. Application of Article 41 of the Convention

111 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

112 The applicant claimed US $1,195,429.17 (approximately €879,270) in respect of pecuniary damage. This amount consisted of the following:

- US $1,043,900 (€766,885) for the hire paid to the owners of the vessel during the period of detention between October 22, 1991 and March 12, 1992;
- US $76,862.50 (€56,470) for the cost of gas oil used by the vessel while in detention; and
- US $74,666.67 (€54,860) paid to the owners of the vessel, following London arbitration, in respect of the agency fees incurred by them for the period between October 22, 1991 and March 12, 1992 (US $12,166.67) and in respect of the reimbursement of Turkish legal fees incurred by the owners (US $62,500).

113 The Government submitted that no award should be made under this heading since the alleged damage in question had been caused by the applicant, which had given untrue information about the nature of the cargo. It further claimed that the amounts claimed were unsubstantiated.

114 The Court reiterates that there must be a clear causal link between the damage claimed by the applicant and the violation of the Convention.[26]

115 In this context, the Court accepts that the applicant company suffered damages as a result of disproportionate interference by the authorities with its rights under Art.1 of Protocol No.1. However, it notes that the applicant has already recovered the losses it sustained in respect of the period after March 12, 1992 in the London arbitration proceedings.[27] The applicant's claim for damages thus relates only to the period between the date of the vessel's arrest and March 12, 1992. In this connection, the Court recalls its finding that the vessel and its cargo should have been released, at the latest, on March 12, 1992 and that their detention from that date onwards was arbitrary.[28] It considers therefore that no award should be made

[26] Amongst other authorities, *Barberà v Spain* (1987) 9 E.H.R.R. CD101 at [16]–[20].
[27] See [53] above.
[28] See [98] above.

under this heading for the period before March 12, 1992. It follows that the applicant's claims for pecuniary damage must be dismissed.

B. Costs and expenses

116 The applicant also claimed £31,060 (approximately €45,870) for the costs and expenses incurred for preparation and presentation of its case before the Court. This sum included fees for work done by its representatives in the proceedings before the Court.

117 The Government contended that the amount claimed was excessive and unjustified.

118 According to the Court's case law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, the Court is not satisfied that all the costs and expenses were necessarily and actually incurred. It considers that part of the amounts claimed by the legal representatives for consultations between themselves are exaggerated. The Court also considers excessive the total number of hours of legal work and the hourly rate claimed in respect of the applicant's lawyers. It therefore finds that it has not been proved that all those legal costs were necessarily and reasonably incurred. Having regard to the details of the claims and vouchers submitted by the applicant, the Court considers it reasonable to award the sum of €35,000 for costs and expenses before the Court.

C. Default interest

119 The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added 3 percentage points.

For these reasons, THE COURT unanimously:

1. *Declares* the complaint under Art.1 of Protocol No.1 to the Convention admissible and the remainder of the application inadmissible.
2. *Holds* that there has been a violation of Art.1 of Protocol No.1 to the Convention.
3. *Holds*:

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Art.44(2) of the Convention, €35,000 (thirty-five thousand euros) for costs and expenses, plus any tax that may be chargeable;
(b) that from the expiry of the abovementioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus 3 percentage points.

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.