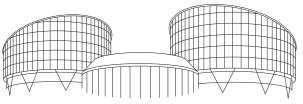
EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

REPORTS OF JUDGMENTS AND DECISIONS

RECUEIL DES ARRÊTS ET DÉCISIONS

2015-II



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

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The *Reports of Judgments and Decisions* is an official publication of the European Court of Human Rights containing a selection of key judgments and decisions of the Court with summaries prepared by the Registry. For the years 2007 and onwards the selection has been made by the Bureau[1] of the Court following a proposal by the Jurisconsult[2].

With the exception of decisions by single judges, all the Court's judgments and decisions, including those not published in this series, can be consulted online in the HUDOC database at http://hudoc.echr.coe.int.

Note on citation

The form of citation for judgments and decisions published in this series from 1 November 1998 follows the pattern: name of case (in italics), application number, paragraph number (for judgments), abbreviation of the European Court of Human Rights (ECHR), year and (for the years 1999 to 2007 inclusive) number of volume.

In the absence of any indication to the contrary the cited text is a judgment on the merits delivered by a Chamber of the Court. Any variation from that is added in brackets after the name of the case: "(dec.)" for a decision on admissibility, "(preliminary objections)" for a judgment concerning only preliminary objections, "(just satisfaction)" for a judgment concerning only just satisfaction, "(revision)" for a judgment concerning revision, "(interpretation)" for a judgment concerning interpretation, "(striking out)" for a judgment striking the case out, "(friendly settlement)" for a judgment concerning a friendly settlement. If the judgment or decision has been given by the Grand Chamber of the Court, "[GC]" is added after the name of the case or after the case description that appears in brackets.

Examples

Judgment on the merits delivered by a Chamber
Campbell v. Ireland, no. 45678/98, § 24, ECHR 1999-II

Judgment on the merits delivered by the Grand Chamber
Campbell v. Ireland [GC], no. 45678/98, § 24, ECHR 1999-II

Decision on admissibility delivered by a Chamber
Campbell v. Ireland (dec.), no. 45678/98, ECHR 1999-II

Decision on admissibility delivered by the Grand Chamber
Campbell v. Ireland (dec.) [GC], no. 45678/98, ECHR 1999-II

Judgment striking the case out delivered by a Chamber
Campbell v. Ireland (striking out), no. 45678/98, § 24, ECHR 1999-II

Judgment on a friendly settlement delivered by a Chamber
Campbell v. Ireland (friendly settlement), no. 45678/98, § 24, ECHR 1999-II

For further information on the Court's mode of citation, which is regularly updated, please see the "Note on citation" published on the Court's website (www.echr.coe.int).

1. The Bureau is composed of the President and Vice-Presidents of the Court and of the Section Presidents.

2. The Jurisconsult is responsible for case-law monitoring and plays a key role in preventing case-law conflicts.

Le *Recueil des arrêts et décisions* est la collection officielle de la Cour européenne des droits de l'homme renfermant une sélection des arrêts et décisions les plus importants ainsi que des sommaires rédigés par le greffe. Depuis 2007, la sélection est faite par le Bureau[1] à la suite de la proposition du jurisconsulte[2].

À l'exception des décisions prises par les juges uniques, tous les arrêts et décisions de la Cour, y compris ceux et celles non publiés dans la présente série, peuvent être consultés dans la base de données HUDOC (http://hudoc.echr.coe.int).

Note concernant la citation des arrêts et décisions

Les arrêts et décisions publiés dans la présente série à compter du 1er novembre 1998 sont cités de la manière suivante : nom de l'affaire (en italique), numéro de la requête, numéro du paragraphe (pour les arrêts), sigle de la Cour européenne des droits de l'homme (CEDH), année et (pour les années 1999 à 2007 incluse) numéro du recueil.

Sauf mention particulière, le texte cité est celui d'un arrêt sur le fond rendu par une chambre de la Cour. L'on ajoute après le nom de l'affaire « (déc.) » pour une décision sur la recevabilité, « (exceptions préliminaires) » pour un arrêt ne portant que sur des exceptions préliminaires, « (satisfaction équitable) » pour un arrêt ne portant que sur la satisfaction équitable, « (révision) » pour un arrêt de révision, « (interprétation) » pour un arrêt d'interprétation, « (radiation) » pour un arrêt rayant l'affaire du rôle, « (règlement amiable) » pour un arrêt sur un règlement amiable. Si l'arrêt ou la décision ont été rendus par la Grande Chambre de la Cour, « [GC] » est ajouté après le nom de l'affaire ou après la description de l'affaire qui apparaît entre parenthèses.

Exemples

Arrêt rendu par une chambre sur le fond
Dupont c. France, n° 45678/98, § 24, CEDH 1999-II

Arrêt rendu par la Grande Chambre sur le fond
Dupont c. France [GC], n° 45678/98, § 24, CEDH 1999-II

Décision rendue par une chambre sur la recevabilité
Dupont c. France (déc.), n° 45678/98, CEDH 1999-II

Décision rendue par la Grande Chambre sur la recevabilité
Dupont c. France (déc.) [GC], n° 45678/98, CEDH 1999-II

Arrêt rendu par une chambre rayant l'affaire du rôle
Dupont c. France (radiation), n° 45678/98, § 15, CEDH 1999-II

Arrêt rendu par une chambre sur un règlement amiable
Dupont c. France (règlement amiable), n° 45678/98, § 15, CEDH 1999-II

Pour plus d'information sur le mode de citation des arrêts et décisions, lequel est régulièrement mis à jour, veuillez consulter la « Note concernant la citation des arrêts et décisions » sur le site Internet de la Cour (www.echr.coe.int).

1. Le bureau est composé du président et des vice-présidents de la Cour et des présidents de section.
2. Le jurisconsulte est chargé d'une veille jurisprudentielle et joue un rôle-clé pour la prévention des conflits de jurisprudence.

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GALLARDO SANCHEZ c. ITALIE
(Requête n° 11620/07)

QUATRIÈME SECTION

ARRÊT DU 24 MARS 2015[1]

1. Texte français original.

SOMMAIRE[1]

Retards injustifiés dans une procédure d'extradition aux fins de poursuites de l'intéressé dans l'État tiers

Il est nécessaire de distinguer deux formes d'extradition, à savoir, d'une part, l'extradition aux fins de l'exécution d'une peine et, d'autre part, celle permettant à l'État requérant de juger la personne concernée. Dans ce dernier cas, la protection des droits de la personne concernée et le bon déroulement de la procédure d'extradition, y compris l'exigence de poursuivre l'individu dans un délai raisonnable, imposent à l'État requis d'agir avec une diligence accrue (paragraphe 42 de l'arrêt).

Article 5 § 1 f)

Extradition – Retards injustifiés dans une procédure d'extradition aux fins de poursuites de l'intéressé dans l'État tiers – Deux formes distinctes d'extradition – Diligence accrue lorsque la procédure est encore pendante dans l'État demandeur – Retards injustifiés dans la procédure d'extradition

*

* *

En fait
Le requérant est un ressortissant vénézuélien. En avril 2005, accusé d'incendie volontaire par les autorités grecques, il fut placé sous écrou extraditionnel par la police italienne en exécution d'un mandat d'arrêt émis en vertu de la Convention européenne d'extradition. Il fut extradé vers la Grèce en octobre 2006.
Devant la Cour, le requérant se plaint de la durée de la détention qu'il a subie en vue de son extradition.

En droit
Article 5 § 1 f) : la détention du requérant à titre extraditionnel était conforme au droit interne et se justifiait par l'exigence de respecter les engagements internationaux de l'État et l'existence d'un risque de fuite.
Toutefois, le requérant a été placé sous écrou extraditionnel afin de permettre aux autorités grecques de le poursuivre. À cet égard, il est nécessaire de distinguer deux formes d'extradition afin de préciser le niveau de diligence requis pour chacune, à savoir, d'une part, l'extradition aux fins de l'exécution d'une peine et, d'autre part, celle permettant à l'État requérant de juger la personne concernée. Dans ce dernier cas, la procédure pénale étant encore pendante, la personne sous écrou extradition-

1. Rédigé par le greffe, il ne lie pas la Cour.

nel est à considérer comme présumée innocente ; de plus, à ce stade, la possibilité pour celle-ci d'exercer ses droits de la défense lors de la procédure pénale afin de prouver son innocence est considérablement limitée, voire inexistante ; enfin, tout examen du fond de l'affaire est interdit aux autorités de l'État requis. Pour toutes ces raisons, la protection des droits de la personne concernée et le bon déroulement de la procédure d'extradition, y compris l'exigence de poursuivre l'individu dans un délai raisonnable, imposent à l'État requis d'agir avec une diligence accrue.
En l'espèce, la détention sous écrou extraditionnel a duré environ un an et six mois et des retards importants imputables aux autorités italiennes se sont produits aux différentes étapes de la procédure d'extradition. Or l'affaire n'était pas spécialement complexe. Par conséquent, compte tenu de la nature de la procédure d'extradition visant à faire poursuivre le requérant dans un État tiers, et du caractère injustifié des retards des juridictions italiennes, la détention du requérant n'était pas « régulière » au sens de l'article 5 § 1 f) de la Convention.
Conclusion : violation (unanimité).

Article 41 : aucune demande formulée.

Jurisprudence citée par la Cour

Amuur c. France, 25 juin 1996, *Recueil des arrêts et décisions* 1996-III
Auad c. Bulgarie, n° 46390/10, 11 octobre 2011
Bogdanovski c. Italie, n° 72177/01, 14 décembre 2006
Chahal c. Royaume-Uni, 15 novembre 1996, *Recueil* 1996-V
Guerra et autres c. Italie, 19 février 1998, *Recueil* 1998-I
Quinn c. France, 22 mars 1995, série A n° 311
Saadi c. Royaume-Uni [GC], n° 13229/03, CEDH 2008
Suso Musa c. Malte, n° 42337/12, 23 juillet 2013
Tabesh c. Grèce, n° 8256/07, 26 novembre 2009
Winterwerp c. Pays-Bas, 24 octobre 1979, série A n° 33
Witold Litwa c. Pologne, n° 26629/95, CEDH 2000-III

En l'affaire Gallardo Sanchez c. Italie,

La Cour européenne des droits de l'homme (quatrième section), siégeant en une chambre composée de :

Päivi Hirvelä, *présidente*,
Guido Raimondi,
George Nicolaou,
Ledi Bianku,
Nona Tsotsoria,
Paul Mahoney,
Krzysztof Wojtyczek, *juges*,

et de Fatoş Aracı, *greffière adjointe de section*,

Après en avoir délibéré en chambre du conseil le 3 mars 2015,

Rend l'arrêt que voici, adopté à cette date :

PROCÉDURE

1. À l'origine de l'affaire se trouve une requête (n° 11620/07) dirigée contre la République italienne et dont un ressortissant vénézuélien, M. Manuel Rogelio Gallardo Sanchez (« le requérant »), a saisi la Cour le 7 mars 2007 en vertu de l'article 34 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales (« la Convention »).

2. Le requérant a été représenté devant la Cour par M^e^ S. Koulouroudis, avocat à Athènes. Le gouvernement italien (« le Gouvernement ») a été représenté par son agent, M^me^ E. Spatafora.

3. Le requérant alléguait que la durée de la détention qu'il avait subie en vue de son extradition avait emporté violation de l'article 5 § 3 de la Convention.

4. Le 2 mai 2013, la requête, dont il a été décidé qu'elle devait en fait être examinée sous l'angle de l'article 5 § 1 f), a été communiquée au Gouvernement.

5. Le 16 décembre 2013, une copie des observations du Gouvernement a été envoyée au représentant du requérant afin de l'inviter à faire parvenir à la Cour ses observations en réponse et ses demandes au titre de la satisfaction équitable. En dépit de l'intérêt manifesté par le requérant démontrant sa volonté de poursuivre l'examen de l'affaire, son représentant n'a pas envoyé les observations dans les délais requis.

EN FAIT

I. LES CIRCONSTANCES DE L'ESPÈCE

6. Les faits de la cause, tels qu'ils ont été exposés par les parties, peuvent se résumer comme suit.

7. Le requérant, M. Manuel Rogelio Gallardo Sanchez, est un ressortissant vénézuélien né en 1965 et résidant au Cap (Afrique du Sud).

8. Le 19 avril 2005, le requérant, qui était accusé d'incendie volontaire par les autorités grecques, fut placé sous écrou extraditionnel par la police de Rome en exécution d'un mandat d'arrêt émis par la cour d'appel d'Athènes le 26 janvier 2005 en vertu de la Convention européenne d'extradition du 13 décembre 1957.

9. Le 22 avril 2005, la cour d'appel de L'Aquila valida l'arrestation du requérant et ordonna son maintien en détention.

10. Le 26 avril 2005, le ministère de la Justice demanda à la cour d'appel le maintien du requérant en détention.

11. Lors de l'audience du 27 avril 2005, le président de la cour d'appel, se fondant sur l'article 717 du code de procédure pénale (paragraphe 25 ci-dessous), procéda à l'identification du requérant et lui demanda s'il consentait à son extradition. L'intéressé n'y consentit pas.

12. Le 9 juin 2005, le ministère de la Justice informa la cour d'appel que, le 25 mai 2005, les autorités grecques avaient envoyé une demande d'extradition accompagnée de toutes les pièces requises à l'appui d'une telle demande.

13. Le 21 juin 2005, le parquet demanda à la cour d'appel d'accueillir la demande d'extradition.

14. L'audience fut fixée au 15 décembre 2005. À la demande du représentant du requérant, l'audience fut renvoyée au 12 janvier 2006.

15. Sans avoir accompli aucun acte d'instruction, la cour d'appel émit un avis favorable à l'extradition par une décision du 12 janvier 2006, déposée le 30 janvier 2006. Elle vérifia la conformité de la demande d'extradition avec la Convention européenne d'extradition et le respect des principes *non bis in idem* et de double incrimination, et elle élimina l'hypothèse selon laquelle des raisons de nature discriminatoire ou politique se trouvaient à la base des poursuites.

16. Le 3 mars 2006, le requérant se pourvut en cassation, soutenant notamment que la demande d'extradition le concernant avait été envoyée par les autorités grecques au-delà du délai de quarante jours prévu par l'article 16 § 4 de la Convention européenne d'extradition, ce qui entraînait selon lui l'illégitimité de sa détention. Il arguait en outre que les accusa-

tions portées contre lui par les autorités grecques ne se fondaient pas sur des indices de culpabilité sérieux. Par conséquent, à ses dires, il devait être mis fin à sa détention.

17. Par un arrêt du 11 mai 2006, déposé au greffe le 18 septembre 2006, la Cour de cassation rejeta le pourvoi avec une motivation d'une page, en raison notamment du fait que la demande d'extradition était parvenue dans le délai prévu par la Convention européenne d'extradition et du fait qu'elle n'avait pas compétence pour trancher la question concernant l'existence d'indices de culpabilité sérieux.

18. Entre-temps, à trois reprises, entre les mois de juin et de septembre 2005, le requérant avait demandé, en vain, sa remise en liberté à la cour d'appel de Rome. Dans sa dernière décision du 27 octobre 2005, adoptée en chambre de conseil dans le respect du principe du contradictoire, et sans avoir accompli aucun acte d'instruction, la cour d'appel souligna qu'il n'existait aucune raison de s'écarter des deux autres décisions de rejet adoptées précédemment eu égard, d'une part, à la persistance du risque de fuite du requérant malgré le fait que les autorités l'avaient privé de son passeport et, d'autre part, à l'obligation de respecter les engagements internationaux de l'État.

19. Le 9 octobre 2006, le ministre de la Justice signa l'arrêté d'extradition.

20. Le 26 octobre 2006, le requérant fut extradé vers la Grèce.

II. TEXTE INTERNATIONAL PERTINENT

21. La Convention européenne d'extradition, signée à Paris le 13 décembre 1957, ratifiée par l'Italie par la loi n° 300 du 30 janvier 1963 et entrée en vigueur à son égard le 4 novembre 1963, puis modifiée par le deuxième protocole additionnel signé le 17 mars 1978, est entrée en vigueur à l'égard de l'Italie le 23 avril 1985. La Convention, telle qu'amendée, prévoit ce qui suit :

Article 8 – Poursuites en cours pour les mêmes faits

« Une Partie requise pourra refuser d'extrader un individu réclamé si cet individu fait l'objet de sa part de poursuites pour le ou les faits à raison desquels l'extradition est demandée. »

Article 9 – *Non bis in idem*

« L'extradition ne sera pas accordée lorsque l'individu réclamé a été définitivement jugé par les autorités compétentes de la Partie requise, pour le ou les faits à raison desquels l'extradition est demandée. L'extradition pourra être refusée si les autorités compétentes de la Partie requise ont décidé de ne pas engager de poursuites ou de mettre fin aux poursuites qu'elles ont exercées pour le ou les mêmes faits. »

Article 12 – Requête et pièces à l'appui

« 1. La requête [en vue d'obtenir l'extradition] sera formulée par écrit et adressée par le ministère de la Justice de la Partie requérante au ministère de la Justice de la Partie requise ; toutefois, la voie diplomatique n'est pas exclue. Une autre voie pourra être convenue par arrangement direct entre deux ou plusieurs Parties.

2. Il sera produit à l'appui de la requête :

a) l'original ou l'expédition authentique soit d'une décision de condamnation exécutoire soit d'un mandat d'arrêt ou de tout autre acte ayant la même force, délivré dans les formes prescrites par la loi de la Partie requérante ;

b) un exposé des faits pour lesquels l'extradition est demandée. Le temps et le lieu de leur perpétration, leur qualification légale et les références aux dispositions légales qui leur sont applicables seront indiqués le plus exactement possible ; et

c) une copie des dispositions légales applicables ou, si cela n'est pas possible, une déclaration sur le droit applicable, ainsi que le signalement aussi précis que possible de l'individu réclamé et tous autres renseignements de nature à déterminer son identité et sa nationalité. »

Article 16 – Arrestation provisoire

« 1. En cas d'urgence, les autorités compétentes de la Partie requérante pourront demander l'arrestation provisoire de l'individu recherché ; les autorités compétentes de la Partie requise statueront sur cette demande conformément à la loi de cette Partie.

2. La demande d'arrestation provisoire indiquera l'existence d'une des pièces prévues au paragraphe 2, alinéa a, de l'article 12 et fera part de l'intention d'envoyer une demande d'extradition ; elle mentionnera l'infraction pour laquelle l'extradition sera demandée, le temps et le lieu où elle a été commise ainsi que, dans la mesure du possible, le signalement de l'individu recherché.

3. La demande d'arrestation provisoire sera transmise aux autorités compétentes de la Partie requise soit par la voie diplomatique, soit directement par la voie postale ou télégraphique, soit par l'Organisation internationale de police criminelle (Interpol), soit par tout autre moyen laissant une trace écrite ou admis par la Partie requise. L'autorité requérante sera informée sans délai de la suite donnée à sa demande.

4. L'arrestation provisoire pourra prendre fin si, dans le délai de dix-huit jours après l'arrestation, la Partie requise n'a pas été saisie de la demande d'extradition et des pièces mentionnées à l'article 12 ; elle ne devra, en aucun cas, excéder quarante jours après l'arrestation. Toutefois, la mise en liberté provisoire est possible à tout moment, sauf pour la Partie requise à prendre toute mesure qu'elle estimera nécessaire en vue d'éviter la fuite de l'individu réclamé.

5. La mise en liberté ne s'opposera pas à une nouvelle arrestation et à l'extradition si la demande d'extradition parvient ultérieurement. »

III. LE DROIT ET LA PRATIQUE INTERNES PERTINENTS

22. Pour ce qui est de l'application des mesures de précaution, l'article 715 du code de procédure pénale (CPP) prévoit que, à la demande d'un État étranger, la cour d'appel peut ordonner l'arrestation provisoire d'un individu en vue de la procédure d'extradition. La demande peut être acceptée a) si l'État étranger agit en vertu d'une décision de condamnation exécutoire ou d'un mandat d'arrêt et s'il s'engage à présenter une demande d'extradition ; b) si l'État étranger a présenté un exposé des faits à l'appui de la demande d'extradition, indiqué l'infraction qui est reprochée à l'individu recherché et fourni le signalement de celui-ci ; c) s'il y a un risque de fuite. L'application de la mesure est communiquée par le ministre de la Justice aux autorités de l'État étranger. La mesure provisoire est levée lorsque l'État étranger ne fait pas parvenir dans un délai de quarante jours à partir de ladite communication aux ministères des Affaires étrangères ou de la Justice la demande d'extradition et les documents à l'appui de pareille demande.

23. Selon l'article 716 § 3 CPP, le président de la cour d'appel doit valider l'arrestation provisoire dans un délai de quatre-vingt-seize heures et éventuellement appliquer la mesure de placement sous écrou.

24. Aux termes de l'article 716 § 4 CPP, la mesure de précaution est levée si le ministère de la Justice ne demande pas à la cour d'appel, dans un délai de dix jours à partir de la validation de l'arrestation provisoire, le maintien de l'intéressé en détention.

25. Aux termes de l'article 717 CPP, lorsque les autorités internes ordonnent une arrestation provisoire ou appliquent une mesure de précaution, le président de la cour d'appel fixe une audience afin d'identifier l'intéressé et lui demander s'il consent à son extradition.

26. Selon l'article 714 CPP, la durée du placement sous écrou ne peut pas dépasser un an et six mois. Elle peut toutefois être prolongée pour une durée maximale globale de trois mois.

27. Aux termes de l'article 718 CPP, la mesure de placement sous écrou peut, à la demande d'une des parties ou d'office, être levée par la cour d'appel ou la Cour de cassation, agissant comme juge de première instance. La cour d'appel décide en chambre de conseil, après avoir entendu les parties. La décision de la cour d'appel peut être attaquée devant la Cour de cassation dans les limites des moyens tirés de la violation de la loi. À cet égard, la Cour de cassation a, à plusieurs reprises, établi qu'elle n'a pas compétence pour examiner les pourvois par lesquels un individu demande sa remise en liberté au motif que le risque de fuite qui justifiait initialement son placement sous écrou avait cessé d'exister (voir, à titre d'exemple, Cour de cassation, 7 septembre 2010, arrêt n° 33545, déposé au greffe le 13 septembre 2010 ; de

façon plus générale, sur l'absence de compétence à examiner des moyens tirés du caractère arbitraire de la motivation des décisions de la cour d'appel, voir Cour de cassation, 24 septembre 2012, arrêt n° 37123, déposé au greffe le 26 septembre 2012).

28. En ce qui concerne la phase judiciaire de l'extradition, aux termes de l'article 704 CPP, la cour d'appel statue en chambre de conseil après avoir entendu les parties et éventuellement obtenu les renseignements appropriés et effectué les vérifications nécessaires. Elle doit établir si les conditions requises par le droit international et le droit interne sont remplies : au-delà des règles prévues par la Convention européenne d'extradition, l'article 705 CPP impose aux tribunaux de vérifier si la personne concernée est poursuivie pour des délits de nature politique ou si elle risque d'être jugée selon des procédures contraires aux droits fondamentaux ou encore si, une fois extradée, elle risque de subir des traitements inhumains, dégradants, à caractère discriminatoire ou, en tout état de cause, contraires à l'un des droits fondamentaux. Selon le même article, dans le cas où la Convention européenne d'extradition s'applique, les tribunaux ne peuvent pas examiner l'existence d'indices de culpabilité sérieux (*gravi indizi di colpevolezza*).

29. Aux termes de l'article 706 CPP, cette décision peut être contestée, en fait et en droit, devant la Cour de cassation, qui statue selon la procédure prévue par l'article 704 CPP.

30. L'article 708 CPP dispose que le ministre de la Justice décide, dans un délai de quarante-cinq jours suivant le dépôt de la décision de la Cour de cassation favorable à l'extradition, si l'individu doit être extradé. À défaut d'une telle décision ou en cas de décision négative, la mesure de placement sous écrou doit être levée.

EN DROIT

I. SUR LA VIOLATION ALLÉGUÉE DE L'ARTICLE 5 § 1 F) DE LA CONVENTION

31. Le requérant se plaint de la durée de la détention qu'il a subie en vue de son extradition. Il dénonce à cet égard une violation de l'article 5 § 3 de la Convention.

32. Maîtresse de la qualification juridique des faits de la cause (voir, parmi d'autres, *Guerra et autres c. Italie*, 19 février 1998, § 44, *Recueil des arrêts et décisions* 1998-I), la Cour estime qu'il y a lieu d'examiner la requête sous l'angle de l'article 5 § 1 f) de la Convention (*Quinn c. France*, 22 mars 1995, série A n° 311, *Chahal c. Royaume-Uni*, 15 novembre 1996,

Recueil 1996-V, et *Bogdanovski c. Italie*, nº 72177/01, 14 décembre 2006). Cette disposition est ainsi libellée :

> « 1. Toute personne a droit à la liberté et à la sûreté. Nul ne peut être privé de sa liberté, sauf dans les cas suivants et selon les voies légales :
>
> (...)
>
> f) s'il s'agit de l'arrestation ou de la détention régulières d'une personne pour l'empêcher de pénétrer irrégulièrement dans le territoire, ou contre laquelle une procédure d'expulsion ou d'extradition est en cours. »

A. Sur la recevabilité

33. Constatant que la requête n'est pas manifestement mal fondée au sens de l'article 35 § 3 a) de la Convention et qu'elle ne se heurte à aucun autre motif d'irrecevabilité, la Cour la déclare recevable.

B. Sur le fond

1. Thèses des parties

34. Le requérant soutient que la durée de la procédure d'extradition était excessive eu égard au caractère peu complexe à ses yeux de l'affaire.

35. Le Gouvernement conteste les allégations du requérant. Il indique que la détention en cause a été ordonnée dans le respect des règles de l'extradition, comme les juridictions italiennes l'auraient constaté, et qu'elle visait uniquement à livrer le requérant à la justice de l'État demandeur. Il ajoute que le requérant n'a pas consenti à son extradition alors que le consentement de l'intéressé aurait, selon lui, permis d'accélérer la procédure, et que le retard dans la fixation de l'audience sur le fond par la cour d'appel se justifie par les trois demandes de libération que le requérant aurait introduites en l'espace de trois mois. Enfin, il estime que la procédure qui a conduit les autorités italiennes, juridictionnelles et administratives, à autoriser l'extradition s'est déroulée dans les délais prévus par les règles du droit interne et du droit international.

2. Appréciation de la Cour

a) Sur la conformité de la détention au droit interne

36. Afin de rechercher si la détention en cause était conforme à l'article 5 § 1 f) de la Convention, la Cour doit vérifier si cette privation de liberté non seulement relevait de l'une des exceptions prévues aux alinéas a) à f), mais aussi était « régulière ». Elle rappelle qu'en matière de « régularité » d'une détention, y compris d'observation des « voies légales », la Convention renvoie pour l'essentiel à la législation nationale et consacre l'obligation d'en

observer les normes de fond comme de procédure (*Saadi c. Royaume-Uni* [GC], nº 13229/03, § 67, CEDH 2008).

37. En l'espèce, la Cour observe que, mieux placées que les organes de la Convention pour vérifier le respect du droit interne, les juridictions nationales ont conclu, lorsqu'elles ont été saisies par le requérant ou lorsque le droit interne l'imposait, à la régularité de la détention litigieuse dans sa phase initiale et quant à sa finalité. Dans un premier temps, la cour d'appel de L'Aquila a validé l'arrestation du requérant. Par la suite, la cour d'appel et la Cour de cassation ont vérifié que la demande d'extradition avait été envoyée par les autorités grecques dans le délai de quarante jours prévu par l'article 16 § 4 de la Convention européenne d'extradition (paragraphes 15, 17 et 21 ci-dessus). Enfin, à trois reprises, les tribunaux ont établi que l'adoption et le maintien des mesures de précaution se justifiaient par l'exigence de respect des engagements internationaux de l'État et par l'existence d'un risque de fuite du requérant (paragraphe 18 ci-dessus).

38. Au vu de ces circonstances, la Cour n'aperçoit aucun élément susceptible de donner à penser que la détention subie par le requérant à titre extraditionnel a poursuivi un but différent de celui pour lequel elle a été imposée et qu'elle n'était pas conforme au droit interne.

b) Sur le caractère arbitraire de la détention

39. La Cour rappelle que, à l'inverse de ce que le Gouvernement allègue, le respect des délais prévus par le droit interne ne peut pas être considéré comme entraînant automatiquement la compatibilité de la détention avec les exigences découlant de l'article 5 § 1 f) de la Convention (*Auad c. Bulgarie*, nº 46390/10, § 131, 11 octobre 2011). Cette disposition exige de surcroît la conformité de toute privation de liberté au but consistant à protéger l'individu contre l'arbitraire (voir, parmi beaucoup d'autres, *Winterwerp c. Pays-Bas*, 24 octobre 1979, § 37, série A nº 33, *Amuur c. France*, 25 juin 1996, § 50, *Recueil* 1996-III, et *Witold Litwa c. Pologne*, nº 26629/95, § 78, CEDH 2000-III). Il est un principe fondamental selon lequel nulle détention arbitraire ne peut être compatible avec l'article 5 § 1, et la notion d'« arbitraire » que contient l'article 5 § 1 va au-delà du défaut de conformité avec le droit national, de sorte qu'une privation de liberté peut être régulière selon la législation interne tout en étant arbitraire et donc contraire à la Convention (*Saadi*, précité, § 67, et *Suso Musa c. Malte*, nº 42337/12, § 92, 23 juillet 2013).

40. À cet égard, la Cour rappelle de surcroît que, dans le contexte de cette disposition, seul le déroulement de la procédure d'extradition justifie une privation de liberté fondée sur cet article et que, si la procédure n'est pas

menée avec la diligence requise, la détention cesse d'être justifiée (*Quinn*, précité, § 48, et *Chahal*, précité, § 113).

41. La Cour a ainsi pour tâche non pas d'évaluer si la durée de la procédure d'extradition est dans son ensemble raisonnable, ce qu'elle fait notamment en matière de durée des procédures sous l'angle de l'article 6, mais d'établir si, indépendamment de la durée globale de la procédure, la durée de la détention n'excède pas le délai raisonnable nécessaire pour atteindre le but poursuivi (*Saadi*, précité, §§ 72-74). Ainsi, s'il y a eu des périodes d'inactivité de la part des autorités et, partant, un défaut de diligence, le maintien en détention cesse d'être justifié. En conclusion, la Cour doit évaluer au cas par cas si, pendant la période de détention en cause, les autorités nationales ont ou non fait preuve de passivité (voir, dans ce sens, en matière d'expulsion, *Tabesh c. Grèce*, n° 8256/07, § 56, 26 novembre 2009).

42. En l'espèce, la Cour constate que le requérant a été placé sous écrou extraditionnel afin de permettre aux autorités grecques d'exercer des poursuites contre lui. À cet égard, elle estime nécessaire de distinguer deux formes d'extradition afin de préciser le niveau de diligence requis pour chacune, à savoir, d'une part, l'extradition aux fins de l'exécution d'une peine et, d'autre part, celle permettant à l'État requérant de juger la personne concernée. Dans ce dernier cas, la procédure pénale étant encore pendante, la personne sous écrou extraditionnel est à considérer comme présumée innocente ; de plus, à ce stade, la possibilité pour celle-ci d'exercer les droits de la défense lors de la procédure pénale afin de prouver son innocence est considérablement limitée, voire inexistante ; enfin, tout examen du fond de l'affaire est interdit aux autorités de l'État requis (paragraphe 28 *in fine* ci-dessus). Pour toutes ces raisons, la protection des droits de la personne concernée et le bon déroulement de la procédure d'extradition, y compris l'exigence de poursuivre l'individu dans un délai raisonnable, imposent à l'État requis d'agir avec une diligence accrue.

43. La Cour a déjà considéré comme excessives, en raison de retards injustifiés de la part des autorités internes, des durées d'un an et onze mois de détention en vue d'une extradition (*Quinn*, précité) et de trois mois en vue d'une expulsion (*Tabesh*, précité).

44. Elle note qu'en l'espèce la détention sous écrou extraditionnel a duré environ un an et six mois (du 19 avril 2005 au 26 octobre 2006).

45. Elle constate que des retards importants se sont produits aux différentes étapes de la procédure d'extradition.

46. En premier lieu, la première audience de la cour d'appel a été fixée au 15 décembre 2005, soit six mois après l'envoi de la demande d'extradition à cette juridiction et huit mois après le placement de l'intéressé sous écrou extraditionnel.

47. La Cour ne saurait partager la position du Gouvernement selon laquelle les recours exercés par le requérant afin d'obtenir sa remise en liberté pendant cette période (paragraphe 18 ci-dessus) peuvent, en soi, justifier le retard de la procédure. En effet, il s'agit là de procédures ayant des objets et des buts différents, l'une ayant eu pour but de vérifier si les exigences formelles pour l'extradition étaient remplies, l'autre permettant d'examiner si les exigences qui ont amené à l'adoption de la mesure de précaution étaient toujours valables et suffisantes. Le fait que le droit interne charge la même juridiction d'appel de cette double tâche constitue un choix légitime de la part de l'État, choix qui ne peut toutefois être invoqué afin de justifier des retards considérables dans l'examen du fond de l'affaire. En tout état de cause, la Cour ne voit pas comment les demandes répétées du requérant, en principe justifiées dans la mesure où la détention se prolongeait en l'absence de toute audience sur le fond, auraient empêché la cour d'appel de fixer plus tôt ladite audience (voir, *mutatis mutandis*, *Quinn*, § 48). Les décisions prises par la cour d'appel se sont fondées exclusivement sur les documents dont elle disposait, ont été adoptées en chambre de conseil dans le respect du principe du contradictoire (paragraphe 27 ci-dessus) et portaient, principalement, sur l'examen de l'exigence du maintien du requérant en détention en raison du risque de fuite (paragraphe 18 ci-dessus).

48. La Cour remarque ensuite que l'affaire n'était pas complexe (voir, *a contrario*, *Bogdanovski*, précité, où le requérant avait demandé le statut de réfugié politique et où la procédure d'extradition avait été suspendue à la demande du Haut Commissariat des Nations unies pour les réfugiés et de la Cour elle-même à la suite de l'application de l'article 39 du règlement). La tâche de la cour d'appel se limitait à l'analyse des éléments suivants : vérifier que la demande d'extradition avait été présentée selon les formes prévues par la Convention européenne d'extradition ; s'assurer que les principes *non bis in idem* et de double incrimination avaient été respectés ; exclure que des raisons de nature discriminatoire ou politique eussent formé la base des poursuites. La loi n'autorisait pas d'appréciation quant à l'existence d'indices de culpabilité sérieux (*gravi indizi di colpevolezza*) (paragraphe 28 *in fine* ci-dessus) et aucune enquête ou activité d'instruction n'a été nécessaire (paragraphe 15 ci-dessus).

49. En deuxième lieu, la Cour est frappée par le fait que la Cour de cassation, après avoir statué dans un délai de deux mois sur le pourvoi du requérant, a mis plus de quatre mois pour déposer au greffe un arrêt d'une seule page dans lequel elle se bornait à préciser que la demande d'extradition avait été envoyée par l'État requérant selon les formes requises et qu'elle-même n'avait pas compétence pour remettre en cause les accusations portées contre le requérant par les autorités grecques (paragraphe 17 ci-dessus). Le

Gouvernement ne produit aucun élément susceptible de justifier un tel délai.

50. Enfin, pour ce qui est de l'argument du Gouvernement selon lequel le requérant aurait pu accélérer la procédure en ne s'opposant pas à son extradition, la Cour estime que si pareille opposition peut en principe justifier un prolongement de la détention dans la mesure où un contrôle juridictionnel s'impose, cela ne peut toutefois pas décharger l'État de tout retard injustifié lors de la phase judiciaire.

51. Par conséquent, compte tenu de la nature de la procédure d'extradition, qui visait à faire poursuivre le requérant dans un État tiers, et du caractère injustifié des retards des juridictions italiennes, la Cour conclut que la détention du requérant n'était pas « régulière » au sens de l'article 5 § 1 f) de la Convention et que, partant, il y a eu violation de cette disposition.

II. SUR L'APPLICATION DE L'ARTICLE 41 DE LA CONVENTION

52. Aux termes de l'article 41 de la Convention,

> « Si la Cour déclare qu'il y a eu violation de la Convention ou de ses Protocoles, et si le droit interne de la Haute Partie contractante ne permet d'effacer qu'imparfaitement les conséquences de cette violation, la Cour accorde à la partie lésée, s'il y a lieu, une satisfaction équitable. »

53. Le requérant n'a présenté aucune demande de satisfaction équitable (paragraphe 5 ci-dessus). Partant, la Cour estime qu'il n'y a pas lieu de lui octroyer de somme à ce titre.

PAR CES MOTIFS, LA COUR, À L'UNANIMITÉ,

1. *Déclare* la requête recevable ;
2. *Dit* qu'il y a eu violation de l'article 5 § 1 f) de la Convention.

Fait en français, puis communiqué par écrit le 24 mars 2015, en application de l'article 77 §§ 2 et 3 du règlement.

Fatoş Aracı	Päivi Hirvelä
Greffière adjointe	Présidente

GALLARDO SANCHEZ v. ITALY
(Application no. 11620/07)

FOURTH SECTION

JUDGMENT OF 24 MARCH 2015[1]

1. Translation; original French.

SUMMARY[1]

Unjustified delays in extradition proceedings for purposes of prosecution in another State

It is necessary to distinguish between two forms of extradition: firstly, where it is requested for the purpose of enforcing a sentence, and, secondly, where it will enable the requesting State to try the person concerned. In the second situation, the protection of the rights of the person concerned and the smooth running of the extradition proceedings, including the requirement that an individual be prosecuted within a reasonable time, oblige the requested State to act with particular expedition (paragraph 42 of the judgment).

Article 5 § 1 (f)

Extradition – Unjustified delays in extradition proceedings for purposes of prosecution in another State – Two distinct forms of extradition – Particular expedition required when prosecution is pending in requesting State – Unjustified delays in extradition proceedings

*

* *

Facts

The applicant was a Venezuelan national. In April 2005, having been charged with arson by the Greek authorities, he was placed in detention pending extradition by the Italian police pursuant to an arrest warrant issued under the European Convention on Extradition. He was extradited to Greece in October 2006.

The applicant complained before the Court of the length of his detention pending extradition.

Law

Article 5 § 1 (f): The applicant's detention pending extradition had been in conformity with domestic law and had been justified by the State's duty to comply with its international commitments and the existence of a risk that the applicant might abscond.

However, the applicant had been placed in detention pending extradition in order to enable the Greek authorities to prosecute him. In that connection it was necessary to distinguish between two forms of extradition in order to specify the level of promptness required for each: firstly, where it was requested for the purpose of enforcing a sentence, and, secondly, where it would enable the requesting State to try the person concerned. In the latter situation, as criminal proceedings were pending, the person detained pending extradition was to be presumed innocent;

1. This summary by the Registry does not bind the Court.

furthermore, at that stage, the person's ability to exercise his or her defence rights in the criminal proceedings for the purposes of proving his or her innocence was considerably limited, or even non-existent; lastly, the authorities of the requested State were not entitled to examine the merits of the case. For all those reasons, the protection of the rights of the person concerned and the smooth running of the extradition proceedings, including the duty to bring proceedings against the individual concerned within a reasonable time, obliged the requested State to act with particular expedition.

In the present case, the detention pending extradition had lasted approximately one year and six months, and considerable delays attributable to the Italian authorities had occurred at the different stages of the extradition proceedings. However, the case had not been particularly complex. Accordingly, having regard to the nature of the extradition proceedings, instituted for the prosecution of the applicant in another State, and the unjustified nature of the delays in the Italian courts, the applicant's detention had not been "lawful" within the meaning of Article 5 § 1 (f) of the Convention.

Conclusion: violation (unanimously).

Article 41: No claim submitted.

Case-law cited by the Court

Amuur v. France, 25 June 1996, *Reports of Judgments and Decisions* 1996-III
Auad v. Bulgaria, no. 46390/10, 11 October 2011
Bogdanovski v. Italy, no. 72177/01, 14 December 2006
Chahal v. the United Kingdom, 15 November 1996, *Reports* 1996-V
Guerra and Others v. Italy, 19 February 1998, *Reports* 1998-I
Quinn v. France, 22 March 1995, Series A no. 311
Saadi v. the United Kingdom [GC], no. 13229/03, ECHR 2008
Suso Musa v. Malta, no. 42337/12, 23 July 2013
Tabesh v. Greece, no. 8256/07, 26 November 2009
Winterwerp v. the Netherlands, 24 October 1979, Series A no. 33
Witold Litwa v. Poland, no. 26629/95, ECHR 2000-III

In the case of Gallardo Sanchez v. Italy,

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

Päivi Hirvelä, *President*,
Guido Raimondi,
George Nicolaou,
Ledi Bianku,
Nona Tsotsoria,
Paul Mahoney,
Krzysztof Wojtyczek, *judges*,
and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 3 March 2015,

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

PROCEDURE

1. The case originated in an application (no. 11620/07) against the Italian Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Venezuelan national, Mr Manuel Rogelio Gallardo Sanchez ("the applicant"), on 7 March 2007.

2. The applicant was represented by Mr S. Koulouroudis, a lawyer practising in Athens. The Italian Government ("the Government") were represented by their Agent, Ms E. Spatafora.

3. The applicant alleged that the length of his detention pending extradition entailed a violation of Article 5 § 3 of the Convention.

4. It was decided that this complaint would instead be examined under Article 5 § 1 (f). On 2 May 2013 notice of the application was given to the Government.

5. On 16 December 2013 a copy of the Government's observations was sent to the applicant's representative, inviting him to file with the Court his observations in reply and his claims by way of just satisfaction. In spite of the interest manifested by the applicant in pursuing the examination of the case, his representative did not file any observations within the time-limit fixed for such purpose.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

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

7. The applicant, Mr Manuel Rogelio Gallardo Sanchez, is a Venezuelan national who was born in 1965 and lives in Cape Town (South Africa).

8. On 19 April 2005 the applicant, who had been accused of arson by the Greek authorities, was taken into custody pending extradition by the Rome police on the basis of an arrest warrant issued by the Athens Court of Appeal on 26 January 2005 under the European Convention on Extradition of 13 December 1957.

9. On 22 April 2005 the L'Aquila Court of Appeal validated the applicant's arrest and ordered his detention.

10. On 26 April 2005 the Ministry of Justice asked the Court of Appeal to extend his detention.

11. At the hearing of 27 April 2005, the President of the Court of Appeal, ruling under Article 717 of the Code of Criminal Procedure (see paragraph 25 below), established the applicant's identity and asked if he gave his consent to his extradition. He did not consent.

12. On 9 June 2005 the Ministry of Justice informed the Court of Appeal that, on 25 May 2005, the Greek authorities had sent a request for extradition together with all the requisite supporting documents.

13. On 21 June 2005 the public prosecutor's office asked the Court of Appeal to grant the extradition request.

14. The hearing was scheduled for 15 December 2005. At the request of the applicant's representative, it was postponed until 12 January 2006.

15. Without any prior investigation the Court of Appeal approved the extradition by a decision of 12 January 2006, deposited on 30 January 2006. It verified the conformity of the extradition request with the European Convention on Extradition and its compliance with the *ne bis in idem* and double-criminality principles, and it ruled out the possibility that the proceedings had been brought for any discriminatory or political reasons.

16. On 3 March 2006 the applicant appealed on points of law, arguing in particular that the request for his extradition had been sent by the Greek authorities after the forty-day time-limit provided for in Article 16 § 4 of the European Convention on Extradition, which meant in his view that his detention had been unlawful. He further argued that the charges laid against him by the Greek authorities were not based on serious indications of guilt. He submitted that he should therefore be released.

17. In a judgment of 11 May 2006, deposited with the registry on 18 September 2006, the Court of Cassation dismissed the appeal with only one page of reasoning, in particular because it found that the extradition request had been received within the time-limit provided for in the European Convention on Extradition and that it did not have jurisdiction to examine whether serious indications of guilt had been adduced.

18. In the meantime, on three occasions between June and September 2005, the applicant had applied to the Rome Court of Appeal, unsuccessfully, requesting his release. In its last decision of 27 October 2005, adopted in private in compliance with the adversarial principle, and without any prior investigation, the Court of Appeal found that there was no reason to depart from its two previous decisions, having regard to the ongoing risk that the applicant might abscond, even though the authorities had taken away his passport, and to the State's obligation to comply with its international commitments.

19. On 9 October 2006 the Minister of Justice signed the extradition order.

20. On 26 October 2006 the applicant was extradited to Greece.

II. RELEVANT INTERNATIONAL INSTRUMENT

21. The European Convention on Extradition, signed in Paris on 13 December 1957 and ratified by Italy by Law no. 300 of 30 January 1963, came into force in respect of Italy on 4 November 1963. It was amended by the Second Additional Protocol to the European Convention on Extradition, signed on 17 March 1978, which came into force in respect of Italy on 23 April 1985. The relevant provisions, as amended, read as follows.

Article 8 – Pending proceedings for the same offences

"The requested Party may refuse to extradite the person claimed if the competent authorities of such Party are proceeding against him in respect of the offence or offences for which extradition is requested."

Article 9 – *Non bis in idem*

"Extradition shall not be granted if final judgment has been passed by the competent authorities of the requested Party upon the person claimed in respect of the offence or offences for which extradition is requested. Extradition may be refused if the competent authorities of the requested Party have decided either not to institute or to terminate proceedings in respect of the same offence or offences."

Article 12 – The request and supporting documents

"1. The request [for extradition] shall be in writing and shall be addressed by the Ministry of Justice of the requesting Party to the Ministry of Justice of the requested Party; however, use of the diplomatic channel is not excluded. Other means of communication may be arranged by direct agreement between two or more Parties.

2. The request shall be supported by:

(a) the original or an authenticated copy of the conviction and sentence or detention order immediately enforceable or of the warrant of arrest or other order having the

same effect and issued in accordance with the procedure laid down in the law of the requesting Party;

(b) a statement of the offences for which extradition is requested. The time and place of their commission, their legal descriptions and a reference to the relevant legal provisions shall be set out as accurately as possible; and

(c) a copy of the relevant enactments or, where this is not possible, a statement of the relevant law and as accurate a description as possible of the person claimed, together with any other information which will help to establish his identity and nationality."

Article 16 – Provisional arrest

"1. In case of urgency the competent authorities of the requesting Party may request the provisional arrest of the person sought. The competent authorities of the requested Party shall decide the matter in accordance with its law.

2. The request for provisional arrest shall state that one of the documents mentioned in Article 12, paragraph 2.a, exists and that it is intended to send a request for extradition. It shall also state for what offence extradition will be requested and when and where such offence was committed and shall so far as possible give a description of the person sought.

3. A request for provisional arrest shall be sent to the competent authorities of the requested Party either through the diplomatic channel or direct by post or telegraph or through the International Criminal Police Organisation (Interpol) or by any other means affording evidence in writing or accepted by the requested Party. The requesting authority shall be informed without delay of the result of its request.

4. Provisional arrest may be terminated if, within a period of 18 days after arrest, the requested Party has not received the request for extradition and the documents mentioned in Article 12. It shall not, in any event, exceed 40 days from the date of such arrest. The possibility of provisional release at any time is not excluded, but the requested Party shall take any measures which it considers necessary to prevent the escape of the person sought.

5. Release shall not prejudice re-arrest and extradition if a request for extradition is received subsequently."

III. RELEVANT DOMESTIC LAW AND PRACTICE

22. As regards the application of precautionary measures, Article 715 of the Code of Criminal Procedure (CCP) provides that, at the request of a foreign State, the Court of Appeal may order the provisional arrest of an individual for the purposes of extradition proceedings. The request may be accepted (a) if the foreign State is acting pursuant to an enforceable judgment of conviction or an arrest warrant and intends to send an extradition request; (b) if the foreign State has provided a description of the relevant acts in support of the extradition request, indicated the offence

with which the wanted person is charged, and provided a description of that person; (c) if there is a risk that the person might abscond. Notification of the application of the measure is given by the Minister of Justice to the authorities of the foreign State. The precautionary measure will be discontinued if the foreign State does not send the extradition request and supporting documents, within forty days following that notification, to the Ministry of Foreign Affairs and the Ministry of Justice.

23. Under Article 716 § 3 of the CCP, the President of the Court of Appeal must confirm the provisional arrest within ninety-six hours and order the application of a custodial measure.

24. Under Article 716 § 4 of the CCP, the precautionary measure will be discontinued if the Ministry of Justice does not ask the Court of Appeal, within ten days from the date of the confirmation of the arrest, to order the individual's retention in custody.

25. Under Article 717 of the CCP, where the domestic authorities have ordered a custodial measure, the President of the Court of Appeal will schedule a hearing in order to identify the individual concerned and establish whether the latter gives his or her consent to extradition.

26. In accordance with Article 714 of the CCP, the length of the custodial measure may not exceed one year and six months. It may, however, be extended for a total period not exceeding three months.

27. Under Article 718 of the CCP, the custodial measure may, at the request of one of the parties or spontaneously, be discontinued by the Court of Appeal or the Court of Cassation, sitting as a court of first instance. The Court of Appeal deliberates in private after hearing the parties. The decision of the Court of Appeal may be appealed against before the Court of Cassation in so far as the grounds of appeal are based on a violation of statute law. In that connection the Court of Cassation has, on several occasions, established that it does not have jurisdiction to examine appeals on points of law in which the appellant is seeking release on the ground that the risk of his or her absconding, which was initially the justification for the custodial measure, has ceased to exist (see, for example, Court of Cassation, judgment no. 33545 of 7 September 2010, deposited with the registry on 13 September 2010; more generally, on the lack of jurisdiction to examine grounds based on arbitrariness in the reasoning of the Court of Appeal's decisions, see Court of Cassation, judgment no. 37123 of 24 September 2012, deposited with the registry on 26 September 2012).

28. As regards the judicial phase of the extradition, as provided for in Article 704 of the CCP, the Court of Appeal rules in private having heard the parties, gathered the relevant information and carried out the necessary verifications. It must establish whether the conditions laid down

by domestic and international law have been satisfied: in addition to the rules of the European Convention on Extradition, Article 705 of the CCP requires the courts to verify whether the person concerned has been charged with a political offence, whether he or she risks being tried according to procedures which do not guarantee the protection of fundamental rights, or whether, once extradited, he or she risks being subjected to treatment that is inhuman, degrading or discriminatory, or to any action that may breach one of the person's fundamental rights. Under the same Article, where the European Convention on Extradition applies, the courts are not entitled to examine whether or not there are serious indications of guilt (*gravi indizi di colpevolezza*).

29. Under Article 706 of the CCP, that decision may be challenged, on the facts and on points of law, before the Court of Cassation, which will rule in accordance with the procedure laid down in Article 704 of the CCP.

30. Article 708 of the CCP provides that the Minister of Justice must decide, within a period of forty-five days following the depositing of the Court of Cassation's decision approving the extradition, whether the individual is to be extradited. If the Minister fails to issue a decision, or decides to reject the extradition, the custodial measure must be discontinued.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 1 (f) OF THE CONVENTION

31. The applicant complained of the length of his detention pending extradition. He submitted that there had been a violation of Article 5 § 3 of the Convention.

32. The Court, being master of the characterisation to be given in law to the facts of the case (see, among other authorities, *Guerra and Others v. Italy*, 19 February 1998, § 44, *Reports of Judgments and Decisions* 1998-I), finds that the application should be examined under Article 5 § 1 (f) of the Convention (see *Quinn v. France*, 22 March 1995, Series A no. 311; *Chahal v. the United Kingdom*, 15 November 1996, *Reports* 1996-V; and *Bogdanovski v. Italy*, no. 72177/01, 14 December 2006), which reads as follows:

> "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:
>
> ...

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

A. Admissibility

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

B. Merits

1. The parties' submissions

34. The applicant argued that the length of the extradition proceedings had been excessive having regard to the fact that the case, in his view, was not a complex one.

35. The Government contested the applicant's allegations. They argued that the detention in question had been ordered in compliance with the extradition rules, as the Italian courts had found, and that its sole purpose had been for the applicant to be surrendered to the courts of the requesting State. They added that the applicant had not given his consent to the extradition, pointing out that consent would have accelerated the proceedings, and that the delay in the scheduling by the Court of Appeal of a hearing on the merits could be explained by the three applications for release that the applicant had filed within a period of three months. Lastly, they took the view that the proceedings in question, which had led the Italian authorities, both judicial and administrative, to authorise the extradition, had been conducted within the time-limits provided for by the rules of domestic and international law.

2. The Court's assessment

(a) Conformity of the detention with domestic law

36. In order to ascertain whether the detention in question was compatible with Article 5 § 1 (f) of the Convention, the Court must verify that the deprivation of liberty, in addition to falling within one of the exceptions set out in sub-paragraphs (a) to (f), was "lawful". It 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 and lays down the obligation to conform to the substantive and procedural rules of national law (see *Saadi v. the United Kingdom* [GC], no. 13229/03, § 67, ECHR 2008).

37. In the present case, the Court would observe that, being better placed than the Convention organs to verify compliance with domestic law, the domestic courts found, when called upon by the applicant or when domestic law so required, that the detention measure was lawful in its initial phase and in terms of its purpose. At the outset, the L'Aquila Court of Appeal confirmed the applicant's arrest; subsequently, the Court of Appeal and the Court of Cassation verified that the extradition request had been sent by the Greek authorities within the forty-day period laid down in Article 16 § 4 of the European Convention on Extradition (see paragraphs 15, 17 and 21 above). Lastly, on three occasions, the courts established that the adoption and maintaining of the precautionary measures were justified by the requirement to comply with the State's international commitments and by the existence of a risk that the applicant might abscond (see paragraph 18 above).

38. In those circumstances, the Court does not not discern any evidence to suggest that the detention pending extradition pursued an aim other than that for which it was ordered or that it did not comply with domestic law.

(b) Whether the detention was arbitrary

39. The Court would observe that, contrary to what the Government alleged, compliance with the time-limits provided for in domestic law cannot be regarded as automatically bringing the applicant's detention into line with Article 5 § 1 (f) of the Convention (see *Auad v. Bulgaria*, no. 46390/10, § 131, 11 October 2011). Article 5 § 1 (f) requires, in addition, that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness (see, among many other authorities, *Winterwerp v. the Netherlands*, 24 October 1979, § 37, Series A no. 33; *Amuur v. France*, 25 June 1996, § 50, *Reports* 1996-III; and *Witold Litwa v. Poland*, no. 26629/95, § 78, ECHR 2000-III). It is a fundamental principle that no detention which is arbitrary can be compatible with Article 5 § 1, and the notion of "arbitrariness" in Article 5 § 1 extends beyond a lack of conformity with national law, such that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus incompatible with the Convention (see *Saadi*, cited above, § 67, and *Suso Musa v. Malta*, no. 42337/12, § 92, 23 July 2013).

40. The Court would further reiterate that any deprivation of liberty under Article 5 § 1 (f) will be justified only for as long as extradition proceedings are in progress and that, if those proceedings are not prosecuted with due diligence, the detention will cease to be permissible (see *Quinn,* cited above, § 48, and *Chahal*, cited above, § 113).

41. The Court thus has the task not of assessing whether the length of the extradition proceedings was reasonable as a whole, as it would do more specifically in length of proceedings cases under Article 6, but of establishing, regardless of the overall duration of the proceedings, whether the length of the detention exceeded that reasonably required for the purpose pursued (see *Saadi*, cited above, §§ 72-74). Where there have been periods of inaction on the part of the authorities, and therefore a lack of expedition, the maintaining of the detention measure will cease to be justified. In conclusion, the Court must assess, on a case-by-case basis, whether or not, during the detention period in question, the domestic authorities remained inactive at any time (see, for a similar finding in a deportation case, *Tabesh v. Greece*, no. 8256/07, § 56, 26 November 2009).

42. In the present case, the Court observes that the applicant was detained pending extradition to enable the Greek authorities to prosecute him. In that connection the Court finds it necessary to distinguish between two forms of extradition in order to clarify the level of promptness required for each one: first, where extradition is requested for the purpose of enforcing a sentence and, second, where extradition will enable the requesting State to try the person concerned. In the second situation, the criminal proceedings are still pending and the person detained pending extradition must be presumed innocent; in addition, at that stage, the possibility for that person to exercise his or her defence rights during the criminal proceedings in order to prove his or her innocence is considerably limited, or even non-existent; lastly, the requested State's authorities are not entitled to examine the merits of the case (see paragraph 28 *in fine* above). For all these reasons, the protection of the rights of the person concerned and the smooth running of the extradition proceedings, including the requirement that an individual be prosecuted within a reasonable time, oblige the requested State to act with particular expedition.

43. The Court has already had occasion to find excessive, on account of unjustified delays on the part of the domestic authorities, detention periods of one year and eleven months pending extradition (see *Quinn*, cited above) and of three months pending deportation (see *Tabesh*, cited above).

44. It notes that in the present case the applicant's detention pending extradition lasted about one year and six months (from 19 April 2005 to 26 October 2006).

45. It finds that major delays occurred at the various stages of the extradition proceedings.

46. Firstly, the first hearing of the Court of Appeal was scheduled for 15 December 2005, six months after the extradition request had been sent to the Court of Appeal and eight months after the applicant had been taken into custody pending extradition.

47. The Court cannot agree with the Government when they argue that the remedies used by the applicant in order to obtain his release during that period (see paragraph 18 above) may, in themselves, justify the delay in the proceedings. The proceedings in question comprised two parts with different objects and purposes, consisting on the one hand of ascertaining whether the formal requirements for extradition had been met, and on the other of examining whether the criteria justifying the adoption of the precautionary measure remained valid and sufficient. The fact that domestic law has entrusted the same appellate court with this two-fold task constitutes a legitimate choice on the part of the State, but a choice which cannot be relied upon to justify considerable delays in examining the merits of the case. In any event, the Court fails to see how the applicant's repeated requests, which were justified in principle, since his detention was extended in the absence of any hearing on the merits, prevented the Court of Appeal from scheduling such a hearing at an earlier date (see, *mutatis mutandis*, *Quinn*, § 48). The Court of Appeal's decisions were based exclusively on the documents at its disposal, were adopted in private in compliance with the adversarial principle (see paragraph 27 above) and mainly concerned the examination of the requirement of maintaining the applicant in custody on account of the risk of his absconding (see paragraph 18 above).

48. The Court further notes that the case was not a complex one (contrast *Bogdanovski*, cited above, where the applicant had sought political-refugee status and the extradition proceedings had been suspended at the request of the United Nations High Commissioner for Refugees and the Court itself, following the application of Rule 39 of the Rules of Court). The Court of Appeal's task was confined to verifying that the extradition request had been submitted in accordance with the European Convention on Extradition; that the *ne bis in idem* and the double-criminality principles had been complied with; and that the criminal proceedings were not motivated by discriminatory or political reasons. The court was not entitled by law to assess whether there were any serious indications of guilt (*gravi indizi di colpevolezza* – see paragraph 28 *in fine* above) and no inquiries or investigative activity were necessary (see paragraph 15 above).

49. Secondly, the Court is struck by the fact that the Court of Cassation, after ruling within two months on the applicant's appeal, then took more than four months to deposit with its registry a one-page judgment merely stating that the extradition request had been sent by the requesting State in accordance with the proper procedure and that it did not itself have jurisdiction to call into question the charges laid against the applicant by the Greek authorities (see paragraph 17 above). The Government did not adduce any evidence capable of justifying that delay.

50. Lastly, as to the Government's argument that the applicant could have accelerated the proceedings by not opposing his extradition, the Court finds that, while such opposition may in principle justify an extension of custody as it would have to be examined by a court, this cannot relieve the State of its responsibility for any unjustified delay during the judicial phase.

51. Consequently, having regard to the nature of the extradition proceedings, whose aim was to ensure that the prosecution of the applicant would be pursued in another State, and the unjustified delays in the Italian courts, the Court finds that the applicant's detention was not "lawful" within the meaning of Article 5 § 1 (f) of the Convention and that there has therefore been a violation of that provision.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

52. 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."

53. The applicant did not submit a claim for just satisfaction (see paragraph 5 above). Accordingly, the Court considers that there is no call to award him any sum on that account.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 5 § 1 (f) of the Convention.

Done in French, and notified in writing on 24 March 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı	Päivi Hirvelä
Deputy Registrar	President

MORICE c. FRANCE
(Requête n° 29369/10)

GRANDE CHAMBRE

ARRÊT DU 23 AVRIL 2015[1]

1. Arrêt rendu par la Grande Chambre à la suite du renvoi de l'affaire en application de l'article 43 de la Convention.

SOMMAIRE[1]

Condamnation pénale d'un avocat pour complicité de diffamation de juges d'instruction en raison de propos relatés dans la presse

La condamnation du requérant, avocat, à une sanction importante pour complicité de diffamation s'analyse en une ingérence disproportionnée dans son droit à la liberté d'expression, dès lors que les propos qui lui étaient reprochés dans la presse ne constituaient pas des attaques gravement préjudiciables à l'action des tribunaux dénuées de fondement sérieux, mais des critiques à l'égard des juges, exprimées dans le cadre d'un débat d'intérêt général relatif au fonctionnement de la justice et dans le contexte d'une affaire au retentissement médiatique important depuis l'origine. S'ils pouvaient certes passer pour virulents, ils n'en constituaient pas moins des jugements de valeur reposant sur une « base factuelle » suffisante (paragraphes 128, 174 et 177 de l'arrêt).

Article 10

Liberté d'expression – Condamnation pénale d'un avocat pour complicité de diffamation de juges d'instruction en raison de propos relatés dans la presse – Protection de la réputation d'autrui – Protection des droits d'autrui – Propos concernant le fonctionnement du pouvoir judiciaire – Propos visant des juges d'instruction écartés de la procédure – Sujet et débat d'intérêt général – Marge d'appréciation restreinte – Jugements de valeur – Base factuelle suffisante – Propos à replacer dans le contexte de l'affaire et le contenu de la lettre pris dans leur ensemble – Limites plus larges de la critique admissible pour les magistrats que pour les simples particuliers – Nature des propos ne pouvant perturber la sérénité des débats judiciaires – Exercice des voies de droit disponibles – Propos constituant des critiques à l'égard des magistrats exprimées dans le cadre d'un débat d'intérêt général relatif au fonctionnement de la justice et dans le contexte d'une affaire au retentissement médiatique important – Sanction pénale importante – Proportionnalité – Nécessaire dans une société démocratique

*

* *

En fait

En 1995, le juge Borrel, un magistrat détaché dans le cadre d'accords de coopération entre la France et Djibouti, fut retrouvé mort. L'enquête diligentée par la gendarmerie de Djibouti conclut au suicide. Contestant cette thèse, la veuve du juge

1. Rédigé par le greffe, il ne lie pas la Cour.

Borrel déposa une plainte avec constitution de partie civile et désigna le requérant pour la représenter. Deux informations judiciaires furent ouvertes contre X du chef d'assassinat. L'information fut confiée à la juge M. à laquelle fut ensuite adjoint le juge L.L.

En juin 2000, la chambre d'accusation de la cour d'appel dessaisit les juges M. et L.L. du dossier et désigna un nouveau juge d'instruction, le juge P., pour poursuivre l'information. En parallèle, la chambre d'accusation fit droit à une demande du requérant de dessaisissement de la juge M. dans une autre affaire très médiatisée concernant la scientologie.

En septembre 2000, le requérant et l'un de ses confrères adressèrent une lettre à la garde des Sceaux dans le cadre de l'instruction sur le décès du juge Borrel. Ils y déclaraient saisir à nouveau la ministre de la Justice en raison « du comportement parfaitement contraire aux principes d'impartialité et de loyauté, des magistrats [M. et L.L.] » et demandaient que soit ordonnée une enquête de l'Inspection générale des services judiciaires sur « les nombreux dysfonctionnements qui ont été mis au jour dans le cadre de l'information judiciaire ».

Le lendemain parut dans le journal *Le Monde* un article dans lequel le journaliste relatait que les avocats de M^me^ Borrel avaient « vivement » mis en cause la juge M. auprès de la garde des Sceaux. Il était précisé que la juge M. était, entre autres, accusée par le requérant et son confrère d'avoir « un comportement parfaitement contraire aux principes d'impartialité et de loyauté » et qu'elle semblait « avoir omis de coter et de transmettre une pièce de procédure à son successeur ».

Les deux magistrats mis en cause déposèrent une plainte avec constitution de partie civile, pour diffamation publique envers un fonctionnaire public, contre le directeur du journal *Le Monde*, l'auteur de l'article et le requérant. Ce dernier fut déclaré coupable par la cour d'appel de complicité du délit de diffamation envers un fonctionnaire public, condamné à une amende de 4 000 euros (EUR) et, solidairement avec ses deux coïnculpés, au paiement de 7 500 EUR de dommages-intérêts à chacune des parties civiles.

En droit

Article 10 : la condamnation pénale du requérant constitue une ingérence dans l'exercice de son droit à la liberté d'expression, tel que garanti par l'article 10 de la Convention. L'ingérence était prévue par la loi et avait pour but la protection de la réputation ou des droits d'autrui.

Pour condamner le requérant, les juges d'appel ont estimé que le simple fait d'affirmer qu'un juge d'instruction avait eu « un comportement parfaitement contraire aux principes d'impartialité et de loyauté » constituait une accusation particulièrement diffamatoire. Ils ajoutaient que les propos du requérant relatifs au retard de transmission d'une cassette vidéo et sa référence, avec l'emploi du terme « connivence », à une carte manuscrite adressée par le procureur de Djibouti à la juge M. ne faisaient que conforter ce caractère diffamatoire, la « preuve de la vérité » des propos tenus n'étant pas rapportée et la bonne foi du requérant étant exclue.

a) *La qualité d'avocat du requérant* – Il est incontestable que les propos litigieux s'inscrivaient dans le cadre de la procédure et qu'ils visaient des juges d'instruction définitivement écartés de la procédure lorsque le requérant s'est exprimé. Ses déclarations ne pouvaient donc directement participer de la mission de défense de sa cliente, dès lors que l'instruction se poursuivait devant un autre juge, qui n'était pas mis en cause.

b) *La contribution à un débat d'intérêt général* – Les propos reprochés au requérant, qui concernaient le fonctionnement du pouvoir judiciaire, sujet d'intérêt général, et le déroulement de l'affaire Borrel ayant connu un retentissement médiatique très important s'inscrivaient dans le cadre d'un débat d'intérêt général, ce qui implique un niveau élevé de protection de la liberté d'expression allant de pair avec une marge d'appréciation des autorités particulièrement restreinte.

c) *La nature des propos litigieux* – Les déclarations incriminées constituent davantage des jugements de valeur que de pures déclarations de fait, compte tenu de la tonalité générale des propos comme du contexte dans lequel ils ont été tenus, dès lors qu'elles renvoient principalement à une évaluation globale du comportement des juges d'instruction durant l'information.
La « base factuelle » sur laquelle reposaient ces jugements de valeur était suffisante. En effet, le fait de la non-transmission de la cassette vidéo était non seulement établi, mais également suffisamment sérieux pour être relevé et consigné par le juge P. dans un procès-verbal. Quant à la carte manuscrite, elle atteste d'une certaine familiarité du procureur de la République de Djibouti à l'égard de la juge M., tout en accusant les avocats des parties civiles de se livrer à une « entreprise de manipulation ».
Enfin, il est avéré que le requérant est intervenu en sa qualité d'avocat dans deux affaires médiatiques instruites par la juge M. Un dysfonctionnement a été identifié par les juridictions d'appel à chaque fois, entraînant le dessaisissement de la juge M., et ce à la demande du requérant.
De plus, les expressions utilisées par le requérant présentaient un lien suffisamment étroit avec les faits de l'espèce, outre le fait que les propos ne pouvaient passer pour trompeurs ou comme une attaque gratuite.

d) *Les circonstances particulières de l'espèce* – i. La prise en compte de l'ensemble du contexte – Le contexte de l'affaire se caractérisait non seulement par le comportement des juges d'instruction et par les relations du requérant avec l'un d'eux, mais également par l'historique très spécifique de l'affaire, la dimension interétatique qui en découle, ainsi que par son important retentissement médiatique. Cependant, la cour d'appel a donné une portée très générale à l'expression « comportement parfaitement contraire aux principes d'impartialité et de loyauté », reprochée au requérant envers un magistrat instructeur alors qu'une telle citation aurait dû être replacée dans le contexte propre aux circonstances de l'espèce, et ce d'autant plus qu'il s'agissait en réalité non pas d'une déclaration faite à l'auteur de l'article, mais d'un extrait du texte de la lettre adressée de concert avec un confrère à la garde des Sceaux. De

plus, lorsque le requérant a répondu aux questions du journaliste, celui-ci avait déjà eu connaissance du courrier adressé à la garde des Sceaux par ses propres sources. Et la référence aux poursuites disciplinaires exercées contre la juge M. dans le cadre de l'affaire de la scientologie relevait de la seule responsabilité au journaliste auteur de l'article. Les avocats ne peuvent être tenus pour responsables de tout ce qui figure dans une « interview » publiée par la presse ou des agissements des organes de presse. La cour d'appel devait examiner les propos litigieux en tenant pleinement compte à la fois du contexte de l'affaire et du contenu de la lettre pris dans leur ensemble.
Ainsi, l'emploi du terme « connivence » ne pouvait porter « à lui seul » gravement atteinte à l'honneur et à la considération de la juge M. et du procureur de Djibouti. En outre, les déclarations du requérant ne pouvaient être réduites à la simple expression d'une relation conflictuelle avec la juge M. Les propos litigieux relevaient d'une démarche commune et professionnelle de deux avocats, en raison de faits nouveaux, établis et susceptibles de révéler un dysfonctionnement grave du service de la justice, impliquant les deux anciens juges chargés d'instruire l'affaire dans laquelle leurs clients étaient parties civiles.
Aussi, si les propos du requérant avaient assurément une connotation négative, force est de constater que, malgré une certaine hostilité et la gravité susceptible de les caractériser, la question centrale des déclarations concernait le fonctionnement d'une information judiciaire, ce qui relevait d'un sujet d'intérêt général et ne laissait donc guère de place pour des restrictions à la liberté d'expression. De plus, un avocat doit pouvoir attirer l'attention du public sur d'éventuels dysfonctionnements judiciaires, l'autorité judiciaire pouvant tirer un bénéfice d'une critique constructive.

ii. La garantie de l'autorité du pouvoir judiciaire – Les juges M. et L.L. étaient des magistrats pour lesquels les limites de la critique admissible étaient donc plus larges que pour les simples particuliers et ils pouvaient donc faire, en tant que tels, l'objet des commentaires litigieux.
En outre, les propos du requérant n'étaient pas de nature à perturber la sérénité des débats judiciaires, compte tenu du dessaisissement, par la juridiction supérieure, des deux juges d'instruction visés par les critiques.
Pour les mêmes motifs, et compte tenu de ce qui précède, on ne saurait davantage considérer que la condamnation du requérant ait pu être de nature à préserver l'autorité du pouvoir judiciaire.

iii. L'exercice des voies de droit disponibles – La saisine de la chambre d'accusation de la cour d'appel témoigne manifestement d'une volonté première du requérant et de son confrère de régler la question par les voies de droit disponibles. Ce n'est en réalité qu'après leur exercice qu'est apparu un dysfonctionnement, relevé par le juge d'instruction P. dans son procès-verbal. Or, à ce stade, la chambre d'accusation ne pouvait plus être saisie de ces faits, puisqu'elle avait précisément déjà dessaisi les juges M. et L.L. du dossier. En tout état de cause, quatre ans et demi s'étaient déjà

écoulés depuis l'ouverture de l'instruction, laquelle n'était toujours pas close au jour du prononcé de l'arrêt de la Cour européenne. En outre, les parties civiles et leurs avocats ont été diligents.
Par ailleurs, la demande d'enquête adressée à la garde des Sceaux pour se plaindre de ces faits nouveaux n'était pas un recours juridictionnel, ce qui aurait éventuellement justifié de ne pas intervenir dans la presse, mais une simple demande d'enquête administrative soumise à la décision discrétionnaire de la ministre de la Justice.
Enfin, ni le procureur général ni le bâtonnier ou le conseil de l'ordre des avocats compétents n'ont estimé nécessaire d'engager des poursuites disciplinaires contre le requérant en raison de ses déclarations dans la presse, alors qu'ils en avaient la possibilité.

iv. Conclusion sur les circonstances de l'espèce – Les propos reprochés au requérant ne constituaient pas des attaques gravement préjudiciables à l'action des tribunaux dénuées de fondement sérieux, mais des critiques à l'égard des juges M. et L.L., exprimées dans le cadre d'un débat d'intérêt général relatif au fonctionnement de la justice et dans le contexte d'une affaire au retentissement médiatique important depuis l'origine. S'ils pouvaient certes passer pour virulents, ils n'en constituaient pas moins des jugements de valeur reposant sur une « base factuelle » suffisante.

e) *Les peines prononcées* – Le requérant a été condamné au pénal et à une amende de 4 000 EUR et, solidairement avec ses deux coïnculpés, au paiement de 7 500 EUR de dommages-intérêts à chacune des parties civiles. Ainsi, il a fait l'objet d'une sanction qui n'était pas « la plus modérée possible » mais au contraire importante, sa qualité d'avocat ayant même été retenue pour justifier une plus grande sévérité.
Compte tenu de ce qui précède, la condamnation du requérant pour complicité de diffamation s'analyse en une ingérence disproportionnée dans le droit à la liberté d'expression de l'intéressé, qui n'était donc pas « nécessaire dans une société démocratique » au sens de l'article 10 de la Convention.
Conclusion : violation (unanimité).

La Cour conclut aussi à l'unanimité à la violation de l'article 6 § 1 en ce que les craintes du requérant, à savoir que devant la Cour de cassation sa cause n'a pas été examinée équitablement par un tribunal impartial compte tenu de la présence dans la formation de jugement d'un conseiller qui s'était préalablement et publiquement exprimé en faveur de l'une des parties civiles, pouvaient passer pour objectivement justifiées.

Article 41 : 4 270 EUR pour dommage matériel ; 15 000 EUR pour préjudice moral.

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Paturel c. France, n° 54968/00, 22 décembre 2005
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En l'affaire Morice c. France,

La Cour européenne des droits de l'homme, siégeant en une Grande Chambre composée de :

Dean Spielmann, *président*,
Josep Casadevall,
Guido Raimondi,
Isabelle Berro,
Ineta Ziemele,
George Nicolaou,
Luis López Guerra,
Mirjana Lazarova Trajkovska,
Ann Power-Forde,
Zdravka Kalaydjieva,
Julia Laffranque,
Erik Møse,
André Potocki,
Johannes Silvis,
Valeriu Griţco,
Ksenija Turković,
Egidijus Kūris, *juges*,

et de Johan Callewaert, *greffier adjoint de la Grande Chambre*,

Après en avoir délibéré en chambre du conseil les 21 mai 2014 et 18 février 2015,

Rend l'arrêt que voici, adopté à cette dernière date :

PROCÉDURE

1. À l'origine de l'affaire se trouve une requête (n° 29369/10) dirigée contre la République française et dont un ressortissant de cet État, M. Olivier Morice (« le requérant »), a saisi la Cour le 7 mai 2010 en vertu de l'article 34 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales (« la Convention »).

2. Le requérant a été représenté par M^e^ C. Audhoui et M^e^ J. Tardif, avocats à Paris. Le gouvernement français (« le Gouvernement ») a été représenté par son agent, M^me^ E. Belliard, directrice des affaires juridiques au ministère des Affaires étrangères.

3. Le requérant alléguait une atteinte au principe d'impartialité prévu par l'article 6 § 1 de la Convention devant la Cour de cassation, ainsi qu'à son droit à la liberté d'expression garanti par l'article 10 en raison de sa condamnation.

4. La requête a été attribuée à la cinquième section de la Cour (article 52 § 1 du règlement). Le 11 juin 2013, une chambre de ladite section, composée de Mark Villiger, président, Angelika Nußberger, Boštjan M. Zupančič, Ganna Yudkivska, André Potocki, Paul Lemmens, Aleš Pejchal, juges, et de Claudia Westerdiek, greffière de section, l'a déclarée recevable et a rendu un arrêt. Elle y constate une violation de l'article 6 § 1 de la Convention à l'unanimité, ainsi qu'une non-violation de l'article 10 à la majorité. Des opinions partiellement dissidentes des juges Yudkivska et Lemmens ont été jointes à l'arrêt.

5. Le 3 octobre 2013, le requérant a demandé le renvoi de l'affaire devant la Grande Chambre, conformément à l'article 43 de la Convention. Cette demande a été acceptée par le collège de la Grande Chambre le 9 décembre 2013.

6. La composition de la Grande Chambre a été arrêtée conformément aux articles 26 §§ 4 et 5 de la Convention et 24 du règlement.

7. Tant le requérant que le Gouvernement ont déposé des observations écrites sur le fond de l'affaire. Des observations ont également été reçues du Conseil des barreaux européens, ainsi que de l'ordre des avocats au barreau de Paris, du Conseil national des barreaux et de la Conférence des bâtonniers, le président les ayant autorisés à intervenir dans la procédure écrite (articles 36 § 2 de la Convention et 44 § 3 du règlement).

8. Une audience s'est déroulée en public au Palais des droits de l'homme, à Strasbourg, le 21 mai 2014 (article 59 § 3 du règlement).

Ont comparu :

– *pour le Gouvernement*
M^me^ N. Ancel, sous-directrice des droits de l'homme
au ministère des Affaires étrangères et
du Développement international, *agent*,
M. A. Letocart, ministère de la Justice,
M^mes^ M.-A. Recher, ministère de la Justice,
P. Rouault-chalier, ministère de la Justice,
E. Topin, ministère des Affaires étrangères et
du Développement international, *conseillers* ;

– *pour le requérant*
M^es^ C. Audhoui, avocate au barreau de Paris,
L. Pettiti, avocat au barreau de Paris,
M. N. Hervieu, collaborateur au sein d'un cabinet
d'avocats aux conseils, *conseils* ;

M^es J. Tardif, avocat au barreau de Paris,
C. Chauffray, avocate au barreau de Paris, *conseillers*.

La Cour a entendu en leurs déclarations M. Morice, M^e Pettiti, M. Hervieu et M^me Ancel.

EN FAIT

I. LES CIRCONSTANCES DE L'ESPÈCE

9. Le requérant, qui est né en 1960 et réside à Paris, est avocat au barreau de Paris.

A. Le décès du juge Borrel et la procédure subséquente

10. Le 19 octobre 1995, le juge Bernard Borrel, magistrat détaché depuis un an par la France auprès du ministre de la Justice de Djibouti en tant que conseiller technique, dans le cadre des accords de coopération entre les deux États, fut retrouvé mort à quatre-vingts kilomètres de la ville de Djibouti. Son corps, à demi dénudé et en partie carbonisé, gisait à une vingtaine de mètres en contrebas d'une route isolée. L'enquête diligentée dans les jours qui suivirent par la gendarmerie de Djibouti conclut au suicide par immolation.

11. Le 7 décembre 1995, une information judiciaire fut ouverte au tribunal de grande instance de Toulouse pour recherche des causes de la mort. Le corps de Bernard Borrel, rapatrié et inhumé à Toulouse, fit l'objet d'une autopsie le 15 février 1996. Le rapport conclut à l'absence d'élément suspect, bien que l'état de putréfaction du corps ne permettait pas de diagnostic précis.

12. Le 3 mars 1997, contestant la thèse du suicide, la veuve de Bernard Borrel, M^me Élisabeth Borrel, également magistrat, déposa une plainte avec constitution de partie civile, en son nom et celui de ses deux enfants mineurs, contre personne non dénommée pour assassinat. Elle désigna le requérant, M^e Morice, pour la représenter dans le cadre de cette procédure.

13. Les 8 et 23 avril 1997, deux informations judiciaires furent ouvertes contre X du chef d'assassinat.

14. Par une ordonnance du 30 avril 1997, l'information pour recherche des causes de la mort et les deux informations du chef d'assassinat furent jointes.

15. Le 29 octobre 1997, la Cour de cassation fit droit à une demande du requérant et dessaisit la juridiction toulousaine au profit du tribunal de grande instance de Paris. Le 12 octobre 1997, l'information fut confiée à

M^me^ M., juge d'instruction, à laquelle fut adjoint le juge L.L. le 7 janvier 1998 pour instruire conjointement l'affaire.

16. Le 19 novembre 1999, un avocat au barreau de Bruxelles informa la police que A., ancien officier supérieur et membre de la garde présidentielle de Djibouti, réfugié en Belgique, avait des révélations à faire concernant le juge Borrel. Les informations révélées furent transmises aux autorités françaises *via* Interpol. Selon un arrêt de la cour d'appel de Versailles du 28 mai 2009 (paragraphe 18 ci-dessous), il résulte du dossier ce qui suit : en l'absence de réponse des juges M. et L.L., due au fait que le témoin souhaitait conserver l'anonymat, aucune suite ne fut donnée ; l'avocat belge de ce témoin avait donc pris contact avec le requérant, lequel organisa une interview de ce témoin avec des journalistes du quotidien *Le Figaro* et de la chaîne de télévision française TF1, à la fin de décembre 1999 ; enfin, c'est à la suite de la publication et de la diffusion de cette interview au début de janvier 2000 que les juges M. et L.L. décidèrent de se rendre en Belgique pour assister l'enquêteur belge lors de l'audition du témoin.

17. Le 31 janvier 2000, les juges M. et L.L. procédèrent à l'audition du témoin à Bruxelles. Ultérieurement, A. déclara avoir fait l'objet de pressions et d'intimidations de la part de la juge M. pour le faire revenir sur son témoignage, ces faits étant expressément dénoncés par son avocat dans une lettre du 2 février 2000 adressée au procureur du Roi. En outre, ce témoin accusa le procureur de la République de Djibouti de l'avoir menacé, pour qu'il se rétracte, ainsi que le chef des services secrets de Djibouti d'avoir imposé au chef de la garde présidentielle, le capitaine I., de rédiger une attestation pour le discréditer. Le capitaine I. confirma les accusations de A. le concernant.

18. Le procureur de la République de Djibouti et le chef des services secrets de ce pays furent poursuivis en France pour subornation de témoin, la veuve du juge Borrel, son fils, le témoin A., le capitaine I. ainsi qu'un avocat français, A.M., mis en cause, étant parties civiles. La juge M. fut entendue en qualité de témoin. Le procureur et le chef des services secrets de Djibouti furent respectivement condamnés à dix-huit et douze mois d'emprisonnement, ainsi qu'à payer des dommages-intérêts aux parties civiles par un jugement du tribunal correctionnel de Versailles du 27 mars 2008, avant d'être relaxés par la cour d'appel de Versailles le 28 mai 2009.

19. Le 2 février 2000, trois syndicats de magistrats, à savoir le Syndicat de la magistrature, l'Association professionnelle des magistrats et l'Union syndicale des magistrats, se constituèrent partie civile dans le cadre de l'information suivie du chef d'assassinat.

20. Le 16 mars 2000, le requérant, agissant au nom de M^me^ Borrel, demanda à ce qu'il soit procédé, d'une part, à l'audition du témoin A. en

Belgique et, d'autre part, à un transport sur les lieux en présence de la partie civile à Djibouti.

21. Par une ordonnance du 17 mars 2000, les juges d'instruction M. et L.L. firent droit à la demande concernant A, estimant qu'une nouvelle audition était absolument nécessaire. Ils refusèrent par ailleurs de procéder à un transport sur les lieux, dès lors que cela avait déjà été fait à deux reprises, une fois en 1999 et une autre la semaine précédant ladite ordonnance, ne « [voyant] pas en quoi un transport sur les lieux en présence de la partie civile serait, à ce stade de la procédure, utile à la manifestation de la vérité ». Ils précisèrent que lors du transport à Djibouti réalisé quelques jours auparavant, ils étaient accompagnés de deux experts, notamment la directrice de l'institut médicolégal de Paris, ajoutant que des films et des photographies avaient été réalisés à cette occasion.

22. Le requérant et son confrère interjetèrent appel de cette ordonnance. Ils déposèrent des conclusions devant la chambre d'accusation, à l'instar de l'avocat du Syndicat de la magistrature, faisant valoir que le dernier transport sur les lieux en présence d'un expert s'analysait en une reconstitution dont les parties civiles avaient été écartées, l'information se déroulant avec pour seul objectif la démonstration du suicide de la victime. Ils demandèrent également que la chambre d'accusation se substitue aux juges d'instruction en évoquant l'affaire.

23. Par un arrêt du 21 juin 2000, la chambre d'accusation de la cour d'appel de Paris estima qu'après deux transports sur les lieux en l'absence des parties civiles, dont un très proche dans son déroulement d'une reconstitution, la nécessité d'organiser une reconstitution sur les lieux en présence des parties civiles afin qu'elles puissent exercer leurs droits était indispensable à la manifestation de la vérité. Partant, elle infirma l'ordonnance des juges M. et L.L. sur ce point. De plus, elle les dessaisit du dossier et désigna un nouveau juge d'instruction, le juge P., pour poursuivre l'information.

24. Le 19 juin 2007, le procureur de la République de Paris, à la suite de la demande de la juge d'instruction alors en charge du dossier, sur le fondement de l'article 11, alinéa 3, du code de procédure pénale, fit un communiqué pour préciser publiquement que « si la thèse du suicide a pu un temps être privilégiée, les éléments recueillis notamment depuis 2002 militent en faveur d'un acte criminel », ajoutant que les expertises avaient permis d'établir que « Bernard Borrel était couché sur le sol lorsque les liquides ont été répandus sur sa personne de manière aléatoire ».

25. La procédure est actuellement toujours pendante.

B. Les faits liés au dossier dit de la Scientologie

26. Par des actes des 29 juin et 16 octobre 2000, la ministre de la Justice saisit le Conseil supérieur de la magistrature, statuant comme conseil de discipline des magistrats du siège, de faits imputables à la juge M. dans le cadre du dossier d'instruction de la Scientologie, dont elle avait la charge et dans le cadre duquel le requérant représentait également des parties civiles. La juge M. se voyait reprocher de ne pas avoir porté l'attention nécessaire au dossier, le laissant pratiquement dans un état de déshérence durant cinq années, de s'être engagée dans une voie transactionnelle excédant la compétence d'un juge d'instruction et de ne pas avoir fait de copie de toutes les pièces de la procédure, rendant impossible la reconstitution du dossier après sa disparition partielle de son cabinet d'instruction. La juge M. demanda la nullité de la saisine du Conseil supérieur de la magistrature, en raison notamment du fait que cet acte avait été rendu public par le directeur de cabinet de la ministre au cours d'une conférence de presse, et ce avant même que cette décision lui ait été personnellement notifiée. En parallèle, le 18 octobre 2000, la chambre d'accusation de la cour d'appel de Paris fit droit à une demande du requérant de dessaisissement de la juge M. du dossier de la Scientologie.

27. Le 4 juillet 2000, au cours de l'Assemblée générale des magistrats du siège du tribunal de grande instance de Paris, la question des poursuites disciplinaires exercées à l'encontre de la juge M. fut évoquée, notamment en raison du fait qu'elles avaient été annoncées dans la presse alors que l'intéressée n'était pas prévenue officiellement et que le président du tribunal n'était pas encore saisi. À cette occasion, un magistrat du tribunal, J.M., déclara ce qui suit :

> « Il n'est pas interdit aux magistrats de base de dire que nous sommes proches de Madame [M.]. Il n'est pas interdit de dire que Madame [M.] a notre confiance et notre soutien. »

28. L'Assemblée générale rédigea la motion suivante adoptée à l'unanimité :

> « L'Assemblée générale des magistrats du siège du tribunal de grande instance de Paris, réunie le 4 juillet 2000, sans contester le pouvoir reconnu au garde des Sceaux d'exercer des poursuites disciplinaires dans les conditions prévues par la loi, s'étonne d'apprendre par voie de presse l'engagement de poursuites de ce type à l'encontre de Madame [M.], premier juge d'instruction à Paris alors que ni l'intéressée elle-même ni la hiérarchie judiciaire n'ont été avisées à ce jour officiellement d'un tel engagement. »

29. Dans le cadre d'un entretien publié par un magazine en juillet-août 2000, la présidente du Syndicat de la magistrature, partie civile dans le dossier Borrel, déclara mettre en cause « le manque d'impartialité de

M^me^ M. dans les dossiers Borrel et [L.] », précisant que les magistrats ayant signé la motion « ne pouvaient pas ignorer que dans deux dossiers sensibles, l'affaire Borrel et l'affaire [L.], son impartialité était fortement contestée ».

30. Par un jugement du 5 janvier 2000, le tribunal de grande instance de Paris, saisi par le requérant en sa qualité d'avocat de deux parties civiles, condamna l'État en raison d'une faute lourde commise par le service public de la justice du fait de la disparition du dossier de la Scientologie du cabinet de la juge M. Il attribua des dommages-intérêts aux plaignants.

31. Le 13 décembre 2001, le Conseil supérieur de la magistrature rejeta les exceptions de nullité de la juge M. et, sur le fond, tout en regrettant un certain manque de rigueur ou une insuffisance de suivi, ne prononça aucune sanction disciplinaire à l'encontre de celle-ci.

C. La poursuite pénale diligentée à l'encontre du requérant

32. Le 1^er^ août 2000, le juge P., désigné en remplacement des juges M. et L.L., rédigea un procès-verbal pour consigner les événements suivants : en réponse à la demande du requérant concernant la cassette vidéo réalisée à Djibouti en mars 2000 et citée par les juges M. et L.L. dans leur ordonnance du 17 mars 2000, le juge P. avait répondu qu'elle ne figurait pas au dossier d'instruction et qu'elle n'était pas référencée comme une pièce à conviction ; le jour-même, le juge P. avait demandé à la juge M. si elle détenait cette cassette vidéo ; la juge M. lui avait aussitôt remis une enveloppe adressée à son nom, fermée, non datée et sans trace de scellés, avec indication des coordonnées de la juge M. comme destinataire et celles du procureur de la République de Djibouti comme expéditeur ; l'enveloppe contenait une cassette vidéo, ainsi qu'une carte manuscrite à l'en-tête du procureur de la République de Djibouti, que le juge P. avait saisie et placée sous scellés. La carte du procureur destinée à la juge M. se lisait comme suit :

> « Salut Marie-Paule,
>
> Je t'envoie comme convenu la cassette vidéo du transport au Goubet. J'espère que l'image sera satisfaisante.
>
> J'ai regardé l'émission « Sans aucun doute » sur TF1. J'ai pu constater à nouveau combien Madame Borrel et ses avocats sont décidés à continuer leur entreprise de manipulation.
>
> Je t'appellerai bientôt.
>
> Passe le bonjour à Roger s'il est rentré, de même qu'à J.C. [D.]
>
> A très bientôt,
>
> Je t'embrasse.
>
> DJAMA »

33. Par une lettre du 6 septembre 2000, le requérant et son confrère, M^e^ L. de Caunes, saisirent la garde des Sceaux pour se plaindre des faits relatés dans le procès-verbal du juge d'instruction P. en date du 1^er^ août 2000, en raison du « comportement parfaitement contraire aux principes d'impartialité et de loyauté des magistrats Madame [M.] et Monsieur [L.L.] ». Ils demandèrent « une enquête de l'Inspection générale des services judiciaires, sur les nombreux dysfonctionnements qui ont été mis au jour dans le cadre de l'information judiciaire ». Ils indiquèrent que la forme et le fond de la carte adressée par le procureur de Djibouti à la juge M. révélait une surprenante et regrettable intimité complice, le procureur se trouvant sous la dépendance directe du gouvernement dont le chef était « soupçonné très ouvertement et très sérieusement d'être l'instigateur de l'assassinat de Bernard Borrel ».

34. Par ailleurs, cette lettre fut reprise, accompagnée de déclarations du requérant au journaliste, dans un article du journal *Le Monde* paru le 7 septembre et daté du vendredi 8 septembre 2000. Cet article se lisait comme suit :

> « LES AVOCATS de la veuve du juge Bernard Borrel, retrouvé mort en 1995 à Djibouti dans des circonstances mystérieuses, ont vivement mis en cause, mercredi 6 septembre, auprès du garde des Sceaux, la juge [M.], dessaisie du dossier au printemps. Celle-ci est accusée par M^es^ Olivier Morice et Laurent de Caunes d'avoir « un comportement parfaitement contraire aux principes d'impartialité et de loyauté » et semble avoir omis de coter et de transmettre une pièce de procédure à son successeur.
>
> Les deux avocats, qui n'avaient pas été autorisés à se rendre à Djibouti en mars pour un second transport sur les lieux, ont demandé le 1^er^ août à consulter la cassette vidéo tournée sur place. Le juge [P.], chargé de l'instruction depuis le dessaisissement [des juges M. et L.L.] le 21 juin, leur a indiqué que la cassette ne figurait pas au dossier et n'était pas « référencée dans la procédure comme étant une pièce à conviction ». Le juge a aussitôt appelé sa collègue, qui lui a remis la cassette dans la journée. « Les juges [M.] et [L.L.] avaient gardé par devers eux cette cassette, proteste M^e^ Olivier Morice, qu'ils avaient omis de placer sous scellés, plus d'un mois après leur dessaisissement. »
>
> Pire, dans l'enveloppe le juge [P.] a découvert un mot manuscrit et assez familier de Djama [S.], le procureur de la République de Djibouti. « Salut Marie-Paule, je t'envoie comme convenu la cassette vidéo du transport au Goubet, peut-on lire dans ce texte. J'espère que l'image sera satisfaisante. J'ai regardé l'émission «Sans aucun doute» sur TF1. J'ai pu constater à nouveau combien M^me^ Borrel et ses avocats sont décidés à continuer leur entreprise de manipulation. Je t'appellerai bientôt. Passe le bonjour à Roger [L.L.] s'il est rentré, de même qu'à J.-C. [D.] [procureur adjoint à Paris]. A très bientôt, je t'embrasse, Djama. »
>
> Les avocats de M^me^ Borrel sont évidemment furieux. « Cette pièce démontre l'étendue de la connivence qui existe entre le procureur de Djibouti et les magistrats français, assure M^e^ Morice, et on ne peut qu'être scandalisés. » Ils ont réclamé à Elisabeth Guigou

une enquête de l'Inspection générale des services judiciaires. La ministre de la Justice n'avait pas reçu leur courrier, jeudi 7 septembre. M^me^ [M.] fait déjà l'objet de poursuites disciplinaires devant le Conseil supérieur de la magistrature (CSM), notamment pour la disparition de pièces dans l'instruction du dossier de la Scientologie (*Le Monde* du 3 juillet). »

35. Les juges M. et L.L. déposèrent une plainte avec constitution de partie civile contre X du chef de dénonciation calomnieuse. Le 26 septembre 2000, le parquet de Paris ouvrit une information pour dénonciation calomnieuse. Le 5 novembre 2000, la Cour de cassation désigna le juge d'instruction de Lille lequel, le 15 mai 2006, rendit une ordonnance de non-lieu qui fut ensuite confirmée par la chambre de l'instruction de la cour d'appel de Douai le 19 juin 2007.

36. Par ailleurs, les 12 et 15 octobre 2000, les juges M. et L.L. déposèrent également une plainte avec constitution de partie civile pour diffamation publique envers un fonctionnaire public, contre le directeur de publication du quotidien *Le Monde*, le journaliste auteur de l'article, ainsi que le requérant.

37. Par une ordonnance du 2 octobre 2001, un juge d'instruction près le tribunal de grande instance de Nanterre renvoya le requérant et les deux autres personnes mises en cause devant le tribunal correctionnel en raison des passages suivants de l'article litigieux :

« Celle-ci [la juge M.] est accusée par M^es^ Olivier Morice et Laurent de Caunes d'avoir « un comportement parfaitement contraire aux principes d'impartialité et de loyauté » et semble avoir omis de coter et de transmettre une pièce de procédure à son successeur. »

« Les juges [M. et L.L.] avaient gardé par devers eux cette cassette, proteste M^e^ Olivier Morice, qu'ils avaient omis de placer sous scellés, plus d'un mois après leur dessaisissement. »

« Pire, dans l'enveloppe le juge [P.] a découvert un mot manuscrit et assez familier. »

« Les avocats de M^me^ Borrel sont évidemment furieux. « Cette pièce démontre l'étendue de la connivence qui existe entre le procureur de Djibouti et les magistrats français », assure M^e^ Morice, « et on ne peut qu'être scandalisés ». »

38. Par un jugement du 4 juin 2002, le tribunal correctionnel de Nanterre rejeta les exceptions de nullité soulevées par les requérants, notamment celle tirée de l'immunité, prévue par l'article 41 de la loi du 29 juillet 1881 sur la liberté de la presse, pour les débats judiciaires et les écrits produits devant une juridiction, en raison du fait que l'article ne faisait que reprendre le contenu de la lettre envoyée à la garde des Sceaux. Le tribunal estima sur ce point que cette lettre n'était pas un acte de saisine du Conseil supérieur de la magistrature et que son contenu devait être considéré comme purement informatif et, dès lors, comme non couvert par l'immunité.

39. Le tribunal considéra ensuite que le caractère diffamatoire des propos n'avait pas été « véritablement contesté », le requérant revendiquant la teneur des imputations qu'il estimait entièrement fondées. Reprenant ensuite chacun des propos litigieux pour vérifier si la diffamation était établie, ainsi que pour en apprécier la portée et la gravité, il jugea tout d'abord que « l'accusation d'impartialité et de déloyauté à l'encontre d'un juge constitue, à l'évidence, une imputation particulièrement diffamatoire puisqu'elle revient à mettre en cause ses qualités, sa rigueur morale et professionnelle et en somme sa capacité à exercer des fonctions de magistrat ». Il estima ensuite que les propos sur l'absence de transmission de la cassette étaient également diffamatoires, en ce qu'ils laissaient entendre au moins une négligence fautive ou une sorte d'obstruction. Quant à l'emploi du terme « connivence », le tribunal considéra qu'il sous-entendait clairement un comportement partial et déloyal en accord avec un magistrat d'un pays étranger, ce qui était d'autant plus grave que l'article laissait supposer que l'on disposait d'éléments sérieux compte tenu de la demande d'enquête adressée à la garde des Sceaux.

40. Sur la culpabilité du requérant, le tribunal jugea en tout cas établi que le journaliste avait eu connaissance du courrier adressé à la garde des Sceaux par ses propres sources et qu'il avait souhaité en avoir confirmation et commentaire par le requérant, avec qui il avait eu un entretien téléphonique. Le requérant ayant été au courant de ce que ses déclarations au journaliste seraient rendues publiques, le tribunal estima qu'il était dès lors coupable du chef de complicité de diffamation publique, sauf à ce que l'offre de preuve de la vérité des faits ou la bonne foi soient retenues. Toutefois, le tribunal écarta les différentes offres de preuve soumises par le requérant, rappelant que pour être retenue, « la preuve que l'on entend rapporter doit être parfaite et complète et corrélative à l'ensemble des imputations retenues comme diffamatoires ». S'agissant de la bonne foi du requérant, il jugea que « la mise en cause professionnelle et morale très virulente des magistrats instructeurs (...) dépasse à l'évidence le droit de libre critique légitimement admissible » et que les profondes divergences entre les avocats de M^me^ Borrel et les juges d'instruction ne pouvaient justifier une absence totale de prudence dans l'expression.

41. S'agissant de la peine, le tribunal prit expressément en compte la qualité d'avocat du requérant, qui n'avait dès lors pu « méconnaître la portée et la gravité de propos dépourvus de toute prudence », pour « sanctionner une telle faute pénale par une amende d'un montant suffisamment significatif ». Il le condamna dès lors à une amende de 4 000 euros (EUR), ainsi que, solidairement avec les autres prévenus, à verser 7 500 EUR de dommages-intérêts à chacun des deux magistrats mis en cause et 3 000 EUR au titre des

frais. Il ordonna également l'insertion d'un encart dans le journal *Le Monde*, à leurs frais partagés. Le requérant, ses coprévenus, les deux juges parties civiles, ainsi que le ministère public interjetèrent appel de ce jugement.

42. Par un arrêt du 28 mai 2003, la cour d'appel de Versailles jugea que les citations délivrées sur la plainte de L.L. étaient nulles, que l'action de ce dernier était prescrite et elle relaxa les trois prévenus à ce titre. Par ailleurs, elle confirma les déclarations de culpabilité des trois prévenus concernant la plainte de la juge M., ainsi que le montant de l'amende infligée au requérant, celui des dommages-intérêts attribués à la juge M., à qui elle accorda par ailleurs 5 000 EUR pour les frais de procédure, outre la condamnation à la publication d'un encart dans le quotidien *Le Monde*. Le requérant et le juge L.L. formèrent un pourvoi en cassation.

43. Le 12 octobre 2004, la Cour de cassation cassa l'arrêt dans toutes ses dispositions et renvoya l'affaire devant la cour d'appel de Rouen.

44. Le 25 avril 2005, la cour d'appel de Rouen donna acte aux trois prévenus de leur renonciation à invoquer la nullité des citations délivrées dans le cadre de la plainte du juge L.L. et elle sursit à statuer sur le fond.

45. Le 8 juin 2005, le président de la chambre criminelle de la Cour de cassation rejeta les requêtes en examen immédiat de leurs pourvois présentées par les trois prévenus et les parties civiles.

46. Par un arrêt du 16 juillet 2008, après plusieurs renvois et la tenue d'une audience le 30 avril 2008, la cour d'appel de Rouen confirma le rejet de l'exception d'immunité par le tribunal de grande instance de Nanterre, ainsi que les déclarations de culpabilité à l'égard des prévenus, à savoir pour complicité de diffamation publique envers des fonctionnaires publics s'agissant du requérant. Elle condamna ce dernier au paiement d'une amende de 4 000 EUR et confirma sa condamnation solidaire avec ses coprévenus à payer 7 500 EUR de dommages-intérêts à chacun des juges et à publier un communiqué dans le quotidien *Le Monde*. S'agissant des frais, elle condamna les trois prévenus à payer 4 000 EUR au juge L.L. et le requérant seul à payer 1 000 EUR à la juge M.

47. Dans sa motivation, la cour d'appel estima tout d'abord qu'une affirmation selon laquelle un magistrat instructeur a, dans le traitement d'un dossier, un « comportement parfaitement contraire aux principes d'impartialité et de loyauté », équivaut à lui reprocher un comportement contraire à l'éthique professionnelle et à son serment de magistrat, ce qui constitue une accusation particulièrement diffamatoire revenant à lui imputer une absence de probité, un manquement délibéré à ses devoirs dans l'exercice de ses fonctions et à remettre en cause sa capacité à les exercer. Elle jugea ensuite que les propos du requérant relatifs au retard de transmission de la cassette vidéo imputaient aux juges une négligence fautive dans le suivi du

dossier, jetant un discrédit sur le sérieux professionnel de ces magistrats et sous-entendant qu'ils avaient délibérément gardé par devers eux la cassette après leur dessaisissement, au moins dans un but d'obstruction, dès lors que seule l'intervention des avocats auprès du juge P., suivie de celle de ce magistrat auprès de la juge M. auraient permis d'obtenir cette pièce le 1er août 2000. Pour la cour d'appel, de telles assertions, imputant à ces magistrats un manquement délibéré aux devoirs de leur charge et une absence de probité dans l'accomplissement de leurs fonctions, constituaient l'imputation de faits portant atteinte à l'honneur et à la considération de ces derniers, et ce d'autant plus que le requérant, évoquant la carte manuscrite adressée par le procureur de Djibouti à la juge M., confirmait ce climat de suspicion et le comportement blâmable de ces magistrats en évoquant l'étendue de la « connivence » entre eux. Sur ce point, elle considéra que le terme de « connivence » portait, à lui seul, gravement atteinte à l'honneur et à la considération de la juge M. et du procureur de Djibouti. Selon la cour d'appel, cela ne faisait que conforter le caractère diffamatoire des propos précédents, et ce d'autant plus que l'article ajoutait que les avocats avaient demandé au garde des Sceaux une enquête de l'Inspection générale des services judiciaires.

48. La cour d'appel jugea dès lors que les propos étaient diffamatoires et que la preuve de la vérité des faits diffamatoires n'était pas rapportée. Elle estima sur ce point que rien n'établissait que le juge L.L. avait été en possession ou même informé de la réception de la cassette vidéo et qu'il fût concerné par le retard de transmission ; que l'arrêt de la chambre d'accusation du 21 juin 2000 dessaisissant les deux juges du dossier exprimait uniquement une désapprobation du refus des juges de procéder à une reconstitution en présence des parties civiles ; qu'il n'était pas établi que la cassette vidéo serait parvenue à la juge M. avant son dessaisissement ou qu'elle aurait été en sa possession lors de la transmission du dossier d'instruction au juge P. ; que rien ne démontrait que la juge M. aurait été animée d'une volonté d'obstruction et qu'elle aurait eu un comportement déloyal au sujet de cette cassette ; que la carte manuscrite adressée à la juge M. par le procureur de Djibouti n'établissait nullement une connivence entre eux, le tutoiement et les embrassades entre des magistrats n'étant pas forcément révélateurs d'une intimité complice, leur éventuelle convergence d'opinion ne prouvant pas une complicité et une connivence des juges français pour fausser la procédure d'instruction, quel qu'ait été le comportement du procureur de Djibouti dans cette affaire ; que la lettre de l'avocat du témoin A. adressée au procureur du Roi en Belgique pour dénoncer les pressions exercées par la juge M. sur son client n'était pas suffisamment probante à elle seule pour démontrer que la juge M. aurait pris parti pour la thèse du suicide et montrer une volonté de faire obstacle à la vérité, et ce même si

la juge M. reconnaissait avoir dit aux policiers belges que A. était un faux témoin ; enfin, que les nombreux articles de presse n'avaient pas valeur de preuve du comportement et de l'attitude des magistrats dans le déroulement de la procédure.

49. S'agissant de la bonne foi du requérant, la cour d'appel de renvoi nota qu'il invoquait les devoirs inhérents à sa profession, les résultats obtenus dans le dossier depuis le dessaisissement des juges M. et L.L. dont attestait le communiqué de presse du procureur de la République de Paris du 19 juin 2007, ainsi que, d'une part, l'arrêt de la cour d'appel de Douai également du 19 juin 2007 confirmant l'ordonnance de non-lieu à la suite de la plainte des deux magistrats pour dénonciation calomnieuse et, d'autre part, la condamnation du procureur de Djibouti pour subornation de témoin par le tribunal correctionnel de Versailles le 27 mars 2008.

50. Elle releva qu'à la date des faits poursuivis, le 7 septembre 2000, le requérant avait obtenu le dessaisissement des juges M. et L.L. et que le juge P. était en possession de la cassette vidéo depuis le 1er août 2000. Elle considéra que le requérant avait mis en cause professionnellement et moralement les deux juges de façon très virulente, mettant gravement en cause leur impartialité et leur honnêteté intellectuelle, par des propos dépassant largement le droit de critique et n'ayant plus le moindre intérêt procédural. La cour d'appel estima en outre : que le non-lieu prononcé en faveur du requérant dans la procédure diligentée contre lui à la suite de la plainte des deux juges pour dénonciation calomnieuse n'était nullement incompatible avec sa mauvaise foi ; que le caractère excessif des propos du requérant était révélateur de l'intensité du conflit l'ayant opposé aux deux magistrats, en particulier la juge M., et que ces propos s'analysaient comme un règlement de comptes *a posteriori*, ce dont témoignait la publication de l'article le 7 septembre 2000 alors que la chambre d'accusation de Paris avait été saisie le 5 septembre du dossier de la Scientologie dans lequel la juge M. était soupçonnée d'être à l'origine d'une disparition de pièces ; que cela traduisait de la part du requérant une animosité personnelle et une volonté de discréditer ces magistrats, en particulier la juge M. avec qui il était en conflit dans plusieurs procédures, ce qui excluait de sa part toute bonne foi.

51. Le requérant, ses deux coprévenus et la juge M. se pourvurent en cassation contre cet arrêt. Dans son mémoire, le requérant souleva un premier moyen de cassation fondé sur l'article 10 de la Convention et l'immunité de l'article 41 de la loi sur la presse, soutenant qu'il vise à garantir les droits de la défense et protège l'avocat au regard de tout propos prononcé ou tout écrit produit dans le cadre de tout type de procédure juridictionnelle, notamment disciplinaire. Dans son second moyen, il soutint, au regard de l'article 10 de la Convention : que les propos incriminés traitaient d'une

affaire médiatisée de longue date, portant sur les conditions suspectes dans lesquelles un magistrat français en poste à Djibouti y avait été retrouvé « suicidé » et sur la façon discutable dont avait été dirigée l'instruction, avec un présupposé manifeste en défaveur de la thèse de l'assassinat soutenue par la partie civile ; qu'eu égard à l'importance du sujet d'intérêt général dans lequel ces propos s'inséraient, la cour d'appel ne pouvait lui reprocher d'avoir dépassé les limites ; que la cour d'appel n'avait pas examiné sa bonne foi dans l'expression des propos rapportés dans l'article du *Monde*, mais par rapport au contenu de la lettre adressée à la garde des Sceaux et sur laquelle elle n'avait pas à porter d'appréciation concernant les faits reprochés aux juges ; que sauf à interdire à tout avocat de s'exprimer sur une enquête en cours, une animosité personnelle ne pouvait être déduite de la seule circonstance qu'il avait eu un différend avec l'un des magistrats dans une autre procédure ; que la bonne foi n'est pas subordonnée à l'actualité ou au fait que le problème avait été « réparé » par le dessaisissement des juges, l'absence de nécessité des propos n'étant pas exclusive de bonne foi ; enfin, que les opinions exprimées sur le fonctionnement d'une institution fondamentale de l'État, comme le déroulement d'une procédure pénale, ne sont pas subordonnées à la prudence et limitées aux critiques théoriques et abstraites, mais peuvent être personnelles lorsqu'elles reposent sur une base factuelle suffisante.

52. Les pourvois devaient initialement être examinés par une formation restreinte de la première section de la chambre criminelle de la Cour de cassation, ce dont attestent le rapport du conseiller rapporteur daté du 21 juillet 2009, le bureau virtuel du dossier à la Cour de cassation, ainsi que les trois avis à partie délivrés respectivement les 15 septembre, 14 et 27 octobre 2009, les deux derniers de ces documents ayant été envoyés après la date de l'audience. Dès lors, J.M. (paragraphe 27 ci-dessus), devenu conseiller à la Cour de cassation, affecté à la chambre criminelle, et qui n'était ni président de la chambre, ni doyen, ni rapporteur, n'était pas supposé siéger dans cette affaire.

53. Par un arrêt du 10 novembre 2009, la Cour de cassation, dans une formation finalement composée de dix conseillers, parmi lesquels J.M., rejeta les pourvois. S'agissant des moyens soulevés par le requérant, elle jugea que l'exception d'immunité juridictionnelle avait été valablement écartée, le fait de rendre publique la démarche entreprise auprès de la garde des Sceaux ne constituant pas un acte de saisine du Conseil supérieur de la magistrature et ne se rattachant pas à un débat mettant en œuvre l'exercice des droits de la défense devant une juridiction. Concernant les différents arguments développés dans le cadre du second moyen soulevé par le requérant, elle estima que la cour d'appel avait justifié sa décision, précisant :

« que si toute personne a droit à la liberté d'expression et si le public a un intérêt légitime à recevoir des informations relatives aux procédures en matière pénale ainsi qu'au fonctionnement de la justice, l'exercice de ces libertés comporte des devoirs et responsabilités et peut être soumis, comme dans le cas d'espèce où les limites admissibles de la liberté d'expression dans la critique de l'action des magistrats ont été dépassées, à des restrictions ou sanctions prévues par la loi qui constituent des mesures nécessaires, dans une société démocratique, à la protection de la réputation des droits d'autrui ».

II. LE DROIT INTERNE ET INTERNATIONAL PERTINENT

A. Le droit interne applicable en matière de diffamation

54. Les dispositions pertinentes de la loi du 29 juillet 1881 sur la liberté de la presse se lisent comme suit :

Article 23

« Seront punis comme complices d'une action qualifiée crime ou délit ceux qui, soit par des discours, cris ou menaces proférés dans des lieux ou réunions publics, soit par des écrits, imprimés, dessins, gravures, peintures, emblèmes, images ou tout autre support de l'écrit, de la parole ou de l'image vendus ou distribués, mis en vente ou exposés dans des lieux ou réunions publics, soit par des placards ou des affiches exposés au regard du public, soit par tout moyen de communication au public par voie électronique, auront directement provoqué l'auteur ou les auteurs à commettre ladite action, si la provocation a été suivie d'effet.

Cette disposition sera également applicable lorsque la provocation n'aura été suivie que d'une tentative de crime prévue par l'article 2 du code pénal. »

Article 29

« Toute allégation ou imputation d'un fait qui porte atteinte à l'honneur ou à la considération de la personne ou du corps auquel le fait est imputé est une diffamation. La publication directe ou par voie de reproduction de cette allégation ou de cette imputation est punissable, même si elle est faite sous forme dubitative ou si elle vise une personne ou un corps non expressément nommés, mais dont l'identification est rendue possible par les termes des discours, cris, menaces, écrits ou imprimés, placards ou affiches incriminés.

Toute expression outrageante, termes de mépris ou invective qui ne renferme l'imputation d'aucun fait est une injure. »

Article 31

« Sera punie de la même peine, la diffamation commise par les mêmes moyens, à raison de leurs fonctions ou de leur qualité, envers un ou plusieurs membres du ministère, un ou plusieurs membres de l'une ou de l'autre Chambre, un fonctionnaire public (...) »

Article 41

« (...) Ne donneront lieu à aucune action en diffamation, injure ou outrage, ni le compte rendu fidèle fait de bonne foi des débats judiciaires, ni les discours prononcés ou les écrits produits devant les tribunaux.

Pourront néanmoins les juges, saisis de la cause et statuant sur le fond, prononcer la suppression des discours injurieux, outrageants ou diffamatoires, et condamner qui il appartiendra à des dommages-intérêts.

Pourront toutefois les faits diffamatoires étrangers à la cause donner ouverture, soit à l'action publique, soit à l'action civile des parties, lorsque ces actions leur auront été réservées par les tribunaux, et, dans tous les cas, à l'action civile des tiers. »

Article 55

« Quand le prévenu voudra être admis à prouver la vérité des faits diffamatoires, conformément aux dispositions de l'article 35 de la présente loi, il devra, dans le délai de dix jours après la signification de la citation, faire signifier au ministère public ou au plaignant au domicile par lui élu, suivant qu'il est assigné à la requête de l'un ou de l'autre :

1° Les faits articulés et qualifiés dans la citation, desquels il entend prouver la vérité ;

2° La copie des pièces ;

3° Les noms, professions et demeures des témoins par lesquels il entend faire la preuve.

Cette signification contiendra élection de domicile près le tribunal correctionnel, le tout à peine d'être déchu du droit de faire la preuve.»

B. Code de procédure pénale

55. Les dispositions de l'article 11 du code de procédure pénale disposent :

Article 11

« Sauf dans le cas où la loi en dispose autrement et sans préjudice des droits de la défense, la procédure au cours de l'enquête et de l'instruction est secrète.

Toute personne qui concourt à cette procédure est tenue au secret professionnel dans les conditions et sous les peines des articles 226-13 et 226-14 du code pénal.

Toutefois, afin d'éviter la propagation d'informations parcellaires ou inexactes ou pour mettre fin à un trouble à l'ordre public, le procureur de la République peut, d'office et à la demande de la juridiction d'instruction ou des parties, rendre publics des éléments objectifs tirés de la procédure ne comportant aucune appréciation sur le bien-fondé des charges retenues contre les personnes mises en cause. »

C. Sur l'exercice de la profession d'avocat

56. La Recommandation Rec(2000)21 du Comité des Ministres du Conseil de l'Europe aux États membres sur la liberté d'exercice de la profession d'avocat (adoptée le 25 octobre 2000) indique ce qui suit :

> « (...) Désirant promouvoir la liberté d'exercice de la profession d'avocat afin de renforcer l'État de droit, auquel participe l'avocat, notamment dans le rôle de défense des libertés individuelles ;
>
> Conscient de la nécessité d'un système judiciaire équitable garantissant l'indépendance des avocats dans l'exercice de leur profession sans restriction injustifiée et sans être l'objet d'influences, d'incitations, de pressions, de menaces ou d'interventions indues, directes ou indirectes, de la part de qui que ce soit ou pour quelque raison que ce soit ;
>
> (...)
>
> Principe I – Principes généraux concernant la liberté d'exercice de la profession d'avocat
>
> 1. Toutes les mesures nécessaires devraient être prises pour respecter, protéger et promouvoir la liberté d'exercice de la profession d'avocat sans discrimination ni intervention injustifiée des autorités ou du public, notamment à la lumière des dispositions pertinentes de la Convention européenne des droits de l'homme.
>
> (...) »

57. Les « Principes de base relatifs au rôle du barreau » (adoptés par le huitième Congrès des Nations unies pour la prévention du crime et le traitement des délinquants qui s'est tenu à La Havane, Cuba, du 27 août au 7 septembre 1990) prévoient notamment que :

> « 16. Les pouvoirs publics veillent à ce que les avocats a) puissent s'acquitter de toutes leurs fonctions professionnelles sans entraves, intimidation, harcèlement ni ingérence indue ; b) puissent voyager et consulter leurs clients librement, dans le pays comme à l'étranger ; et c) ne fassent pas l'objet, ni ne soient menacés de poursuites ou de sanctions économiques ou autres pour toutes mesures prises conformément à leurs obligations et normes professionnelles reconnues et à leur déontologie.
>
> (...)
>
> 22. Les pouvoirs publics doivent veiller à ce que toutes les communications et les consultations entre les avocats et leurs clients, dans le cadre de leurs relations professionnelles, restent confidentielles. »

58. Le Conseil des barreaux européens (CCBE) a adopté deux textes fondateurs : le Code de déontologie des avocats européens, qui remonte au 28 octobre 1988 et qui a été modifié à plusieurs reprises, ainsi que la Charte des principes essentiels de l'avocat européen, adoptée le 24 novembre 2006. Cette dernière, qui n'est pas un code de déontologie, énonce dix principes

essentiels qui sont l'expression de la base commune à toutes les règles nationales et internationales qui régissent la profession d'avocat, à savoir :

« a) l'indépendance et la liberté d'assurer la défense de son client ;

b) le respect du secret professionnel et de la confidentialité des affaires dont il a la charge ;

c) la prévention des conflits d'intérêts que ce soit entre plusieurs clients ou entre le client et lui-même ;

d) la dignité, l'honneur et la probité ;

e) la loyauté à l'égard de son client ;

f) la délicatesse en matière d'honoraires ;

g) la compétence professionnelle ;

h) le respect de la confraternité ;

i) le respect de l'État de droit et la contribution à une bonne administration de la justice ;

j) l'autorégulation de sa profession. »

59. Il existe enfin un guide pratique relatif aux principes internationaux sur l'indépendance et la responsabilité des juges, des avocats et des procureurs, élaboré et édité par la Commission internationale des juristes (à partir de 2004, avec une dernière version du 22 juillet 2009), qui contient de nombreux documents internationaux.

D. Sur les relations entre les juges et les avocats

60. Les passages pertinents de l'avis n° (2013)16 du Conseil consultatif de juges européens (CCJE) sur les relations entre les juges et les avocats, adopté les 13-15 novembre 2013, se lisent comme suit :

« 6. Dans le cadre de sa mission et de ses obligations professionnelles qui sont de défendre les droits et les intérêts de son client, l'avocat doit aussi jouer un rôle essentiel dans l'administration de la justice. Dans le commentaire de la Charte des principes essentiels de l'avocat européen du CCBE [Conseil des barreaux européens], le rôle de l'avocat est défini au n° 6 comme suit : « un avocat, qu'il intervienne pour un citoyen, une entreprise ou l'État, a pour mission de conseiller et de représenter fidèlement le client, d'agir comme un professionnel respecté par les tiers, et un acteur indispensable à une bonne administration de la justice. En intégrant tous ces aspects, l'avocat, qui sert les intérêts de son client et veille au respect des droits de ce dernier, assure également une fonction sociale, qui est de prévenir et d'éviter les conflits, de veiller à les résoudre conformément au droit, pour favoriser l'évolution du droit et défendre la liberté, la justice et l'État de droit ». Comme l'indique le paragraphe 1.1 du Code de déontologie des avocats européens du CCBE, le respect de la mission de l'avocat est une condition essentielle à l'État de droit et à une société démocratique. Les Principes de base

des Nations unies relatifs au rôle du barreau précisent que la protection adéquate des libertés fondamentales et des droits de l'homme, qu'ils soient économiques, sociaux ou culturels ou civils et politiques, dont toute personne doit pouvoir jouir, exigent que chacun ait effectivement accès à des services juridiques fournis par des avocats indépendants. Le Principe 12 rappelle que les avocats, en tant qu'agents essentiels de l'administration de la justice, préservent à tout moment l'honneur et la dignité de leur profession.

7. Le juge et l'avocat doivent être indépendants dans l'exercice de leurs fonctions et doivent aussi être et apparaître indépendants l'un par rapport à l'autre. Cette indépendance est affirmée par le statut et les principes éthiques de chacune des professions. Le CCJE estime que cette indépendance est essentielle au bon fonctionnement de la justice.

Le CCJE se réfère à la Recommandation CM/Rec (2010)12, paragraphe 7, qui déclare que l'indépendance des juges devrait être garantie au niveau juridique le plus élevé possible. L'indépendance des avocats devrait être garantie de la même manière.

(...)

9. Deux domaines de relations entre juges et avocats peuvent être distingués :

– d'une part, les relations entre les juges et les avocats qui résultent des principes et des règles de procédure dans chaque État et qui ont une incidence directe sur l'efficacité et la qualité des procédures judiciaires. Dans son avis n° 11 (2008) sur la qualité des décisions de justice, le CCJE a déjà précisé dans ses conclusions et recommandations que le niveau de qualité des décisions de justice résulte clairement des interactions entre les nombreux acteurs du système judiciaire ;

– d'autre part, les relations qui résultent des comportements déontologiques des juges et des avocats, et qui imposent un respect mutuel des rôles de chacun et un dialogue constructif entre les juges et les avocats.

(...)

19. Les juges et les avocats disposent chacun de leurs propres principes déontologiques. Cependant, plusieurs principes éthiques sont communs aux juges et avocats, tels que le respect de la loi, le secret professionnel, l'intégrité et la dignité, le respect pour les justiciables, la compétence, l'équité et le respect mutuel.

20. Les principes éthiques des juges et des avocats devraient aussi concerner les relations entre les deux professions.

(...)

Concernant les avocats, les paragraphes 4.1, 4.2, 4.3 et 4.4 du Code de déontologie des avocats européens du CCBE expriment les principes suivants : l'avocat qui comparaît devant la cour ou le tribunal doit observer les règles déontologiques applicables. L'avocat doit en toutes circonstances observer le caractère contradictoire des débats. L'avocat défend son client avec conscience et sans crainte, sans tenir compte de ses propres intérêts, ni de quelque conséquence que ce soit pour lui-même ou toute autre personne, tout en faisant preuve de respect et de loyauté envers l'office du juge. À

aucun moment, l'avocat ne doit donner sciemment au juge une information fausse ou de nature à l'induire en erreur.

21. Le CCJE considère que les relations entre les juges et les avocats doivent être fondées sur la compréhension mutuelle du rôle de chacun, sur le respect mutuel et l'indépendance de l'un vis-à-vis de l'autre.

Pour cela, le CCJE est d'avis qu'il faut développer le dialogue et les échanges entre juges et avocats à un niveau institutionnel national et européen sur la question des relations mutuelles. Tant les principes éthiques des juges que ceux des avocats devraient être pris en compte. À cet égard, le CCJE encourage l'identification des principes éthiques communs, tels que le devoir d'indépendance, le devoir de maintenir la primauté du droit à tout moment, la coopération pour une conduite équitable et rapide des procédures et la formation professionnelle permanente. Les associations professionnelles et les organes indépendants chargés de l'administration des professions de juge et d'avocat devraient être responsables de ce processus.

(...)

24. Les relations entre les juges et les avocats devraient toujours préserver l'impartialité et l'image d'impartialité du tribunal. Les juges et les avocats devraient en être pleinement conscients. Des règles procédurales et déontologiques adéquates devraient préserver cette impartialité.

25. Les juges et les avocats disposent tous deux de la liberté d'expression conformément à l'article 10 de la Convention.

Les juges sont cependant tenus de sauvegarder le secret des délibérations et leur impartialité, ce qui implique, notamment, qu'ils doivent s'abstenir de faire des commentaires sur les procédures et sur le travail des avocats.

La liberté d'expression des avocats connaît également ses limites afin de maintenir, conformément à l'article 10, paragraphe 2, de la Convention, l'autorité et l'impartialité du pouvoir judiciaire. Le respect de la confraternité et le respect de l'État de droit ainsi que la contribution à une bonne administration de la justice – les principes h) et i) de la Charte des principes essentiels de l'avocat européen du CCBE – requièrent l'abstention de critiques abusives envers des collègues, des juges individuels et des procédures et décisions judiciaires.

(...) »

E. Sur la dépénalisation de la diffamation

61. La Recommandation 1814 (2007) de l'Assemblée parlementaire du Conseil de l'Europe sur la dépénalisation de la diffamation indique notamment :

« 1. L'Assemblée parlementaire, se référant à sa Résolution 1577 (2007) intitulée « Vers une dépénalisation de la diffamation », invite le Comité des Ministres à exhorter tous les États membres à examiner leur législation en vigueur relative à la diffamation et à procéder, si nécessaire, à des amendements afin de la mettre en conformité avec la

jurisprudence de la Cour européenne des droits de l'homme, en vue d'éliminer tout risque d'abus ou de poursuites injustifiées.

2. L'Assemblée prie instamment le Comité des Ministres de charger son comité intergouvernemental compétent, le Comité directeur sur les médias et les nouveaux services de communication (CDMC), d'élaborer, à la suite de ses importants travaux sur la question et à la lumière de la jurisprudence de la Cour, un projet de recommandation à l'attention des États membres définissant des règles précises en matière de diffamation en vue d'éradiquer l'usage abusif des poursuites pénales.

(...) »

62. La réponse du Comité des Ministres, adoptée à la 1029e réunion des Délégués des Ministres (11 juin 2008), est rédigée comme suit :

« 1. Le Comité des Ministres a examiné avec attention la Recommandation 1814 (2007) de l'Assemblée parlementaire intitulée « Vers une dépénalisation de la diffamation ». Il a communiqué la recommandation aux gouvernements des États membres, ainsi qu'au Comité directeur sur les médias et les nouveaux services de communication (CDMC), au Comité européen pour les problèmes criminels (CDPC), au Comité directeur pour les droits de l'homme (CDDH) et au Commissaire aux droits de l'homme du Conseil de l'Europe pour information et commentaires éventuels. Les commentaires reçus figurent en annexe.

2. Par décision du 24 novembre 2004, le Comité des Ministres a, entre autres, chargé le Comité directeur sur les moyens de communication de masse (CDMM), qui est ensuite devenu le Comité directeur sur les médias et les nouveaux services de communication (CDMC), d'examiner « l'adaptation des lois relatives à la diffamation avec la jurisprudence pertinente de la Cour européenne des droits de l'homme, y compris la question de la dépénalisation de la diffamation ». Il a pris note de la réponse reçue en septembre 2006 et du fait que le CDMC juge souhaitable que les États membres adoptent une démarche volontariste sur la question de la diffamation, en examinant leur législation interne, même en l'absence d'arrêt de la Cour européenne des droits de l'homme les concernant directement, à la lumière des normes élaborées par la Cour et, s'il y a lieu, en mettant leur droit pénal, administratif et civil en conformité avec ces normes. Dans le document susmentionné, le CDMC estime que des mesures devraient également être prises pour rendre la mise en œuvre pratique des lois sur la diffamation pleinement conforme à ces normes.

3. Le Comité des Ministres partage cette opinion, ainsi que l'appel de l'Assemblée parlementaire aux États membres à prendre de telles mesures, en vue d'éliminer tout risque d'abus ou de poursuites injustifiées.

4. Ayant à l'esprit le rôle de la Cour européenne des droits de l'homme dans le développement de principes généraux sur la diffamation au moyen de sa jurisprudence et sa compétence pour statuer sur les allégations de violations de l'article 10 dans des affaires spécifiques, le Comité des Ministres ne juge pas souhaitable, pour le moment, d'élaborer des règles détaillées concernant la diffamation à l'intention des États membres.

5. Enfin, le Comité des Ministres estime qu'il n'est pas nécessaire à ce jour de réviser sa Recommandation n° R (97) 20 sur le discours de haine ni d'élaborer des lignes directrices sur cette question. En revanche, les États membres pourraient s'employer davantage à améliorer la visibilité de la recommandation et l'utilisation qui en est faite. »

F. L'arrêt de la Cour internationale de justice (CIJ) du 4 juin 2008 dans l'affaire Djibouti c. France

63. Dans son arrêt du 4 juin 2008 sur l'« affaire relative à certaines questions concernant l'entraide judiciaire en matière pénale (Djibouti c. France) », la CIJ relève qu'il ne lui appartient pas de se prononcer sur les faits et l'établissement des responsabilités dans l'affaire Borrel, et en particulier sur les circonstances du décès de Bernard Borrel, mais que ladite affaire est à l'origine du différend entre ces deux États, du fait de l'ouverture de plusieurs procédures judiciaires, en France et à Djibouti, et de la mise en œuvre de mécanismes conventionnels bilatéraux d'entraide judiciaire entre les parties. La CIJ constate en particulier que si l'objet de la requête de Djibouti vise uniquement la transmission par la France du dossier de l'affaire Borrel, la requête, prise dans son ensemble, a un objet plus large qui inclut la convocation adressée au président de Djibouti et celles adressées à deux hauts fonctionnaires djiboutiens, ainsi que des mandats d'arrêt délivrés à l'encontre de ces deux derniers ultérieurement.

64. La CIJ constate notamment que les motifs de la décision du juge d'instruction français de ne pas faire droit à la demande d'entraide judiciaire étaient justifiés par le fait que la transmission du dossier d'instruction dans l'affaire Borrel était « contraire aux intérêts essentiels de la France », dans la mesure où celui-ci contenait des documents « secret-défense » qui avaient été déclassifiés, ainsi que des informations et des témoignages sur une autre affaire en cours. Elle estime que ces motifs entrent dans les prévisions de l'article 2 c) de la convention d'entraide, lequel autorise l'État requis à refuser d'exécuter une commission rogatoire s'il estime que cette exécution est de nature à porter atteinte à la souveraineté, la sécurité, l'ordre public, ou d'autres de ses intérêts essentiels. La CIJ décide également de ne pas ordonner la communication du dossier Borrel expurgé de certaines pages, comme Djibouti l'avait demandé à titre subsidiaire. Elle juge cependant que la France a manqué à son obligation de motivation dans sa lettre de refus de donner suite à la demande d'entraide, tout en écartant les autres demandes de Djibouti relatives aux convocations adressées au président et aux deux hauts fonctionnaires de Djibouti.

EN DROIT

I. SUR LA VIOLATION ALLÉGUÉE DE L'ARTICLE 6 § 1 DE LA CONVENTION

65. Le requérant estime que, devant la Cour de cassation, sa cause n'a pas été examinée équitablement par un tribunal impartial, compte tenu de la présence dans la formation de jugement d'un conseiller qui s'était préalablement et publiquement exprimé en faveur de l'une des parties civiles, la juge M. Il invoque l'article 6 § 1 de la Convention, dont les dispositions pertinentes sont ainsi libellées :

> « Toute personne a droit à ce que sa cause soit entendue équitablement (...) par un tribunal indépendant et impartial, établi par la loi, qui décidera (...) du bien-fondé de toute accusation en matière pénale dirigée contre elle. »

A. L'arrêt de la chambre

66. Après avoir relevé que le requérant n'avait pas été mis en mesure de présenter une demande de récusation, dès lors qu'il n'avait pas été informé avant l'audience du changement de la formation appelée à examiner son pourvoi et que la procédure était essentiellement écrite, la chambre a examiné le grief sous l'angle de l'impartialité objective. Elle a constaté que le juge J.M., l'un des conseillers ayant siégé dans la formation de la chambre criminelle de la Cour de cassation qui s'est prononcée sur le pourvoi de la juge M. et du requérant dans l'affaire les opposant, avait neuf ans auparavant manifesté publiquement son soutien et sa confiance à la juge M. à propos d'une autre affaire, dans laquelle celle-ci était juge d'instruction et le requérant conseil de parties civiles. Au vu des faits, il était clair que le requérant et la juge M. étaient en opposition tant dans le dossier pour lequel cette dernière a reçu le soutien du juge J.M. que dans celui où le juge J.M. a siégé en qualité de conseiller à la Cour de cassation, ce dernier ayant en outre exprimé son soutien dans un cadre officiel et assez général, l'assemblée générale des magistrats du siège du tribunal de grande instance de Paris. La chambre a conclu à la violation de l'article 6 § 1, considérant que l'impartialité de la Cour de cassation pouvait susciter des doutes sérieux et que les craintes du requérant à cet égard pouvaient passer pour objectivement justifiées.

B. Les thèses des parties devant la Grande Chambre

1. Le requérant

67. Le requérant reconnaît qu'il n'est pas établi que le conseiller J.M. ait fait montre de préventions personnelles envers lui, mais il soutient qu'indépendamment de sa conduite personnelle, sa présence au sein de la formation de jugement créait une situation qui rendait ses craintes objectivement justifiées et légitimes. Selon lui, le fait que J.M. ait siégé au sein de la formation de la chambre criminelle de la Cour de cassation suffit à caractériser une violation de l'article 6 § 1 de la Convention. Le juge J.M. avait en effet, par le passé, apporté son soutien à la juge M., alors chargée de l'instruction dans l'affaire dite de la Scientologie, en réaction à des mises en cause professionnelles la visant et qui émanaient à la fois des parties civiles, notamment représentées par le requérant, et du ministère public. Le requérant souligne que la juge M. avait finalement été dessaisie à sa demande et qu'il avait obtenu la condamnation de l'État français pour dysfonctionnement du service public de la justice le 5 janvier 2000.

68. Il estime qu'il n'avait aucun moyen de récuser le conseiller J.M., dès lors qu'il ne savait pas et ne pouvait raisonnablement savoir que celui-ci allait siéger dans le cadre de son affaire : le rapport du conseiller rapporteur, le bureau virtuel de son dossier et les avis à avocat donnaient tous la même information, à savoir que la chambre criminelle devait siéger en formation restreinte. Cette dernière était composée du président de la chambre, du doyen et du conseiller rapporteur : le juge J.M. n'ayant aucune de ces qualités, sa participation était exclue.

69. Sur le fond, le requérant ne prétend pas que le juge J.M. aurait témoigné de préventions personnelles à son égard et il ne met pas en cause son droit à la liberté d'expression. Il se plaint de sa seule présence au sein de la formation de jugement, qui rendait selon lui objectivement justifiées et légitimes ses craintes d'un manque d'impartialité. Compte tenu de la prise de position du juge J.M. en faveur de la juge M. à propos d'une autre affaire ayant eu une ampleur médiatique comparable et impliquant les mêmes protagonistes, un doute sérieux quant à l'impartialité de la chambre criminelle existait et ses craintes à cet égard pouvaient passer pour objectivement justifiées.

2. Le Gouvernement

70. Le Gouvernement constate que l'impartialité subjective du conseiller J.M. n'est pas en cause et qu'il convient dès lors de déterminer si les circonstances permettent de retenir l'existence de doutes sérieux sur l'impartialité objective de la Cour de cassation. Revenant sur la portée des déclarations

faites en juillet 2000 par le juge J.M., alors en poste au tribunal de grande instance de Paris, il souligne que la déclaration, faite des années avant l'audience de la chambre criminelle, concernait une autre affaire que la présente espèce et que les termes utilisés traduisaient une position personnelle qui ne concernait que les conditions d'information de l'engagement de poursuites disciplinaires à l'encontre d'une collègue du tribunal. Le Gouvernement en déduit que ces propos, à la fois limités dans leur portée et très anciens, sont insuffisants pour considérer que le défaut d'impartialité objective du juge J.M. soit démontré dans sa qualité de juge à la Cour de cassation.

71. Le Gouvernement indique en outre que le pourvoi en cassation est une voie de recours extraordinaire et que le contrôle de la Cour de cassation est limité au respect du droit. Par ailleurs, la composition de la chambre criminelle était élargie, avec dix juges qui se sont prononcés.

72. Le gouvernement défendeur estime par conséquent que l'article 6 § 1 de la Convention n'a pas été violé.

C. L'appréciation de la Cour

1. Principes généraux

73. La Cour rappelle que l'impartialité se définit d'ordinaire par l'absence de préjugé ou de parti pris et peut s'apprécier de diverses manières. Selon la jurisprudence constante de la Cour, aux fins de l'article 6 § 1, l'impartialité doit s'apprécier selon une démarche subjective, en tenant compte de la conviction personnelle et du comportement du juge, c'est-à-dire en recherchant si celui-ci a fait preuve de parti pris ou préjugé personnel dans le cas d'espèce, ainsi que selon une démarche objective consistant à déterminer si le tribunal offrait, notamment à travers sa composition, des garanties suffisantes pour exclure tout doute légitime quant à son impartialité (voir, par exemple, *Kyprianou c. Chypre* [GC], n° 73797/01, § 118, CEDH 2005-XIII, et *Micallef c. Malte* [GC], n° 17056/06, § 93, CEDH 2009).

74. Pour ce qui est de la démarche subjective, le principe selon lequel un tribunal doit être présumé exempt de préjugé ou de partialité est depuis longtemps établi dans la jurisprudence de la Cour (*Kyprianou*, précité, § 119, et *Micallef*, précité, § 94). L'impartialité personnelle d'un magistrat se présume jusqu'à preuve du contraire (*Hauschildt c. Danemark*, 24 mai 1989, § 47, série A n° 154). Quant au type de preuve exigé, la Cour s'est par exemple efforcée de vérifier si un juge avait fait montre d'hostilité ou de malveillance pour des raisons personnelles (*De Cubber c. Belgique*, 26 octobre 1984, § 25, série A n° 86).

75. Dans la très grande majorité des affaires soulevant des questions relatives à l'impartialité, la Cour a eu recours à la démarche objective

(*Micallef*, précité, § 95). La frontière entre l'impartialité subjective et l'impartialité objective n'est cependant pas hermétique car non seulement la conduite même d'un juge peut, du point de vue d'un observateur extérieur, entraîner des doutes objectivement justifiés quant à son impartialité (démarche objective), mais elle peut également toucher à la question de sa conviction personnelle (démarche subjective) (*Kyprianou*, précité, § 119). Ainsi, dans des cas où il peut être difficile de fournir des preuves permettant de réfuter la présomption d'impartialité subjective du juge, la condition d'impartialité objective fournit une garantie importante supplémentaire (*Pullar c. Royaume-Uni*, 10 juin 1996, § 32, *Recueil des arrêts et décisions* 1996-III).

76. Pour ce qui est de l'appréciation objective, elle consiste à se demander si, indépendamment de la conduite personnelle du juge, certains faits vérifiables autorisent à suspecter l'impartialité de ce dernier. Il en résulte que, pour se prononcer sur l'existence, dans une affaire donnée, d'une raison légitime de redouter d'un juge ou d'une juridiction collégiale un défaut d'impartialité, l'optique de la personne concernée entre en ligne de compte mais ne joue pas un rôle décisif. L'élément déterminant consiste à savoir si l'on peut considérer les appréhensions de l'intéressé comme objectivement justifiées (*Micallef*, précité, § 96).

77. L'appréciation objective porte essentiellement sur les liens hiérarchiques ou autres entre le juge et d'autres acteurs de la procédure (*Micallef*, précité, § 97). Il faut en conséquence décider dans chaque cas d'espèce si la nature et le degré du lien en question sont tels qu'ils dénotent un manque d'impartialité de la part du tribunal (*Pullar*, précité, § 38).

78. En la matière, même les apparences peuvent revêtir de l'importance ou, comme le dit un adage anglais, «*justice must not only be done, it must also be seen to be done*» (il faut non seulement que justice soit faite, mais aussi qu'elle le soit au vu et au su de tous) (*De Cubber*, précité, § 26). Il y va de la confiance que les tribunaux d'une société démocratique se doivent d'inspirer aux justiciables. Tout juge dont on peut légitimement craindre un manque d'impartialité doit donc se déporter (*Castillo Algar c. Espagne*, 28 octobre 1998, § 45, *Recueil* 1998-VIII, et *Micallef*, précité, § 98).

2. Application de ces principes au cas d'espèce

79. En l'espèce, la crainte d'un manque d'impartialité tenait au fait que le conseiller J.M., qui siégeait dans la formation de la Cour de cassation ayant adopté l'arrêt du 10 décembre 2009, s'était exprimé en faveur de la juge M. neuf ans auparavant, dans le cadre des poursuites disciplinaires exercées à l'encontre de celle-ci en raison de son comportement dans l'affaire de la Scientologie. S'exprimant en sa qualité de magistrat et de collègue au sein

du même tribunal, dans le cadre de l'Assemblée générale des magistrats du siège du tribunal de grande instance de Paris, réunie le 4 juillet 2000, dont il avait ensuite voté la motion de soutien à la juge M., il avait alors déclaré : « Il n'est pas interdit aux magistrats de base de dire que nous sommes proches de Madame [M.]. Il n'est pas interdit de dire que Madame [M.] a notre confiance et notre soutien. » (paragraphes 27-28 ci-dessus)

80. La Grande Chambre constate d'emblée que le requérant reconnaît dans ses observations qu'il n'est pas établi que le conseiller J.M. ait fait montre de préventions personnelles envers lui : il soutient juste qu'indépendamment de sa conduite personnelle, la présence de J.M. au sein de la formation de jugement créait une situation qui rendait ses craintes objectivement justifiées et légitimes (paragraphe 67 ci-dessus).

81. Aux yeux de la Cour, il faut dès lors examiner l'affaire sous l'angle du critère d'impartialité objective, et plus particulièrement trancher la question de savoir si les doutes du requérant, suscités par la situation d'espèce, peuvent être considérés comme objectivement justifiés dans les circonstances de la cause.

82. À ce titre, la Cour estime tout d'abord que les termes employés par le juge J.M. en faveur d'une collègue magistrat, la juge M., laquelle était précisément à l'origine des poursuites diligentées contre le requérant dans la procédure en cause, pouvaient susciter chez le prévenu des doutes quant à l'impartialité du « tribunal » ayant jugé sa cause.

83. Certes, dans ses observations, le Gouvernement soutient notamment que les propos de J.M. seraient insuffisants pour caractériser un défaut d'impartialité objective de sa part, compte tenu de l'ancienneté des faits et de ce que les termes utilisés traduisaient une position personnelle qui ne concernait que les conditions dans lesquelles l'information relative à l'engagement de poursuites disciplinaires à l'encontre d'une collègue du tribunal a été diffusée.

84. La Cour considère cependant qu'il ne saurait être fait abstraction du contexte très particulier de l'affaire. En effet, elle rappelle tout d'abord que cette dernière concernait un avocat et une juge intervenant en cette qualité dans le cadre de deux informations relatives à des affaires particulièrement médiatiques, à savoir, d'une part, l'affaire Borrel à l'origine des propos litigieux du requérant et, d'autre part, l'affaire de la Scientologie relative aux propos de J.M. Elle relève ensuite, avec la chambre, que la juge M. instruisait déjà l'affaire Borrel, dont les répercussions médiatiques et politiques étaient importantes, lorsque J.M. lui a publiquement apporté son soutien dans le cadre de l'affaire de la Scientologie (voir également paragraphe 29 ci-dessus). Comme la chambre l'a souligné, J.M. s'était alors exprimé dans

un cadre officiel, l'Assemblée générale des magistrats du siège du tribunal de grande instance de Paris.

85. La Cour observe ensuite que le requérant, avocat dans ces deux affaires de parties civiles qui contestaient le travail de la juge M., a été condamné à la suite de la plainte de cette dernière : partant, le conflit professionnel prenait l'apparence d'un conflit personnel, dès lors que la juge M. avait saisi les juridictions internes d'une demande de réparation d'un préjudice né d'une infraction dont elle accusait le requérant d'être l'auteur.

86. La Cour souligne en outre, sur ce point, que l'arrêt de la cour d'appel de renvoi établit lui-même expressément un lien entre les propos du requérant dans la procédure en cause et le dossier de la Scientologie, pour en déduire un « règlement de comptes *a posteriori* » et une animosité personnelle du requérant à l'égard de la juge M. « avec qui il était en conflit dans plusieurs procédures » (paragraphe 50 ci-dessus).

87. Or c'est précisément cet arrêt de la cour d'appel qui a fait l'objet d'un pourvoi du requérant et qui était soumis à l'examen de la formation de la chambre criminelle de la Cour de cassation dans laquelle a siégé le conseiller J.M. La Cour ne partage pas l'argument du Gouvernement selon lequel cette situation ne soulèverait pas de difficulté, dès lors que le pourvoi en cassation est une voie de recours extraordinaire et que le contrôle de la Cour de cassation est uniquement limité au respect du droit.

88. En effet, la Cour insiste dans sa jurisprudence sur le rôle crucial de l'instance en cassation, qui constitue une phase particulière de la procédure pénale dont l'importance peut se révéler capitale pour l'accusé, comme en l'espèce puisqu'en cas de cassation l'affaire aurait pu faire l'objet d'un nouvel examen en fait et en droit par une autre cour d'appel. Comme elle l'a jugé à maintes reprises, l'article 6 § 1 de la Convention n'astreint pas les États contractants à créer des cours d'appel ou de cassation, mais un État qui se dote de juridictions de cette nature a l'obligation de veiller à ce que les justiciables jouissent auprès d'elles des garanties fondamentales de l'article 6 (voir, notamment, *Delcourt c. Belgique*, 17 janvier 1970, § 25, série A n° 11, *Omar c. France*, 29 juillet 1998, § 41, *Recueil* 1998-V, *Guérin c. France*, 29 juillet 1998, § 44, *Recueil* 1998-V, et *Louis c. France*, n° 44301/02, § 27, 14 novembre 2006), ce qui concerne indéniablement l'exigence d'impartialité de la juridiction.

89. Enfin, la Cour estime que l'argument du Gouvernement selon lequel J.M. siégeait au sein d'une composition élargie à dix juges n'est pas déterminant au regard de la question de l'impartialité objective sous l'angle de l'article 6 § 1 de la Convention. Compte tenu du secret des délibérations, il est impossible de connaître l'influence réelle de J.M. au cours de celles-ci. Ainsi, dans le contexte qui vient d'être rappelé (paragraphes 84-86 ci-des-

sus), l'impartialité de la juridiction de jugement pouvait susciter des doutes sérieux.

90. De plus, le requérant n'avait pas été informé du fait que le conseiller J.M. siégeait et il n'avait aucune raison de penser qu'il le ferait. La Cour note en effet qu'il lui avait au contraire été indiqué que l'affaire serait examinée par une formation restreinte de la chambre criminelle de la Cour de cassation, ce que confirment le rapport du conseiller rapporteur, le bureau virtuel du dossier à la Cour de cassation et les trois avis à partie, dont ceux délivrés après la date de l'audience (paragraphe 52 ci-dessus). Le requérant n'a donc pas pu contester la présence de J.M. ni soulever la question de l'impartialité à ce titre.

91. Compte tenu de ce qui précède, la Cour estime qu'en l'espèce les craintes du requérant pouvaient passer pour objectivement justifiées.

92. La Cour en conclut qu'il y a eu violation de l'article 6 § 1 de la Convention.

II. SUR LA VIOLATION ALLÉGUÉE DE L'ARTICLE 10 DE LA CONVENTION

93. Le requérant allègue que sa condamnation pénale a entraîné une violation de son droit à la liberté d'expression tel que prévu par l'article 10 de la Convention, lequel se lit comme suit :

> « 1. Toute personne a droit à la liberté d'expression. Ce droit comprend la liberté d'opinion et la liberté de recevoir ou de communiquer des informations ou des idées sans qu'il puisse y avoir ingérence d'autorités publiques et sans considération de frontière. Le présent article n'empêche pas les États de soumettre les entreprises de radiodiffusion, de cinéma ou de télévision à un régime d'autorisations.
>
> 2. L'exercice de ces libertés comportant des devoirs et des responsabilités peut être soumis à certaines formalités, conditions, restrictions ou sanctions prévues par la loi, qui constituent des mesures nécessaires, dans une société démocratique, à la sécurité nationale, à l'intégrité territoriale ou à la sûreté publique, à la défense de l'ordre et à la prévention du crime, à la protection de la santé ou de la morale, à la protection de la réputation ou des droits d'autrui, pour empêcher la divulgation d'informations confidentielles ou pour garantir l'autorité et l'impartialité du pouvoir judiciaire. »

A. L'arrêt de la chambre

94. La chambre a conclu à la non-violation de l'article 10 de la Convention. Elle a estimé que le requérant ne s'était pas limité à des déclarations factuelles concernant la procédure en cours, puisqu'il les avait assorties de jugements de valeur mettant en cause l'impartialité et la loyauté d'une juge.

95. La chambre, après avoir noté que la juge d'instruction en cause n'était plus chargée de la procédure, a estimé, d'une part, que le requérant aurait dû attendre le résultat de sa demande adressée la veille à la garde des Sceaux pour obtenir une enquête de l'Inspection générale des services judiciaires sur les nombreux dysfonctionnements de l'instruction allégués et, d'autre part, qu'il avait déjà exercé avec succès un recours juridique pour tenter de remédier à d'éventuels dysfonctionnements de la justice, la juge visée par ses propos ayant été dessaisie de l'affaire. Compte tenu de ces éléments et de l'emploi de termes qu'elle a estimés particulièrement virulents, la chambre a considéré que le requérant avait dépassé les limites que les avocats doivent respecter dans la critique publique de la justice. Elle a ensuite ajouté que sa conclusion était renforcée par la gravité des accusations lancées dans l'article, la chronologie des événements pouvant par ailleurs laisser penser que les propos du requérant étaient dictés par une animosité personnelle envers la juge. Quant à la « proportionnalité » de la sanction, la chambre a jugé qu'une amende de 4 000 EUR ainsi que la condamnation solidaire à payer 7 500 EUR de dommages-intérêts à chacun des juges ne paraissaient pas démesurées.

B. Les thèses des parties devant la Grande Chambre

1. Le requérant

96. Le requérant considère que la jurisprudence de la Cour garantit à la liberté d'expression des avocats, qui jouent un rôle central dans l'administration de la justice et le maintien de l'État de droit, une intense protection, une restriction ne pouvant qu'être exceptionnelle. Une telle protection s'explique pour deux motifs : d'une part, aucune circonstance particulière ne justifie d'accorder une large marge d'appréciation aux États, les textes européens et internationaux protégeant au contraire les avocats dans l'exercice de leur activité de défense ; d'autre part, leur liberté d'expression renvoie également au droit de leurs clients de bénéficier d'un procès équitable au sens de l'article 6 de la Convention. Il considère en outre que le droit des avocats à intervenir dans la presse, dans l'optique de la défense de leurs clients, est admis explicitement et que la tolérance européenne à l'égard des critiques d'avocats visant des magistrats est en principe conséquente, même lorsqu'elles sont proférées dans l'espace publique et médiatique. Il estime cependant que l'arrêt de la chambre témoigne des graves incertitudes et variations jurisprudentielles qui affectent l'exercice de cette liberté, tout particulièrement hors de l'enceinte du prétoire. Le requérant estime que son affaire permettra à la Grande Chambre de clarifier l'interprétation de

la Convention sur ce point et de consacrer la protection de la parole de l'avocat.

97. Il propose à cet égard de retenir une conception formelle de la liberté d'expression des avocats, indexée sur la défense et l'intérêt de leurs clients, pour offrir dans ce cadre une protection privilégiée au nom de l'article 10 de la Convention. Une telle conception permettrait en outre de dissiper une ambiguïté concernant le statut des avocats : ces derniers participent au bon fonctionnement de la justice, mais ils n'ont pas à adopter une posture conciliante envers le système judiciaire et les magistrats, leur mission première étant de défendre leurs clients. Témoin clé de la procédure, l'avocat devrait bénéficier d'une protection fonctionnelle qui ne se limite pas au prétoire et qui doit être la plus large possible, afin de contribuer efficacement à la défense de son client et à l'information du public. Une telle conception fonctionnelle permettrait également de sanctionner efficacement les éventuels excès et dérapages d'avocats en violation des règles déontologiques et de préserver l'indispensable protection des magistrats contre les attaques indues. Tout détournement de la finalité première de la protection renforcée de la liberté d'expression de l'avocat, à savoir la protection des droits de la défense, pourrait ainsi être sanctionné.

98. En ce cas, le requérant constate que sa condamnation s'analyse en une ingérence dans l'exercice de son droit à la liberté d'expression. Il ne conteste pas le fait qu'elle était prévue par la loi, en l'espèce les articles 23, 29 et 31 de la loi du 29 juillet 1881.

99. S'il ne nie pas davantage qu'elle poursuivait le but légitime de la protection de la réputation ou des droits d'autrui, il souhaite nuancer considérablement l'idée selon laquelle les poursuites engagées contre lui auraient été de nature à « garantir l'autorité et l'impartialité du pouvoir judiciaire » : ses propos litigieux aspiraient au contraire à renforcer cette autorité et non à la saper. Le requérant estime en outre que la chambre a mis sur le même plan, à tort, d'une part la liberté d'expression des avocats et le droit du public d'être informé des questions d'intérêt général et, d'autre part, la dignité de la profession d'avocat et la bonne réputation des magistrats : les premiers sont en effet des droits garantis par l'article 10 de la Convention, tandis que les seconds ne sont que des intérêts susceptibles de justifier une restriction qui doit être exceptionnelle.

100. Quant à l'ingérence et sa nécessité dans une société démocratique, le requérant considère qu'elle ne correspondait à aucun besoin social impérieux et qu'elle n'était pas proportionnée aux buts poursuivis.

101. L'absence de besoin social impérieux ressort tout d'abord du contexte dans lequel les propos ont été tenus, puisqu'il s'agissait d'une affaire particulièrement médiatique, ce que la Cour avait déjà relevé dans

son arrêt *July et SARL Libération c. France* (n° 20893/03, CEDH 2008) et ce que la chambre confirme au paragraphe 76 de son arrêt. L'affaire touchait en outre à une question d'intérêt général justifiant une forte protection de la liberté d'expression, compte tenu de la qualité de la victime, du lieu et des circonstances de son décès, des intérêts diplomatiques en jeu et des soupçons d'implication en tant que commanditaire de l'actuel président de la République de Djibouti. L'affaire a d'ailleurs donné lieu à un communiqué de presse du procureur de la République de Paris, le 19 juin 2007, pour indiquer que la thèse du suicide était écartée au profit de la piste criminelle : or cette déclaration a été faite à la demande du juge d'instruction sur le fondement de l'article 11 alinéa 3 du code de procédure pénale (qui permet de rendre publics des éléments du dossier pour éviter la propagation d'informations parcellaires ou inexactes ou pour mettre fin à un trouble de l'ordre public). L'affaire est suffisamment sensible pour être actuellement instruite par trois juges d'instruction.

102. Le requérant estime que les propos relatifs au dysfonctionnement de la justice, au service de la mission de défense du client, justifiaient des garanties plus intenses encore. Il estime n'avoir pas dépassé les limites de la critique admissible : ses propos visaient uniquement le comportement professionnel des juges M. et L.L., si crucial pour les parties civiles ; ses propos se fondaient sur une base factuelle suffisante, à savoir, d'une part, sur le fait que la cassette litigieuse n'avait pas été transmise au nouveau juge d'instruction avec le reste du dossier et, d'autre part, sur la carte manuscrite rédigée par le procureur de Djibouti à la juge M., ces deux éléments factuels étant avérés ; au demeurant, les poursuites des juges M. et L.L. à l'encontre du requérant et de son confrère M^e^ de Caunes pour dénonciation calomnieuse, à la suite de leur demande adressée à la garde des Sceaux, a fait l'objet d'une ordonnance de non-lieu, confirmée en appel.

103. Quant au reproche selon lequel il aurait fait preuve d'une animosité personnelle, le requérant réfute cette accusation, rappelant que seuls comptent la teneur et l'objet des propos litigieux, et non des intentions que l'on voudrait lui attribuer et qui n'étaient pas les siennes. Le requérant ajoute qu'il n'était pas à l'origine de la mention de la procédure disciplinaire en cours contre la juge M. et il relève qu'en tout état de cause le juge L.L. a également déposé une plainte sans que personne ne songe à caractériser une animosité personnelle à son égard. Le requérant conteste en outre qu'une insulte, injure ou invective puisse être décelée dans ses propos relatés par l'article du journal *Le Monde*. Enfin, il indique s'être borné à défendre publiquement les thèses de sa cliente, en gardant à l'esprit ses intérêts et sans dépasser le cadre de sa mission de défense. Il estime à cet égard que cela ne pouvait aucunement influencer les autorités ministérielles et juridiction-

nelles et il conteste par ailleurs qu'une action juridique d'un avocat pour son client soit exclusive d'une expression par voie de presse pour une affaire suscitant l'intérêt du public ; il estime au contraire qu'un avocat a le droit de définir librement sa stratégie de défense au service du client.

104. Enfin, le requérant estime la sanction infligée particulièrement disproportionnée. Sur le plan pénal, il a été condamné à une amende de 4 000 EUR, supérieure à celles qui ont été infligées à l'auteur de l'article et au directeur du *Monde* (respectivement 3 000 et 1 500 EUR). Sur le plan civil, outre les sommes relatives aux frais exposés par les juges M. et L.L., il a été condamné à payer solidairement avec ses coprévenus 7 500 EUR à chacun de ces deux juges au titre des dommages-intérêts. Enfin, la publication d'un communiqué dans le journal *Le Monde* avec une astreinte de 500 EUR par jour de retard a été ordonnée. Il estime que de telles sanctions sont injustifiées et disproportionnées. Elles ne peuvent manquer de susciter un important et regrettable effet dissuasif envers l'ensemble des avocats.

2. Le Gouvernement

105. Le Gouvernement ne conteste pas que la condamnation du requérant constitue une ingérence dans l'exercice de son droit à la liberté d'expression. Il estime toutefois que cette ingérence était prévue par la loi, puisqu'elle trouvait sa base légale dans les articles 23, 29 et suivants de la loi du 29 juillet 1881, et qu'elle poursuivait un but légitime. Sur ce dernier point, il considère qu'elle tendait à garantir l'autorité et l'impartialité du pouvoir judiciaire, ainsi que la protection de la réputation ou des droits d'autrui, les propos visant des magistrats dans l'exercice de leurs fonctions et portant aussi atteinte à la confiance des citoyens dans la magistrature.

106. S'agissant de la nécessité de l'ingérence dans une société démocratique, le Gouvernement estime que la qualité d'auxiliaire de justice des avocats les différencie fondamentalement des journalistes. Ils ont un rôle central d'intermédiaires entre les justiciables et l'institution judiciaire ; ils contribuent à ce que la justice soit rendue de manière efficace et sereine. L'objectif légitime d'informer l'opinion sur des sujets d'intérêt général, parmi lesquels les questions relatives au fonctionnement de la justice, doit donc être concilié avec les impératifs résultant, d'une part, d'une bonne administration de la justice et, d'autre part, de la dignité de la profession d'avocat et, enfin, de la bonne réputation des magistrats.

107. Le Gouvernement identifie des situations différentes dans la jurisprudence de la Cour en matière de liberté d'expression : la participation de l'avocat à un débat d'intérêt général indépendamment de toute procédure en cours, avec une liberté d'expression particulièrement étendue ; l'expression de l'avocat dans son rôle de défenseur de son client, avec une large

liberté d'expression au cours d'une audience au sein du prétoire. Cette liberté d'expression dans la défense d'un client à l'occasion d'une procédure en cours connaît toutefois certaines limites afin de préserver l'autorité judiciaire, comme lorsque l'avocat tient des propos critiques avant même d'avoir recouru aux voies légales à sa disposition pour remédier aux dysfonctionnements rencontrés. Le Gouvernement estime que les avocats, auxiliaires de justice, ont ainsi l'obligation de recourir aux voies judiciaires pour obtenir la correction d'erreurs alléguées ; au contraire, la dénonciation violente dans la presse, alors qu'il existe des moyens juridiques d'y remédier, n'est pas justifiée par les impératifs d'une défense efficace du client de l'avocat et contribue à jeter le doute sur la probité du système judiciaire.

108. En l'espèce, le Gouvernement considère que le requérant disposait de multiples voies judiciaires, dont il a effectivement fait usage, pour assurer l'efficience de cette défense. Son intervention dans les médias ne pouvait donc avoir pour but que d'informer l'opinion publique sur un sujet d'intérêt général mais, s'agissant d'une affaire en cours, son intervention devait être faite avec mesure.

109. Dans le cadre de l'examen des propos litigieux, il renvoie à la marge d'appréciation reconnue aux États en la matière. L'article litigieux concernait une affaire particulièrement sensible qui a connu dès ses débuts un retentissement médiatique très important. À ses yeux, il ressort de la lecture de l'article du journal *Le Monde* que les propos litigieux visaient, de manière non équivoque, les deux magistrats en des termes attentatoires à leur honneur, le requérant ne s'étant pas borné à une critique générale des institutions mais s'étant exprimé de façon partiale et sans la moindre prudence. Il estime qu'il ne s'agissait pas de déclarations factuelles se rapportant au fonctionnement de la justice, mais de jugements de valeur mettant gravement en cause la probité des juges d'instruction. Le Gouvernement indique que les juridictions internes ont fait une analyse minutieuse de chacun des propos reprochés, pour estimer qu'ils dépassaient les limites de la critique admissible. Il estime en outre que les pièces produites par le requérant étaient dépourvues de valeur probante.

110. Concernant le bénéfice de la bonne foi refusée au requérant, qui invoquait les devoirs inhérents à sa mission de défense des intérêts de sa cliente, le Gouvernement précise que les juridictions françaises apprécient la bonne foi au regard des dispositions de l'article 10 et de quatre critères qui doivent être cumulativement réunis : la légitimité du but poursuivi, l'absence d'animosité personnelle, le caractère sérieux de l'enquête ou des éléments dont dispose l'auteur des propos et, enfin, la prudence dans l'expression. Les juridictions internes ont estimé que ces conditions n'étaient pas réunies en l'espèce, analysant les propos du requérant comme un règlement de compte

avec un magistrat. Il ne lui est pas reproché de s'être exprimé en dehors de l'enceinte judiciaire, mais d'avoir diffusé des propos excessifs alors qu'il lui était loisible de s'exprimer en des termes non infamants pour les services de l'État.

111. Le Gouvernement considère que de telles attaques dirigées contre des magistrats ne contribuaient ni à une exacte appréciation par le public des enjeux, alors que l'institution judiciaire est privée d'un droit de réplique, ni à la sérénité des débats judiciaires dans un contexte où le magistrat instructeur objet des vives critiques avait été déchargé du dossier. Selon lui, il ne s'agissait pas non plus d'une défense zélée par un avocat de son client puisqu'il avait à sa disposition des voies judiciaires de contestation. Le Gouvernement renvoie à la décision d'irrecevabilité de la Cour dans l'affaire *Floquet et Esménard c. France* ((déc.), n^os^ 29064/08 et 29979/08, 10 janvier 2002) qui concernait des propos tenus par des journalistes dans l'affaire Borrel, et ce d'autant qu'il s'agit en l'espèce non pas d'un journaliste mais d'un avocat s'exprimant de surcroît à l'occasion d'une affaire pendante devant les juridictions internes.

112. Quant à la sanction infligée au requérant, il estime qu'elle ne saurait être considérée comme excessive ou de nature à emporter un effet dissuasif pour l'exercice de la liberté d'expression. Il conclut donc à l'absence de violation de l'article 10 de la Convention.

C. Les tiers intervenants devant la Grande Chambre

1. Observations du Conseil des barreaux européens (CCBE)

113. Le CCBE souligne que l'arrêt de la Cour dans cette affaire aura très certainement un impact considérable sur les modalités d'interprétation et d'application des normes de conduite imposées aux avocats européens et plus particulièrement s'agissant de leur liberté de parole et d'expression dans le cadre de l'exercice des droits de la défense. L'avocat occupe une situation centrale dans l'administration de la justice et son statut spécifique doit être protégé. Pierre angulaire d'une société démocratique, la liberté d'expression revêt quant à elle une caractéristique particulière s'agissant des avocats, qui doivent exercer leur profession sans entraves ; si l'usage de sa parole était censurée ou limitée, la défense réelle et effective du justiciable ne serait pas assurée.

114. Il rappelle la jurisprudence de la Cour, selon laquelle une restriction à la liberté d'expression emporte violation de l'article 10 si elle ne relève pas des exceptions mentionnées par le paragraphe 2 de ce texte. Les critères d'examen renvoient à l'existence de l'ingérence, sa prévisibilité légale, sa nécessité dans une société démocratique pour répondre à un « besoin social

impérieux » et les circonstances spécifiques de l'espèce. Pour le CCBE, ces critères valent d'autant plus lorsqu'il s'agit d'un avocat qui défend les droits protégés par la Convention.

115. Les limites à la liberté d'expression devraient tout d'abord être raisonnablement prévisibles, avec une définition plus restrictive et plus précise des critères quant aux limites pouvant être apportées à la liberté d'expression des avocats. Le CCBE relève des divergences d'appréciation des sections de la Cour, une affaire connexe (*July et SARL Libération*, précitée) ayant donné lieu à un constat de violation de l'article 10 alors que la chambre a, en l'espèce, conclu à la non-violation. Le CCBE relève que ces divergences d'appréciation trouvent apparemment leur source dans l'approche différente des propos de l'avocat : une certaine immunité s'appliquerait pour les propos, même violents, à l'égard du système judiciaire ou d'une juridiction, tandis que la mise en cause d'un magistrat ne bénéficierait d'aucune immunité. Le CCBE estime qu'une telle distinction est extrêmement difficile à mettre en œuvre et qu'elle génère des difficultés quasi insurmontables, du fait de l'interdépendance entre le général et le personnel dans la conduite d'une procédure, outre le fait que dans le système inquisitoire la fonction se confond avec l'institution.

116. La présente affaire concernant la liberté d'expression en dehors du prétoire, les limites devraient également tenir compte du fait que dans des affaires sensibles et médiatisées, notamment face à la raison d'État, l'avocat n'a parfois pas d'autre choix que de dénoncer publiquement les obstacles au bon déroulement de la procédure ; à ce titre, sa liberté de parole et d'expression devrait être équivalente à celle des journalistes. Restreindre leur liberté d'expression, surtout dans le cadre d'une procédure inquisitoire comme en France, les empêcherait de contribuer au bon fonctionnement de la justice et d'assurer la confiance du public en celle-ci.

117. Le CCBE souligne que lorsqu'une affaire est médiatisée, et de surcroît au regard de la raison d'État, les droits de la défense ne peuvent parfois être utilement sauvegardés que par une communication publique, même empreinte d'une certaine vivacité. Se fondant sur les constats de la Cour dans l'affaire *Mor c. France* (n° 28198/09, § 42, 15 décembre 2011), il estime que l'absence de poursuites de l'autorité judiciaire et de l'autorité ordinale permettrait de résoudre de manière prévisible les incertitudes liées à des poursuites intempestives d'un magistrat dont l'office se confond avec l'institution judiciaire.

2. Observations communes de l'ordre des avocats au barreau de Paris, du Conseil national des barreaux et de la Conférence des bâtonniers

118. Ces tierces parties rappellent tout d'abord que, jusqu'à une période récente, la question de la liberté de parole ne s'est posée qu'à l'intérieur des palais de justice et que, dans le cadre de la défense de son client à l'audience, l'avocat bénéficie d'une immunité de poursuites, cette dernière étant une immunité pour les écrits produits et les propos tenus devant une juridiction, accordée par l'article 41 de la loi du 29 juillet 1881. Cette immunité couvre les propos susceptibles d'être considérés comme outrageants, diffamatoires ou injurieux.

119. Selon elles, la présente affaire pose la question de principe de la liberté d'expression de l'avocat pour la défense de son client lorsqu'il s'adresse à la presse et que l'affaire connaît un certain écho auprès du public. La question corollaire est de savoir quand commence l'excès d'un propos, même très vif, qui touche un adversaire, un magistrat ou un confrère.

120. Tout avocat, célèbre ou non, est le dépositaire de la parole de son client. Lorsque l'affaire est portée devant l'opinion publique, il lui appartient de continuer à la défendre, qu'il s'agisse d'engager les procédures *ad hoc* ou d'apporter lui-même sa voix au concert médiatique, ce qui est devenu usuel. Il ne s'agit plus d'un droit de l'avocat, mais d'un devoir de sa charge, et ce que l'affaire éclate soit bien avant l'audience publique, ce qui est souvent le cas, soit après celle-ci.

121. L'avocat est en droit de critiquer la décision de justice et d'exprimer les critiques de son client ; son propos est alors nécessairement interprété et reçu par le public comme une expression partiale et subjective. Le parallèle entre le devoir de réserve des magistrats et la liberté de parole de l'avocat n'est pas convaincant : alors que la parole du magistrat serait considérée comme objective, celle de l'avocat est prise comme l'expression de protestations d'une partie : il n'est donc pas anormal qu'un magistrat soit tenu de se taire ; l'expression de l'avocat, pour une partie au procès, ne perturbe en rien l'autorité et l'indépendance de la justice.

122. Les tierces parties rappellent que si le juge français a toujours strictement appliqué l'immunité de l'article 41 de la loi de 1881 aux seuls propos judiciaires, il ne dénie pas l'évolution imposée aux avocats lorsque leurs affaires sont médiatiques. Elles citent un exemple récent dans une affaire médiatisée d'un avocat ayant été poursuivi pour avoir diffamé son confrère : le tribunal de grande instance de Paris a reconnu le bénéfice de la bonne foi, nonobstant le fait que les propos manquaient singulièrement de mesure et ne reposaient que sur une conviction personnelle, dès lors qu' « ils émanaient d'un avocat passionné qui consacre toute son énergie à la

défense de sa cliente, qui ne saurait restreindre sa liberté d'expression au seul motif qu'il évoque sa cause devant des journalistes, au lieu de s'adresser à des magistrats » (jugement définitif de la 17e chambre du tribunal de grande instance de Paris, 20 octobre 2010). La césure entre l'expression judiciaire et extra-judiciaire est donc aujourd'hui dépassée. La parole de l'avocat procède en outre d'un devoir d'information, les avocats étant, comme les journalistes, des « chiens de garde de la démocratie ».

123. Elles soutiennent enfin qu'il existe en la matière une double obligation de proportionnalité : l'une à la charge de l'avocat, l'autre qui pèse sur les États. S'agissant de l'avocat, elles rappellent la difficulté de son rôle et le fait que ce devoir de proportionnalité fait écho aux devoirs de délicatesse et de modération, auxquels il ne peut déroger que pour la défense de son client et en raison de l'attaque et de la pression qu'il subit. S'agissant des États, les tierces parties considèrent que l'avocat devrait normalement jouir d'une immunité lorsque ses propos, même excessifs, se rattachent à la défense des intérêts de son client. Toute atteinte à son droit d'expression ne devrait qu'être exceptionnelle, le critère étant celui des propos détachables ou non de l'activité de défense du client. La marge de la liberté d'expression, qui doit rester aussi importante que celle des journalistes, doit tenir compte des contraintes qui pèsent sur les avocats et de la médiatisation accrue, avec une presse toujours plus curieuse et investigatrice.

D. L'appréciation de la Cour

1. Les principes généraux

a) Concernant la liberté d'expression

124. Les principes généraux permettant d'apprécier la nécessité d'une ingérence donnée dans l'exercice de la liberté d'expression, maintes fois réaffirmés par la Cour depuis l'arrêt *Handyside c. Royaume-Uni* (7 décembre 1976, série A no 24), ont été résumés dans l'arrêt *Stoll c. Suisse* ([GC], no 69698/01, § 101, CEDH 2007-V) et rappelés plus récemment dans l'arrêt *Animal Defenders International c. Royaume-Uni* ([GC], no 48876/08, § 100, CEDH 2013) :

> « i. La liberté d'expression constitue l'un des fondements essentiels d'une société démocratique, l'une des conditions primordiales de son progrès et de l'épanouissement de chacun. Sous réserve du paragraphe 2 de l'article 10, elle vaut non seulement pour les « informations » ou « idées » accueillies avec faveur ou considérées comme inoffensives ou indifférentes, mais aussi pour celles qui heurtent, choquent ou inquiètent : ainsi le veulent le pluralisme, la tolérance et l'esprit d'ouverture sans lesquels il n'est pas de « société démocratique ». Telle que la consacre l'article 10, elle est assortie d'exceptions qui appellent toutefois une interprétation étroite, et le besoin de la restreindre doit se trouver établi de manière convaincante (...)

ii. L'adjectif « nécessaire », au sens de l'article 10 § 2, implique un « besoin social impérieux ». Les États contractants jouissent d'une certaine marge d'appréciation pour juger de l'existence d'un tel besoin, mais elle se double d'un contrôle européen portant à la fois sur la loi et sur les décisions qui l'appliquent, même quand elles émanent d'une juridiction indépendante. La Cour a donc compétence pour statuer en dernier lieu sur le point de savoir si une « restriction » se concilie avec la liberté d'expression que protège l'article 10.

iii. La Cour n'a point pour tâche, lorsqu'elle exerce son contrôle, de se substituer aux juridictions internes compétentes, mais de vérifier sous l'angle de l'article 10 les décisions qu'elles ont rendues en vertu de leur pouvoir d'appréciation. Il ne s'ensuit pas qu'elle doive se borner à rechercher si l'État défendeur a usé de ce pouvoir de bonne foi, avec soin et de façon raisonnable : il lui faut considérer l'ingérence litigieuse à la lumière de l'ensemble de l'affaire pour déterminer si elle était « proportionnée au but légitime poursuivi » et si les motifs invoqués par les autorités nationales pour la justifier apparaissent « pertinents et suffisants » (...) Ce faisant, la Cour doit se convaincre que les autorités nationales ont appliqué des règles conformes aux principes consacrés à l'article 10 et ce, de surcroît, en se fondant sur une appréciation acceptable des faits pertinents (...) »

125. Par ailleurs, s'agissant du niveau de protection, l'article 10 § 2 de la Convention ne laisse guère de place pour des restrictions à la liberté d'expression dans deux domaines : celui du discours politique et celui des questions d'intérêt général (*Sürek c. Turquie (n° 1)* [GC], n° 26682/95, § 61, CEDH 1999-IV, *Lindon, Otchakovsky-Laurens et July c. France* [GC], n^os^ 21279/02 et 36448/02, § 46, CEDH 2007-IV, et *Axel Springer AG c. Allemagne* [GC], n° 39954/08, § 90, 7 février 2012). Partant, un niveau élevé de protection de la liberté d'expression, qui va de pair avec une marge d'appréciation des autorités particulièrement restreinte, sera normalement accordé lorsque les propos tenus relèvent d'un sujet d'intérêt général, ce qui est le cas, notamment, pour des propos relatifs au fonctionnement du pouvoir judiciaire, et ce alors même que le procès ne serait pas terminé pour les autres accusés (*Roland Dumas c. France*, n° 34875/07, § 43, 15 juillet 2010, et *Gouveia Gomes Fernandes et Freitas e Costa c. Portugal*, n° 1529/08, § 47, 29 mars 2011). Une certaine hostilité (*E.K. c. Turquie*, n° 28496/95, § 79-80, 7 février 2002) et la gravité éventuellement susceptible de caractériser certains propos (*Thoma c. Luxembourg*, n° 38432/97, § 57, CEDH 2001-III) ne font pas disparaître le droit à une protection élevée compte tenu de l'existence d'un sujet d'intérêt général (*Paturel c. France*, n° 54968/00, § 42, 22 décembre 2005).

126. En outre, dans les arrêts *Lingens c. Autriche* (8 juillet 1986, § 46, série A n° 103) et *Oberschlick c. Autriche (n° 1)* (23 mai 1991, § 63, série A n° 204), la Cour a distingué entre déclarations de fait et jugements de valeur. La matérialité des déclarations de fait peut se prouver ; en

revanche, les jugements de valeur ne se prêtant pas à une démonstration de leur exactitude, l'obligation de preuve est donc impossible à remplir et porte atteinte à la liberté d'opinion elle-même, élément fondamental du droit garanti par l'article 10 (*De Haes et Gijsels c. Belgique*, 24 février 1997, § 42, *Recueil* 1997-I). Cependant, en cas de jugement de valeur, la proportionnalité de l'ingérence dépend de l'existence d'une « base factuelle » suffisante sur laquelle reposent les propos litigieux : à défaut, ce jugement de valeur pourrait se révéler excessif (*De Haes et Gijsels*, précité, § 47, *Oberschlick c. Autriche (n° 2)*, 1er juillet 1997, § 33, *Recueil* 1997-IV, *Brasilier c. France*, n° 71343/01, § 36, 11 avril 2006, et *Lindon, Otchakovsky-Laurens et July*, précité, § 55). Pour distinguer une imputation de fait d'un jugement de valeur, il faut tenir compte des circonstances de l'espèce et de la tonalité générale des propos (*Brasilier*, précité, § 37), étant entendu que des assertions sur des questions d'intérêt public peuvent constituer à ce titre des jugements de valeur plutôt que des déclarations de fait (*Paturel*, précité, § 37).

127. Enfin, la nature et la lourdeur des peines infligées sont des éléments à prendre en considération lorsqu'il s'agit de mesurer la proportionnalité de l'ingérence, la Cour ayant souligné qu'une atteinte à la liberté d'expression peut risquer d'avoir un effet dissuasif quant à l'exercice de cette liberté. Le caractère relativement modéré des amendes ne saurait suffire à faire disparaître le risque d'un effet dissuasif sur l'exercice de la liberté d'expression, ce qui est d'autant plus inacceptable s'agissant d'un avocat appelé à assurer la défense effective de ses clients (*Mor*, précité, § 61). D'une manière générale, s'il est légitime que les institutions de l'État soient protégées par les autorités compétentes en leur qualité de garantes de l'ordre public institutionnel, la position dominante que ces institutions occupent commande aux autorités de faire preuve de retenue dans l'usage de la voie pénale (*Castells c. Espagne*, 23 avril 1992, § 46, série A n° 236, *Incal c. Turquie*, 9 juin 1998, § 54, *Recueil* 1998-IV, *Lehideux et Isorni c. France*, 23 septembre 1998, § 57, *Recueil* 1998-VII, *Öztürk c. Turquie* [GC], n° 22479/93, § 66, CEDH 1999-VI, et *Otegi Mondragon c. Espagne*, n° 2034/07, § 58, CEDH 2011).

b) Concernant la garantie de l'autorité du pouvoir judiciaire

128. Les questions concernant le fonctionnement de la justice, institution essentielle à toute société démocratique, relèvent de l'intérêt général. À cet égard, il convient de tenir compte de la mission particulière du pouvoir judiciaire dans la société. Comme garant de la justice, valeur fondamentale dans un État de droit, son action a besoin de la confiance des citoyens pour prospérer. Aussi peut-il se révéler nécessaire de protéger celle-ci contre des attaques gravement préjudiciables dénuées de fondement sérieux, alors surtout que le devoir de réserve interdit aux magistrats visés de réagir (*Prager*

et Oberschlick c. Autriche, 26 avril 1995, § 34, série A nº 313, *Karpetas c. Grèce*, nº 6086/10, § 68, 30 octobre 2012, et *Di Giovanni c. Italie*, nº 51160/06, § 71, 9 juillet 2013).

129. L'expression « autorité du pouvoir judiciaire » reflète notamment l'idée que les tribunaux constituent les organes appropriés pour statuer sur les différends juridiques et se prononcer sur la culpabilité ou l'innocence quant à une accusation en matière pénale, que le public les considère comme tels et que leur aptitude à s'acquitter de cette tâche lui inspire du respect et de la confiance (*Worm c. Autriche*, 29 août 1997, § 40, *Recueil* 1997-V, et *Prager et Oberschlick*, précité).

130. Il y va de la confiance que les tribunaux d'une société démocratique se doivent d'inspirer non seulement au justiciable, à commencer, au pénal, par les prévenus (*Kyprianou*, précité, § 172), mais aussi à l'opinion publique (*Koudechkina c. Russie*, nº 29492/05, § 86, 26 février 2009, et *Di Giovanni*, précité).

131. Il reste qu'en dehors de l'hypothèse d'attaques gravement préjudiciables dénuées de fondement sérieux, compte tenu de leur appartenance aux institutions fondamentales de l'État, les magistrats peuvent faire, en tant que tels, l'objet de critiques personnelles dans des limites admissibles, et non pas uniquement de façon théorique et générale (*July et SARL Libération*, précité, § 74). À ce titre, les limites de la critique admissibles à leur égard, lorsqu'ils agissent dans l'exercice de leurs fonctions officielles, sont plus larges qu'à l'égard de simples particuliers (*ibidem*).

c) Concernant le statut et la liberté d'expression des avocats

132. Le statut spécifique des avocats, intermédiaires entre les justiciables et les tribunaux, leur fait occuper une position centrale dans l'administration de la justice. C'est à ce titre qu'ils jouent un rôle clé pour assurer la confiance du public dans l'action des tribunaux, dont la mission est fondamentale dans une démocratie et un État de droit (*Schöpfer c. Suisse*, 20 mai 1998, §§ 29-30, *Recueil* 1998-III, *Nikula c. Finlande*, nº 31611/96, § 45, CEDH 2002-II, *Amihalachioaie c. Moldova*, nº 60115/00, § 27, CEDH 2004-III, *Kyprianou*, précité, § 173, *André et autre c. France*, nº 18603/03, § 42, 24 juillet 2008, et *Mor*, précité, § 42). Toutefois, pour croire en l'administration de la justice, le public doit également avoir confiance en la capacité des avocats à représenter effectivement les justiciables (*Kyprianou*, précité, § 175).

133. De ce rôle particulier des avocats, professionnels indépendants dans l'administration de la justice, découlent un certain nombre d'obligations, notamment dans leur conduite (*Van der Mussele c. Belgique*, 23 novembre 1983, série A nº 70, *Casado Coca c. Espagne*, 24 février 1994, § 46, série A nº 285-A, *Steur c. Pays-Bas*, nº 39657/98, § 38, CEDH 2003-XI,

Veraart c. Pays-Bas, nº 10807/04, § 51, 30 novembre 2006, et *Coutant c. France* (déc.), nº 17155/03, 24 janvier 2008). Toutefois, s'ils sont certes soumis à des restrictions concernant leur comportement professionnel, qui doit être empreint de discrétion, d'honnêteté et de dignité, ils bénéficient également de droits et de privilèges exclusifs, qui peuvent varier d'une juridiction à l'autre, comme généralement une certaine latitude concernant les propos qu'ils tiennent devant les tribunaux (*Steur*, précité).

134. Ainsi, la liberté d'expression vaut aussi pour les avocats. Outre la substance des idées et des informations exprimées, elle englobe leur mode d'expression (*Foglia c. Suisse*, nº 35865/04, § 85, 13 décembre 2007). Les avocats ont ainsi notamment le droit de se prononcer publiquement sur le fonctionnement de la justice, même si leur critique ne saurait franchir certaines limites (*Amihalachioaie*, précité, §§ 27-28, *Foglia*, précité, § 86, et *Mor*, précité, § 43). Ces dernières se retrouvent dans les normes de conduite imposées en général aux membres du barreau (*Kyprianou*, précité, § 173), à l'instar des dix principes essentiels énumérés par le CCBE pour les avocats européens, qu'il s'agisse notamment de « la dignité, l'honneur et la probité » ou de « la contribution à une bonne administration de la justice » (paragraphe 58 ci-dessus). De telles règles contribuent à protéger le pouvoir judiciaire des attaques gratuites et infondées qui pourraient n'être motivées que par une volonté ou une stratégie de déplacer le débat judiciaire sur le terrain strictement médiatique ou d'en découdre avec les magistrats en charge de l'affaire.

135. La question de la liberté d'expression est liée à l'indépendance de la profession d'avocat, cruciale pour un fonctionnement effectif de l'administration équitable de la justice (*Siałkowska c. Pologne*, nº 8932/05, § 111, 22 mars 2007). Ce n'est qu'exceptionnellement qu'une limite touchant la liberté d'expression de l'avocat de la défense – même au moyen d'une sanction pénale légère – peut passer pour nécessaire dans une société démocratique (*Nikula*, précité, § 55, *Kyprianou*, précité, § 174, et *Mor*, précité, § 44).

136. Il convient toutefois de distinguer selon que l'avocat s'exprime dans le prétoire ou en dehors de celui-ci.

137. S'agissant tout d'abord des « faits d'audience », dès lors que la liberté d'expression de l'avocat peut soulever une question sous l'angle du droit de son client à un procès équitable, l'équité milite également en faveur d'un échange de vues libre, voire énergique, entre les parties (*Nikula*, précité, § 49, et *Steur*, précité, § 37) et l'avocat a le devoir de « défendre avec zèle les intérêts de ses clients » (*Nikula*, précité, § 54), ce qui le conduit parfois à s'interroger sur la nécessité de s'opposer ou non à l'attitude du tribunal ou de s'en plaindre (*Kyprianou*, précité, § 175). De plus, la Cour tient compte

du fait que les propos litigieux ne sortent pas de la salle d'audience. Par ailleurs, elle opère une distinction selon la personne visée, un procureur, qui est une « partie » au procès, devant « tolérer des critiques très larges de la part de [l'avocat de la défense] », même si certains termes sont déplacés, dès lors qu'elles ne portent pas sur ses qualités professionnelles ou autres en général (*Nikula*, précité, §§ 51-52, *Foglia*, *précité,* § 95, et *Roland Dumas*, précité, § 48).

138. Concernant ensuite les propos tenus en dehors du prétoire, la Cour rappelle que la défense d'un client peut se poursuivre avec une apparition dans un journal télévisé ou une intervention dans la presse et, à cette occasion, avec une information du public sur des dysfonctionnements de nature à nuire à la bonne marche d'une instruction (*Mor*, précité, § 59). À ce titre, la Cour estime qu'un avocat ne saurait être tenu responsable de tout ce qui figurait dans l'« interview » publiée, compte tenu du fait que c'est la presse qui a repris ses déclarations et que celui-ci a démenti par la suite ses propos (*Amihalachioaie*, précité, § 37). Dans l'affaire *Foglia* précitée, elle a également considéré qu'il ne se justifiait pas d'attribuer à l'avocat la responsabilité des agissements des organes de presse (*Foglia*, précité, § 97). De même, lorsqu'une affaire fait l'objet d'une couverture médiatique en raison de la gravité des faits et des personnes susceptibles d'être mises en cause, on ne peut sanctionner pour violation du secret de l'instruction un avocat qui s'est contenté de faire des déclarations personnelles sur des informations déjà connues des journalistes et que ces derniers s'apprêtent à diffuser avec ou sans de tels commentaires. Pour autant, l'avocat n'est pas déchargé de son devoir de prudence à l'égard du secret de l'instruction en cours lorsqu'il s'exprime publiquement (*Mor*, précité, §§ 55-56).

139. Il reste que les avocats ne peuvent tenir des propos d'une gravité dépassant le commentaire admissible sans solide base factuelle (*Karpetas*, précité, § 78, voir également *A. c. Finlande* (déc.), n° 44998/98, 8 janvier 2004) ou proférer des injures (*Coutant*, décision précitée). Au regard des circonstances de l'affaire *Gouveia Gomes Fernandes et Freitas e Costa* (précitée, § 48), un ton non pas injurieux mais acerbe, voire sarcastique, visant des magistrats, a été jugé compatible avec l'article 10. La Cour apprécie les propos dans leur contexte général, notamment pour savoir s'ils peuvent passer pour trompeurs ou comme une attaque gratuite (*Ormanni c. Italie*, n° 30278/04, § 73, 17 juillet 2007, et *Gouveia Gomes Fernandes et Freitas e Costa*, précité, § 51) et pour s'assurer que les expressions utilisées en l'espèce présentent un lien suffisamment étroit avec les faits de l'espèce (*Feldek c. Slovaquie*, n° 29032/95, § 86, CEDH 2001-VIII, et *Gouveia Gomes Fernandes et Freitas e Costa*, précité).

2. Application de ces principes au cas d'espèce

140. En l'espèce, la Cour constate que le requérant a été condamné pénalement et civilement en raison de propos relatifs à la procédure dans l'affaire Borrel, reproduits dans un article du quotidien *Le Monde* qui reprenait, d'une part, les termes d'une lettre adressée par le requérant et son confrère à la garde des Sceaux pour demander une enquête administrative et, d'autre part, des déclarations faites au journaliste auteur de l'article litigieux.

141. La Cour relève d'emblée que les parties s'accordent à considérer que la condamnation pénale du requérant constitue une ingérence dans l'exercice de son droit à la liberté d'expression, tel que garanti par l'article 10 de la Convention. C'est également l'opinion de la Cour.

142. Elle constate ensuite que l'ingérence était prévue par la loi, à savoir les articles 23, 29 et 31 de la loi du 29 juillet 1881, ce que reconnaît le requérant.

143. Les parties conviennent également de ce que l'ingérence avait pour but la protection de la réputation ou des droits d'autrui. La Cour n'aperçoit pas de raison d'adopter un point de vue différent. Certes, le requérant entend nuancer le fait que les poursuites engagées contre lui auraient aussi été de nature à « garantir l'autorité et l'impartialité du pouvoir judiciaire » (paragraphe 99 ci-dessus), mais cela relève de la question de la « nécessité » de l'ingérence et ne saurait remettre en cause le fait que celle-ci poursuivait bien au moins l'un des « buts légitimes » reconnus par le paragraphe 2 de l'article 10.

144. Il reste donc à examiner si cette ingérence était « nécessaire dans une société démocratique », ce qui requiert de vérifier si elle était proportionnée au but légitime poursuivi et si les motifs invoqués par les juridictions internes étaient pertinents et suffisants.

145. La Cour note que, pour condamner le requérant, les juges d'appel ont estimé que le simple fait d'affirmer qu'un juge d'instruction avait eu un « comportement parfaitement contraire aux principes d'impartialité et de loyauté » constituait une accusation particulièrement diffamatoire (paragraphe 47 ci-dessus). Ils ajoutaient que les propos du requérant relatifs au retard de transmission de la cassette vidéo et sa référence à la carte manuscrite adressée par le procureur de Djibouti à la juge M. avec l'emploi du terme « connivence » ne faisaient que conforter ce caractère diffamatoire (*ibidem*), la « preuve de la vérité » des propos tenus n'étant pas rapportée (paragraphe 48 ci-dessus) et la bonne foi du requérant étant exclue (paragraphe 49 ci-dessus).

a) La qualité d'avocat du requérant

146. La Cour constate tout d'abord que les propos reprochés au requérant proviennent à la fois des déclarations faites à la demande du journaliste auteur de l'article et de la lettre adressée à la garde des Sceaux. Formulés par le requérant en sa qualité d'avocat de la partie civile, ils concernaient des faits s'inscrivant dans le cadre de la procédure Borrel.

147. À cet égard, elle relève d'emblée que le requérant l'invite à préciser sa jurisprudence concernant l'exercice de la liberté d'expression par un avocat, spécialement hors des prétoires, et à consacrer une protection la plus large possible de la parole de l'avocat (paragraphes 96, 97 et 102 ci-dessus). Le Gouvernement, tout en estimant que la qualité d'auxiliaires de justice des avocats les différencie fondamentalement des journalistes (paragraphe 106 ci-dessus), identifie quant à lui différentes situations, dans lesquelles la liberté d'expression serait « particulièrement étendue », « large » ou au contraire soumise « à certaines limites » (paragraphe 107 ci-dessus).

148. La Cour renvoie les parties aux principes dégagés dans sa jurisprudence, s'agissant en particulier du statut et de la liberté d'expression des avocats (paragraphes 132-139 ci-dessus), notamment en ce qui concerne la nécessité de distinguer selon que l'avocat s'exprime dans le cadre du prétoire ou en dehors de celui-ci. Par ailleurs, compte tenu de son statut spécifique et de sa position dans l'administration de la justice (paragraphe 132 ci-dessus), la Cour estime, contrairement à ce que soutient le CCBE (paragraphe 116 ci-dessus), que l'avocat ne saurait être assimilé à un journaliste. En effet, leurs places et leurs missions respectives dans le débat judiciaire sont intrinsèquement différentes. Il incombe au journaliste de communiquer, dans le respect de ses devoirs et de ses responsabilités, des informations et des idées sur toutes les questions d'intérêt général, y compris celles qui se rapportent à l'administration de la justice. Pour sa part, l'avocat agit en qualité d'acteur de la justice directement impliqué dans le fonctionnement de celle-ci et dans la défense d'une partie. Il ne saurait donc être assimilé à un témoin extérieur chargé d'informer le public. 149. Certes, le requérant soutient que ses déclarations publiées dans le journal *Le Monde* étaient précisément au service de la mission de défense de sa cliente, qu'il lui appartenait de déterminer. Cependant, s'il est incontestable que les propos litigieux s'inscrivaient dans le cadre de la procédure, ils visaient des juges d'instruction définitivement écartés de la procédure lorsqu'il s'est exprimé. La Cour ne décèle donc pas dans quelle mesure ses déclarations pouvaient directement participer de la mission de défense de sa cliente, dès lors que l'instruction se poursuivait devant un autre juge qui n'était pas mis en cause.

b) La contribution à un débat d'intérêt général

150. Il reste que le requérant invoque aussi son droit d'informer le public sur des dysfonctionnements dans le déroulement d'une procédure en cours et de contribuer à un débat d'intérêt général.

151. Sur ce point, la Cour relève, d'une part, que les propos du requérant s'inscrivaient dans le cadre de l'information judiciaire diligentée à la suite du décès d'un magistrat français, Bernard Borrel, détaché auprès du ministère de la Justice de Djibouti en qualité de conseiller technique. La Cour a déjà eu l'occasion de relever que cette affaire a connu, dès son commencement, un retentissement médiatique très important (*July et SARL Libération*, précité, § 67), ce qui témoigne de la place significative qu'elle occupe dans l'opinion publique. Avec le requérant, la Cour note d'ailleurs que la justice a également contribué à l'information du public sur cette affaire, le juge d'instruction chargé de l'affaire en 2007 ayant demandé au procureur de la République de faire un communiqué, en application de l'article 11, alinéa 3, du code de procédure pénale, afin de préciser que la thèse du suicide était écartée au profit de celle d'un assassinat (paragraphes 24 et 55 ci-dessus).

152. D'autre part, elle rappelle avoir déjà jugé que le public a un intérêt légitime à être informé et à s'informer sur les procédures en matière pénale (*July et SARL Libération*, précité, § 66) et que les propos relatifs au fonctionnement du pouvoir judiciaire concernent un sujet d'intérêt général (paragraphe 125 ci-dessus). La Cour a d'ailleurs déjà été saisie à deux reprises, dans les affaires *Floquet et Esménard* et *July et SARL Libération* (précitées), de griefs en lien avec l'affaire Borrel et le droit au respect à la liberté d'expression concernant des propos sur le déroulement de l'instruction, concluant à chaque fois à l'existence d'un débat public d'intérêt général.

153. Partant, la Cour estime que les propos reprochés au requérant, qui concernaient également, à l'instar des affaires *Floquet et Esménard* et *July et SARL Libération* (précitées), le fonctionnement du pouvoir judiciaire et le déroulement de l'affaire Borrel, s'inscrivaient dans le cadre d'un débat d'intérêt général, ce qui implique un niveau élevé de protection de la liberté d'expression allant de pair avec une marge d'appréciation des autorités particulièrement restreinte.

c) La nature des propos litigieux

154. La Cour note qu'après avoir vu ses propos jugés « particulièrement diffamatoires », le requérant n'a pu établir leur véracité, une telle preuve devant être, comme l'ont rappelé les premiers juges, « parfaite et complète et corrélative à l'ensemble des imputations retenues comme diffamatoires » (paragraphe 40 ci-dessus). Sa bonne foi a également été écartée. Sur ce point,

le tribunal correctionnel et la cour d'appel ont notamment estimé que la mise en cause professionnelle et morale des juges M. et L.L. dépassait largement le droit de critique (paragraphes 40 et 50 ci-dessus). En outre, alors que les premiers juges ont considéré que les profondes divergences entre les avocats de M^me^ Borrel et les juges d'instruction ne justifiaient pas une absence totale de prudence dans l'expression, les juges d'appel ont estimé que la décision de non-lieu, prononcée en faveur du requérant dans le cadre de la plainte déposée contre lui par les deux juges d'instruction, n'excluait pas la mauvaise foi. Selon eux, l'animosité personnelle du requérant et sa volonté de discréditer les juges, en particulier la juge M., résultait du caractère excessif de ses propos et du fait que la publication de l'article relatif à l'affaire Borrel coïncidait avec la saisine de la chambre d'accusation contre la juge M. dans le cadre du dossier de la Scientologie (*ibidem*).

155. Or, la Cour a rappelé qu'il convient de distinguer entre déclarations de fait et jugements de valeur (paragraphe 126 ci-dessus). Si la matérialité des premières peut se prouver, les seconds ne se prêtent pas à une démonstration de leur exactitude et dans ce cas l'obligation de preuve, impossible à remplir, porte atteinte à la liberté d'opinion elle-même, élément fondamental du droit garanti par l'article 10 (*ibidem*). En outre, l'existence de garanties procédurales à la disposition de la personne accusée de diffamation fait partie des éléments à prendre en compte dans l'examen de la proportionnalité de l'ingérence sous l'angle de l'article 10 : en particulier, il est indispensable que l'intéressé se voit offrir une chance concrète et effective de pouvoir démontrer que ses allégations reposaient sur une base factuelle suffisante (voir, notamment, *Steel et Morris c. Royaume-Uni*, n° 68416/01, § 95, CEDH 2005-II, *Andrushko c. Russie*, n° 4260/04, § 53, 14 octobre 2010, *Dilipak et Karakaya c. Turquie*, n^os^ 7942/05 et 24838/05, § 141, 4 mars 2014, et *Hasan Yazıcı c. Turquie*, n° 40877/07, § 54, 15 avril 2014). Tel n'a pas été le cas en l'espèce.

156. La Cour estime que, dans les circonstances de l'espèce, les déclarations incriminées constituent davantage des jugements de valeur que de pures déclarations de fait, compte tenu de la tonalité générale des propos comme du contexte dans lequel ils ont été tenus, dès lors qu'elles renvoient principalement à une évaluation globale du comportement des juges d'instruction durant l'information.

157. Il reste dès lors à examiner la question de savoir si la « base factuelle » sur laquelle reposaient ces jugements de valeur était suffisante.

158. La Cour est d'avis que cette condition est remplie en l'espèce. En effet, après le dessaisissement des juges M. et L.L. par la chambre d'accusation de la cour d'appel de Paris (paragraphe 23 ci-dessus), il est apparu qu'une pièce importante du dossier, à savoir une cassette vidéo réalisée

pendant un déplacement des juges accompagnés d'experts sur les lieux du décès, bien que visée dans la dernière ordonnance rendue par ces juges, n'avait pas été transmise au magistrat désigné pour leur succéder avec le dossier de l'information. Ce fait était non seulement établi, mais également suffisamment sérieux pour justifier que le juge P. rédige un procès-verbal pour le consigner et relever expressément ce qui suit : d'une part, cette cassette vidéo ne figurait pas au dossier d'instruction et n'était pas référencée comme une pièce à conviction ; d'autre part, elle lui a été remise dans une enveloppe, adressée au nom de la juge M., ne portant pas trace de scellés et qui contenait également une carte manuscrite à l'en-tête du procureur de la République de Djibouti, rédigée par ce dernier et adressée à la juge M. (paragraphe 32 ci-dessus).

159. De plus, outre le fait que cette carte atteste d'une certaine familiarité du procureur de la République de Djibouti à l'égard de la juge M. (paragraphe 32 ci-dessus), elle accusait les avocats des parties civiles de se livrer à une « entreprise de manipulation ». Or, la Cour souligne à ce titre que non seulement les autorités de Djibouti soutiennent depuis l'origine la thèse d'un suicide, mais que plusieurs représentants de cet État ont été nommément mis en cause ultérieurement dans le cadre de l'information diligentée en France, ce dont atteste en particulier l'arrêt de la Cour internationale de justice (paragraphes 63-64 ci-dessus), ainsi que la procédure diligentée pour subornation de témoin (paragraphe 18 ci-dessus).

160. Enfin, il est avéré que le requérant est intervenu en sa qualité d'avocat dans deux affaires médiatiques instruites par la juge M. Un dysfonctionnement a été identifié par les juridictions d'appel à chaque fois, entraînant le dessaisissement de la juge M., et ce à la demande du requérant (paragraphes 22-23 et 26 ci-dessus). Dans le cadre du premier dossier relatif à l'affaire dite de la Scientologie, le requérant a en outre obtenu la condamnation de l'État français pour dysfonctionnement du service public de la justice (paragraphe 30 ci-dessus).

161. Elle considère en outre que les expressions utilisées par le requérant présentaient un lien suffisamment étroit avec les faits de l'espèce, outre le fait que les propos ne pouvaient passer pour trompeurs ou comme une attaque gratuite (paragraphe 139 ci-dessus). Elle rappelle à ce titre que la liberté d'expression « vaut non seulement pour les « informations » ou « idées » accueillies avec faveur ou considérées comme inoffensives ou indifférentes, mais aussi pour celles qui heurtent, choquent ou inquiètent ». De même, l'emploi d'un « ton acerbe » dans l'expression visant des magistrats n'est pas contraire aux dispositions de l'article 10 de la Convention (voir, par exemple, *Gouveia Gomes Fernandes et Freitas e Costa*, précité, § 48).

d) Les circonstances particulières de l'espèce

i. La prise en compte de l'ensemble du contexte

162. La Cour rappelle que, dans le cadre de l'article 10 de la Convention, il convient d'examiner les propos litigieux à la lumière des circonstances et de l'ensemble du contexte de l'affaire (voir, parmi beaucoup d'autres, *Lingens*, précité, § 40, et Bladet Tromsø *et Stensaas c. Norvège* [GC], n° 21980/93, § 62, CEDH 1999-III). En l'espèce, précisément, le contexte de l'affaire se caractérisait non seulement par le comportement des juges d'instruction et par les relations du requérant avec l'un d'eux, mais également par l'historique très spécifique de l'affaire, la dimension interétatique qui en découle, ainsi que par son important retentissement médiatique. La Cour constate cependant que la cour d'appel a donné une portée très générale à l'expression « comportement parfaitement contraire aux principes d'impartialité et de loyauté », reprochée au requérant envers un magistrat instructeur, jugeant qu'elle constituait, en soi, une accusation particulièrement diffamatoire synonyme de violation de son éthique professionnelle et de son serment par un magistrat (paragraphe 47 ci-dessus). Or, une telle citation aurait dû être replacée dans le contexte propre aux circonstances de l'espèce, et ce d'autant plus qu'il s'agissait en réalité non pas d'une déclaration faite à l'auteur de l'article, mais d'un extrait du texte de la lettre adressée de concert avec son confrère L. de Caunes à la garde des Sceaux le 6 septembre 2000. De plus, lorsque le requérant a répondu aux questions du journaliste, celui-ci avait déjà eu connaissance du courrier adressé à la garde des Sceaux non par le requérant, mais par ses propres sources, ce que le tribunal correctionnel a jugé établi (paragraphe 40 ci-dessus). Le requérant soutient également, sans que cela soit contesté, que la référence aux poursuites disciplinaires exercées contre la juge M. dans le cadre de l'affaire de la Scientologie relevait de la seule responsabilité de l'auteur de l'article. Là encore, la Cour rappelle que les avocats ne peuvent être tenus pour responsables de tout ce qui figure dans une « interview » publiée par la presse ou des agissements des organes de presse.

163. Ainsi, la cour d'appel devait examiner les propos litigieux en tenant pleinement compte à la fois du contexte de l'affaire et du contenu de la lettre pris dans leur ensemble.

164. Pour les mêmes raisons, les propos litigieux ne pouvant être appréciés sortis de leur contexte, la Cour ne saurait partager le point de vue de la cour d'appel de Paris selon lequel l'emploi du terme de « connivence » portait « à lui seul » gravement atteinte à l'honneur et à la considération de la juge M. et du procureur de Djibouti (paragraphe 47 ci-dessus).

165. Quant au motif tiré d'une animosité personnelle du requérant à l'égard de la juge M., en raison de conflits dans le cadre des affaires Borrel et de la Scientologie, la Cour estime qu'il ne présente pas la pertinence et la gravité nécessaires à une condamnation du requérant. En tout état de cause, dès lors que les juges ont constaté l'existence de conflits entre les deux protagonistes, et compte tenu des circonstances particulières de la présente affaire, un tel reproche d'animosité personnelle pouvait indifféremment être adressé au requérant et à la juge M. (voir, *mutatis mutandis*, *Paturel*, précité, § 45), et ce d'autant plus qu'avant de déposer une plainte contre le requérant pour complicité de délit de diffamation, la juge M. avait déjà vainement déposé une plainte contre lui pour dénonciation calomnieuse (paragraphe 35 ci-dessus). D'autres éléments viennent également, sinon contredire, du moins relativiser ce motif de la cour d'appel tiré de l'animosité personnelle du requérant. En premier lieu, les propos ayant trait au « comportement parfaitement contraire aux principes d'impartialité et de loyauté » ne visaient pas uniquement la juge M., mais également le juge L.L., envers lequel le requérant ne s'est pas vu reprocher une animosité personnelle. Ensuite, si le requérant a été poursuivi pour l'extrait précité de la lettre adressée à la garde des Sceaux, ladite lettre avait en réalité été signée et envoyée par deux avocats, le requérant et son confrère M^e^ de Caunes. Or, non seulement ce dernier n'a pas été poursuivi pour les propos qui lui étaient pourtant imputables autant qu'au requérant, mais il ne s'est en outre pas vu reprocher une quelconque animosité à l'égard des juges M. et L.L.

166. En définitive, la Cour considère que les déclarations du requérant ne pouvaient être réduites à la simple expression d'une animosité personnelle, c'est-à-dire à une relation conflictuelle entre deux personnes, le requérant et la juge M. Les propos litigieux s'inscrivaient en réalité dans un cadre plus large, impliquant également un autre avocat et un autre juge. De l'avis de la Cour, ce fait est de nature à soutenir la thèse selon laquelle ils ne relevaient pas d'une démarche personnelle du requérant qui aurait été animé par un désir de vengeance, mais d'une démarche commune et professionnelle de deux avocats, en raison de faits nouveaux, établis et susceptibles de révéler un dysfonctionnement grave du service de la justice, impliquant les deux anciens juges chargés d'instruire l'affaire dans laquelle leurs clients étaient parties civiles.

167. En outre, si les propos du requérant avaient assurément une connotation négative, force est de constater que, malgré une certaine hostilité (*E.K. c. Turquie*, précité, §§ 79-80) et la gravité susceptible de les caractériser (*Thoma*, précité), la question centrale des déclarations concernait le fonctionnement d'une information judiciaire, ce qui relevait d'un sujet d'intérêt général et ne laissait donc guère de place pour des restrictions à la

liberté d'expression. En outre, un avocat doit pouvoir attirer l'attention du public sur d'éventuels dysfonctionnements judiciaires, l'autorité judiciaire pouvant tirer un bénéfice d'une critique constructive.

ii. La garantie de l'autorité du pouvoir judiciaire

168. Certes, le Gouvernement invoque le fait que les autorités judiciaires ne pouvaient pas répliquer. Il est vrai que la mission particulière du pouvoir judiciaire dans la société impose aux magistrats un devoir de réserve (paragraphe 128 ci-dessus). Cependant, ce dernier poursuit une finalité particulière, comme le relèvent les tiers intervenants : la parole du magistrat, contrairement à celle de l'avocat, est reçue comme l'expression d'une appréciation objective qui engage non seulement celui qui s'exprime mais aussi, à travers lui, toute l'institution de la Justice. L'avocat, quant à lui, ne parle qu'en son nom et en celui de ses clients – ce qui le distingue d'ailleurs également d'un journaliste – dont la place dans le débat judiciaire et la mission sont intrinsèquement différentes. Il n'en reste pas moins que s'il peut se révéler nécessaire de protéger les autorités judiciaires contre des attaques gravement préjudiciables dénuées de fondement sérieux, le devoir de réserve interdisant aux magistrats visés de réagir (paragraphe 128 ci-dessus), cela ne saurait avoir pour effet d'interdire aux individus de s'exprimer, par des jugements de valeur reposant sur une base factuelle suffisante, sur des sujets d'intérêt général liés au fonctionnement de la justice ou de prohiber toute critique à l'égard de celle-ci. En l'espèce, les juges M. et L.L. étaient des magistrats et ils appartenaient tous deux aux institutions fondamentales de l'État : les limites de la critique admissible étaient donc plus larges à leur égard que pour les simples particuliers et ils pouvaient donc faire, en tant que tels, l'objet des commentaires litigieux (paragraphes 128 et 131 ci-dessus).

169. La Cour estime en outre, contrairement à ce que soutient le Gouvernement, que les propos du requérant n'étaient pas de nature à perturber la sérénité des débats judiciaires, compte tenu du dessaisissement, par la juridiction supérieure, des deux juges d'instruction visés par les critiques. Ni le nouveau juge d'instruction ni les juridictions supérieures n'étaient en aucune façon visés par les propos litigieux.

170. Pour les mêmes motifs, et compte tenu de ce qui précède, on ne saurait davantage considérer que la condamnation du requérant ait pu être de nature à préserver l'autorité du pouvoir judiciaire. La Cour entend néanmoins souligner l'importance, dans un État de droit et une société démocratique, de préserver l'autorité du pouvoir judiciaire. En tout état de cause, le bon fonctionnement des tribunaux ne saurait être possible sans des relations fondées sur la considération et le respect mutuels entre les différents acteurs de la justice, au premier rang desquels les magistrats et les avocats.

iii. L'exercice des voies de droit disponibles

171. Quant à l'argument du Gouvernement tiré de la possibilité d'exercer des voies de droit disponibles, la Cour l'estime pertinent mais non suffisant en l'espèce pour condamner le requérant. Elle relève tout d'abord que l'exercice des recours disponibles, d'une part, et celui du droit à la liberté d'expression, d'autre part, ne poursuivent pas la même finalité et ne sont pas interchangeables. Cela étant, la Cour estime que la défense d'un client par son avocat doit se dérouler non pas dans les médias, sauf circonstances très particulières (paragraphe 138 ci-dessus), mais devant les tribunaux compétents, ce qui inclut l'exercice des voies de droit disponibles. Elle note qu'en l'espèce la saisine de la chambre d'accusation de la cour d'appel de Paris témoigne manifestement d'une volonté première du requérant et de son confrère de régler la question par les voies de droit disponibles. Ce n'est en réalité qu'après leur exercice qu'est apparu un dysfonctionnement, relevé par le juge d'instruction P. dans son procès-verbal du 1er août 2000 (paragraphe 32 ci-dessus). Or, à ce stade, la chambre d'accusation ne pouvait plus être saisie de ces faits, puisqu'elle avait précisément déjà dessaisi les juges M. et L.L. du dossier. La Cour note également qu'en tout état de cause, quatre ans et demi s'étaient déjà écoulés depuis l'ouverture de l'instruction, laquelle n'est toujours pas close à ce jour. Elle constate en outre que les parties civiles et leurs avocats ont été diligents et, en particulier, qu'ils ont, selon les termes de l'arrêt de la cour d'appel de Versailles du 28 mai 2009, permis de faire entendre un témoin important en Belgique malgré le désintérêt des juges d'instruction M. et L.L. à son égard (paragraphe 16 ci-dessus).

172. Par ailleurs, la demande d'enquête adressée à la garde des Sceaux pour se plaindre de ces faits nouveaux n'était pas un recours juridictionnel, ce qui aurait éventuellement justifié de ne pas intervenir dans la presse, mais une simple demande d'enquête administrative soumise à la décision discrétionnaire de la ministre de la Justice. La Cour note à cet égard que les juges internes, en première instance comme en appel, ont eux-mêmes estimé que la lettre ne pouvait bénéficier de l'immunité accordée aux actes judiciaires, le tribunal correctionnel ayant précisé que son contenu était purement informatif (paragraphes 38 et 46 ci-dessus). La Cour relève qu'il n'est pas soutenu que cette demande aurait eu une quelconque suite et, de plus, elle note que les juges M. et L.L. ne l'ont manifestement pas envisagée comme un exercice normal d'une voie de recours offerte par le droit interne, mais comme une démarche justifiant le dépôt d'une plainte pour dénonciation calomnieuse (paragraphe 35 ci-dessus).

173. Enfin, la Cour constate que ni le procureur général ni le bâtonnier ou le conseil de l'ordre des avocats compétents n'ont estimé nécessaire d'engager des poursuites disciplinaires contre le requérant en raison de ses déclarations dans la presse, alors qu'ils en avaient la possibilité (*Mor*, précité, § 60).

iv. Conclusion sur les circonstances de l'espèce

174. La Cour estime que les propos reprochés au requérant ne constituaient pas des attaques gravement préjudiciables à l'action des tribunaux dénuées de fondement sérieux, mais des critiques à l'égard des juges M. et L.L., exprimées dans le cadre d'un débat d'intérêt général relatif au fonctionnement de la justice et dans le contexte d'une affaire au retentissement médiatique important depuis l'origine. S'ils pouvaient certes passer pour virulents, ils n'en constituaient pas moins des jugements de valeur reposant sur une « base factuelle » suffisante.

e) Les peines prononcées

175. Pour ce qui est des peines prononcées, la Cour rappelle que la nature et la lourdeur des peines infligées sont aussi des éléments à prendre en considération lorsqu'il s'agit de mesurer la proportionnalité de l'ingérence (voir, par exemple, *Sürek*, précité, § 64, *Chauvy et autres c. France*, n° 64915/01, § 78, CEDH 2004-VI, et *Mor*, précité, § 61). Or, en l'espèce, la cour d'appel a condamné le requérant au paiement d'une amende de 4 000 EUR. Ce montant correspond exactement à celui fixé par les juges de première instance, ces derniers ayant expressément tenu compte de la qualité d'avocat du requérant pour faire preuve de sévérité et le « sanctionner (...) par une amende d'un montant suffisamment significatif » (paragraphe 41 ci-dessus). De plus, outre une obligation sous astreinte de publier un communiqué dans le quotidien *Le Monde*, elle l'a condamné solidairement avec le journaliste et le directeur de la publication à payer 7 500 EUR de dommages-intérêts à chacun des juges et à verser 4 000 EUR au juge L.L. au titre de ses frais. La Cour note par ailleurs que seul le requérant a été condamné à verser une somme à la juge M. au titre de ses frais, à hauteur de 1 000 EUR.

176. Or la Cour rappelle que même lorsque la sanction est la plus modérée possible, à l'instar d'une condamnation accompagnée d'une dispense de peine sur le plan pénal et à ne payer qu'un « euro symbolique » au titre des dommages-intérêts (*Mor*, précité, § 61), elle n'en constitue pas moins une sanction pénale et, en tout état de cause, cela ne saurait suffire, en soi, à justifier l'ingérence dans le droit d'expression du requérant (*Brasilier*, précité, § 43). Elle a maintes fois souligné qu'une atteinte à la liberté d'expression peut avoir un effet dissuasif quant à l'exercice de cette liberté (voir,

mutatis mutandis, *Cumpănă et Mazăre c. Roumanie* [GC], nº 33348/96, § 114, CEDH 2004-XI, et *Mor*, précité), risque que le caractère relativement modéré des amendes ne saurait suffire à faire disparaître (*Dupuis et autres c. France*, nº 1914/02, § 48, 7 juin 2007), la sanction d'un avocat pouvant en outre produire des effets directs (poursuites disciplinaires) ou indirects (au regard par exemple de leur image et de la confiance que le public et leur clientèle placent en eux). La Cour rappelle au demeurant que la position dominante des institutions de l'État commande aux autorités de faire preuve de retenue dans l'usage de la voie pénale (paragraphe 127 ci-dessus). La Cour constate cependant qu'en l'espèce le requérant n'a pas seulement été condamné au pénal : il a fait l'objet d'une sanction qui n'était pas « la plus modérée possible » mais au contraire importante, sa qualité d'avocat ayant même été retenue pour justifier une plus grande sévérité.

3. Conclusion

177. Compte tenu de ce qui précède, la Cour estime que la condamnation du requérant pour complicité de diffamation s'analyse en une ingérence disproportionnée dans le droit à la liberté d'expression de l'intéressé, qui n'était donc pas « nécessaire dans une société démocratique » au sens de l'article 10 de la Convention.

178. Partant, il y a eu violation de l'article 10 de la Convention.

III. SUR L'APPLICATION DE L'ARTICLE 41 DE LA CONVENTION

179. Aux termes de l'article 41 de la Convention,

> « Si la Cour déclare qu'il y a eu violation de la Convention ou de ses Protocoles, et si le droit interne de la Haute Partie contractante ne permet d'effacer qu'imparfaitement les conséquences de cette violation, la Cour accorde à la partie lésée, s'il y a lieu, une satisfaction équitable. »

A. Dommage

180. Le requérant demande que lui soit allouée la somme de 4 270 euros (EUR) au titre de son préjudice matériel pour les sommes payées en raison de sa condamnation, ainsi que 20 000 EUR au titre de son préjudice moral du fait de la violation des articles 6 et 10 de la Convention.

181. Le Gouvernement ne se prononce pas devant la Grande Chambre.

182. La Cour constate que le requérant a été condamné à payer une amende de 4 000 EUR, ainsi que 1 000 EUR au titre des frais à la juge M., outre sa condamnation solidaire avec les deux autres coprévenus à verser 7 500 EUR de dommages-intérêts à chacun des juges et 4 000 EUR au juge L.L pour ses frais (paragraphe 46 ci-dessus). Elle estime dès lors qu'il existe

un lien de causalité suffisant entre le dommage matériel allégué et la violation constatée sur le terrain des articles 6 et, surtout, 10 de la Convention. Il y a donc lieu d'ordonner le remboursement des sommes mises à la charge du requérant au titre du préjudice matériel, dans la limite indiquée par lui, à savoir 4 270 EUR correspondant au montant de l'amende, majorée des droits et des frais de justice, payée au Trésor public. 183. La Cour estime par ailleurs que le requérant a subi un préjudice moral certain du fait de sa condamnation pénale et, statuant en équité, elle lui alloue 15 000 EUR à ce titre.

B. Frais et dépens

184. Le requérant sollicite 26 718,80 EUR au titre des frais et dépens pour la procédure devant la Cour.

185. Le Gouvernement ne se prononce pas devant la Grande Chambre.

186. La Cour rappelle que l'allocation de frais et dépens au titre de l'article 41 présuppose que se trouvent établis leur réalité, leur nécessité et, de plus, le caractère raisonnable de leur taux (voir, parmi beaucoup d'autres, *Iatridis c. Grèce* (satisfaction équitable) [GC], n° 31107/96, § 54, CEDH 2000-XI, *Beyeler c. Italie* (satisfaction équitable) [GC], n° 33202/96, § 27, 28 mai 2002, et *Kurić et autres c. Slovénie* (satisfaction équitable) [GC], n° 26828/06, CEDH 2014).

187. En l'espèce, compte tenu des documents en sa possession et des critères susmentionnés, la Grande Chambre estime raisonnable d'octroyer à ce titre 14 400 EUR au requérant.

C. Intérêts moratoires

188. La Cour juge approprié de calquer le taux des intérêts moratoires sur le taux d'intérêt de la facilité de prêt marginal de la Banque centrale européenne majoré de trois points de pourcentage.

PAR CES MOTIFS, LA COUR, À L'UNANIMITÉ,

1. *Dit* qu'il y a eu violation de l'article 6 § 1 de la Convention ;
2. *Dit* qu'il y a eu violation de l'article 10 de la Convention ;
3. *Dit*

   a) que l'État défendeur doit verser au requérant, dans les trois mois, les sommes suivantes :

      i. 4 270 EUR (quatre mille deux cent soixante-dix euros), plus tout montant pouvant être dû à titre d'impôt, pour dommage matériel,

ii. 15 000 EUR (quinze mille euros), plus tout montant pouvant être dû à titre d'impôt, pour dommage moral,

iii. 14 400 EUR (quatorze mille quatre cents euros), plus tout montant pouvant être dû à titre d'impôt par le requérant, pour frais et dépens ;

b) qu'à compter de l'expiration dudit délai et jusqu'au versement, ces montants seront à majorer d'un intérêt simple à un taux égal à celui de la facilité de prêt marginal de la Banque centrale européenne applicable pendant cette période, augmenté de trois points de pourcentage ;

4. *Rejette* la demande de satisfaction équitable pour le surplus.

Fait en français et en anglais, puis prononcé en audience publique au Palais des droits de l'homme, à Strasbourg, le 23 avril 2015.

Johan Callewaert
Adjoint au greffier

Dean Spielmann
Président

Au présent arrêt se trouve joint, conformément aux articles 45 § 2 de la Convention et 74 § 2 du règlement, l'exposé des opinions séparées suivantes :

– opinion concordante du juge Nicolaou ;
– opinion concordante du juge Kūris.

D.S.
J.C.

OPINION CONCORDANTE DU JUGE NICOLAOU

(Traduction)

La juge M., du tribunal de grande instance de Paris, était chargée depuis quelque temps déjà de l'instruction du dossier dit de la Scientologie lorsqu'elle fut désignée en 1997, avec un autre juge d'instruction, pour s'occuper de l'affaire Borrel, sans rapport avec la précédente, et qui a donné lieu à la présente affaire devant la Cour. Le requérant était l'avocat des parties civiles dans les deux affaires et était mécontent de la façon dont la juge M. menait l'instruction dans les deux cas, quoique pour des raisons pas tout à fait identiques.

En juin 2000, à une époque où l'affaire Borrel connaissait des développements importants, les événements prirent dans l'affaire de la Scientologie une tournure désagréable : à la suite d'un procès engagé par le requérant, en qualité d'avocat, où l'État fut condamné pour faute lourde dans le cadre du dossier de la Scientologie, des poursuites disciplinaires furent engagées contre la juge M. Il lui était reproché de ne pas avoir porté l'attention nécessaire au dossier, de l'avoir laissé en quasi déshérence pendant cinq ans, de s'être engagée dans une voie transactionnelle excédant la compétence d'un juge d'instruction et de ne pas avoir fait de copie de toutes les pièces de la procédure, rendant ainsi impossible la reconstitution du dossier après sa disparition partielle de son cabinet d'instruction. La ministre de la Justice saisit de ces questions le Conseil supérieur de la magistrature, statuant comme conseil de discipline des magistrats du siège.

Malheureusement, la décision de la ministre fut rendue publique par son directeur de cabinet au cours d'une conférence de presse avant même qu'elle ne soit notifiée à la juge M. et au président du tribunal. Cette publicité déclencha des protestations de la part des autres magistrats du tribunal de grande instance de Paris. Ils exprimèrent leur soutien envers leur collègue qui avait subi un tel camouflet et réaffirmèrent le droit des juges d'être traités avec respect et que ce droit ne saurait être inférieur à celui reconnu aux membres du public. Réunis en assemblée générale quelques jours plus tard, les magistrats de cette juridiction adoptèrent à l'unanimité la motion suivante :

> « L'Assemblée générale des magistrats du siège du tribunal de grande instance de Paris, réunie le 4 juillet 2000, sans contester le pouvoir reconnu au garde des Sceaux d'exercer des poursuites disciplinaires dans les conditions prévues par la loi, s'étonne d'apprendre par voie de presse l'engagement de poursuites de ce type à l'encontre de Madame [M.], premier juge d'instruction à Paris alors que ni l'intéressée elle-même ni la hiérarchie judiciaire n'ont été avisées à ce jour officiellement d'un tel engagement. »

La question qui se pose sous l'angle de l'article 6 § 1 tourne autour des propos tenus par l'un des magistrats au cours de l'assemblée générale, qui sont les suivants :

> « Il n'est pas interdit aux magistrats de base de dire que nous sommes proches de Madame [M.]. Il n'est pas interdit de dire que Madame [M.] a notre confiance et notre soutien. »

Neuf ans plus tard, la Cour de cassation, siégeant en une formation de dix conseillers, statua en dernière instance sur le pourvoi formé par le requérant contre sa condamnation pénale pour avoir formulé des déclarations au sujet de la juge M. dans le cadre de l'affaire Borrel. Le magistrat qui avait tenu les propos susmentionnés quant à la manière dont la ministre de la Justice avait agi dans l'affaire de la Scientologie, et qui était devenu entre-temps conseiller à la Cour de cassation, était membre de la formation de cette juridiction qui avait connu du pourvoi. Le requérant a admis qu'il n'était pas établi que ce magistrat ait été réellement de parti pris, mais il a soutenu que la seule présence de celui-ci au sein de la formation de jugement rendait objectivement justifiés ses craintes ou doutes quant à un manque d'impartialité.

La Grande Chambre souscrit à cette thèse. Elle indique que les propos tenus par le magistrat en question pour soutenir la juge M. étaient susceptibles de faire naître dans l'esprit du requérant des doutes quant à l'impartialité de la Cour de cassation. Elle estime qu'il faut à cet égard tenir compte du « contexte très particulier de l'affaire » (paragraphe 84 de l'arrêt), qui se caractérise par l'interaction de divers facteurs et relations, et notamment par le fait que le conflit professionnel entre la juge M. et le requérant avait pris l'apparence d'un conflit personnel puisque la première avait porté plainte contre ce dernier. Enfin, la Grande Chambre relève que la cour d'appel avait elle-même constaté l'existence d'un lien entre les deux affaires et qu'il s'agissait d'un « règlement de comptes *a posteriori* ».

La question essentielle qui se pose est celle de savoir s'il était raisonnable de douter de l'impartialité de la Cour de cassation du fait que le magistrat en question siégeait dans sa formation de jugement. On ignore si ce magistrat se souvenait de ce qu'il avait réellement dit neuf ans plus tôt ou s'il lui est venu à l'esprit, lorsqu'il a été désigné pour siéger, que ce qu'il avait fait ou dit à propos de la juge M. pouvait être considéré comme influant sur son impartialité. On peut imaginer que, s'il y avait réfléchi, il aurait informé les autres juges de la formation. On ne sait pas s'il s'en est souvenu ou non ni, dans l'affirmative, s'il s'est dit que la question méritait réflexion. Il se peut que cela ne soit pas le cas ; il se peut aussi que cela soit le cas mais que la formation ait pensé que cela était sans importance, car, dans le cas contraire,

la question aurait pu être résolue très simplement, par son déport ou par une décision du tribunal après que le requérant eut été entendu.

Le Gouvernement n'indique pas que dans ce type de cas le système français offre un redressement dont le requérant aurait dû se prévaloir. Il faut donc en déduire que le requérant n'avait aucun moyen de porter la question devant la Cour de cassation lorsque, après le prononcé de son arrêt, il s'est rendu compte que le juge en question avait fait partie de la formation de jugement (comparer avec *In Re* Pinochet [1999] UKHL 52 (15 janvier 1999) où la Chambre des lords, face à une situation similaire, a annulé son propre arrêt). La Cour se trouve ainsi malheureusement dans l'obligation d'examiner la question en première instance.

L'intégrité d'une procédure judiciaire doit être démontrée aux yeux de tous en termes non ambigus. Pour y parvenir, il est nécessaire de définir la notion de « caractère raisonnable » de la manière la plus large possible, en englobant même le point de vue le plus exigeant sur les apparences. Selon l'adage anglais, « *it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done* » (il est fondamental non seulement que justice soit faite, mais aussi qu'elle le soit manifestement et sans le moindre doute au vu et au su de tous » (Lord Hewart, *Rex v. Sussex Justices, Ex parte McCarthy* [1924] K.B., p. 259). Parallèlement, il est nécessaire d'exclure fermement les interprétations fantaisistes ou les propositions totalement irréalistes.

En l'espèce, rien n'indique que le juge en question ait eu avec la juge M. un lien autre que celui que tous les autres juges participant à la réunion avaient eux aussi avec elle en tant que collègue. Ce magistrat a utilisé la première personne du pluriel, ce qui exprime un soutien collégial et non personnel. Il a pris la parole au cours d'une assemblée de juges où ceux-ci ont protesté collectivement contre une attitude certainement cavalière de la part de la ministre de la Justice envers eux. Cette attitude, qui avait un impact plus direct et immédiat sur la juge M., pouvait se comprendre comme une marque de mépris à l'égard de celle-ci. Dans ce cadre, des propos tels que ceux employés par ce magistrat n'avaient d'autre but que de rétablir l'équilibre. Le magistrat aurait certainement pu mieux choisir ses mots mais nul n'aurait songé que sa déclaration visait à exprimer un avis sur le fond de la procédure disciplinaire en cours ni, autrement dit, un jugement de valeur sur la façon dont la juge M. avait agi. En outre, ce qui a été dit se rapportait exclusivement à la façon dont la juge M. avait, jusqu'à ce moment-là, traité l'affaire de la Scientologie, et n'avait strictement aucun rapport avec ce qui devait se produire plus tard dans l'affaire Borrel. Neuf ans s'étaient alors écoulés depuis que ces propos avaient été tenus et l'on peut supposer que chacun avait continué son chemin de son côté. Absolument rien ne donne

à penser que le juge de la Cour de cassation avait une quelconque raison d'avoir, ou pouvait avoir, un avis sur la façon dont la juge M. s'était comportée ou avait mené l'instruction dans les affaires dont elle était chargée.

Faut-il se méfier des juges au point d'avoir des raisons légitimes de croire dans de telles circonstances que l'on peut douter de l'impartialité d'un juge ? Pour répondre à cette question, la Cour doit savoir quel est l'avis du public en général sur l'intégrité des juges. Ce point est déterminant pour juger du respect dont ils jouissent et de la confiance que l'on peut ou non mettre en eux. Dans certaines limites, plus cette confiance est grande, moins on est enclin à penser que certaines circonstances font naître des doutes. Les juges eux-mêmes ont façonné au fil du temps la perception que l'on a d'eux. La notion d'impartialité objective ne peut, selon moi, se résumer à une pure abstraction conçue du seul point de vue des principes et sans tenir compte des réalités sociales qui président à l'élaboration des normes pratiques. Les juges ne sont peut-être pas parfaits – au demeurant tous ne le sont pas – mais, même alors, j'ai du mal à admettre que l'on ait pu sérieusement penser qu'il y avait en l'espèce la possibilité de croire à une apparence de parti pris. On peut, néanmoins, voir la chose sous un autre angle et dire que, même dans un monde hypothétique où tous les juges seraient parfaits et jouiraient d'une confiance et d'un respect sans bornes, il resterait nécessaire de démontrer que le système de la justice lui-même est à cet égard blanc comme neige et totalement exempt du moindre doute ; il s'agit là d'une approche absolutiste qui n'a pas ma faveur.

Quelle que soit la meilleure approche à adopter sur la question à l'étude, j'ai pour finir décidé qu'il était concevable que l'opinion adoptée par tous les autres membres de la Grande Chambre quant à ce que le résultat doit être puisse être partagée par des personnes sensées de nos jours et que, dès lors, sur cette question d'appréciation, il était juste de se rendre à cette opinion.

OPINION CONCORDANTE DU JUGE KŪRIS

(Traduction)

1. Mon désaccord avec la majorité porte sur deux questions, qui ne sont toutefois ni l'une ni l'autre suffisamment importantes pour jeter le doute sur la conclusion générale de violation des articles 6 § 1 et 10 de la Convention, à laquelle je souscris.

2. Le raisonnement exposé aux paragraphes 89 à 91 de l'arrêt mentionne deux circonstances factuelles qui sont importantes pour le constat de violation de l'article 6 § 1. La première est que le juge J.M. siégeait au sein de la formation de jugement qui a statué sur le pourvoi du requérant ; le texte précise toutefois qu' « il est impossible de connaître l'influence réelle de J.M. au cours [des délibérations] ». La Cour dit que l'argument selon lequel J.M. n'était que l'un des dix juges de cette formation « n'est pas déterminant au regard de la question de l'impartialité objective sous l'angle de l'article 6 § 1 » ; c'est donc son influence « non établie » qui est considérée comme faisant naître « des doutes sérieux » quant à l'impartialité de la juridiction de jugement (paragraphe 89 de l'arrêt). Dans ce contexte, l'argument selon lequel l'impartialité « pouvait susciter des doutes sérieux » renvoie à l'impartialité objective du juge J.M. lui-même et, par extension, de la formation de jugement tout entière. La Cour ne veut pas mettre en cause ouvertement l'impartialité subjective du juge J.M. ; elle estime plutôt que le fait que le requérant ait pu penser qu'il avait des raisons de douter de l'impartialité subjective du juge J.M. a eu une influence sur l'impartialité objective de ce juge et de la formation dans son ensemble. Bien que la Cour ne mette pas en cause explicitement et directement l'impartialité subjective du juge J.M., elle le fait de manière implicite et indirecte ; en effet, la simple allusion à l'influence de ce juge sur l'issue de l'affaire donne à penser qu'elle aurait pu être de nature à conduire à une conclusion défavorable au requérant et que, sans cette influence, l'issue aurait pu être différente.

La deuxième circonstance est que le requérant n'a pas été informé que le juge J.M. siégerait au sein de la formation de jugement. Au contraire, les informations dont il disposait à l'époque ne lui donnaient aucune raison de penser que ce juge ferait partie de la formation judiciaire appelée à statuer sur son pourvoi. En raison de ce défaut d'information (quelle qu'en soit la raison), le requérant « n'a donc pas pu contester la présence de J.M. ni soulever la question de l'impartialité à ce titre » (paragraphe 90 de l'arrêt, lequel renvoie au paragraphe 52 du même texte).

À mon avis, la première de ces deux circonstances n'a pas en elle-même d'importance sur le plan juridique. Nous ne savons pas et ne pouvons pas

savoir si le juge J.M. a exprimé au cours des délibérations un avis qui aurait pu être défavorable au requérant. Ainsi, dire que le juge a pu avoir une influence plus ou moins grande sur l'issue de l'affaire relève de la pure spéculation. On pourrait tout aussi bien spéculer sur le manque d'impartialité des juges « nationaux » – c'est ainsi qu'ils sont couramment appelés – à la Cour, dans les affaires dirigées contre l'État au titre duquel ils ont été élus, au motif que lorsqu'une affaire examinée par une chambre est déférée à la Grande Chambre au titre de l'article 43 de la Convention, le juge national a déjà siégé dans l'affaire en tant que membre de la chambre. Or pareille spéculation est réfutée par l'article 26 § 4 de la Convention, qui prévoit expressément que le juge élu au titre de la Haute Partie contractante concernée siège d'office à la Grande Chambre. En conséquence, la participation du juge national à la Grande Chambre est rendue obligatoire, de la manière la plus formelle qui soit, par la Convention elle-même, et est donc absolument nécessaire.

Au vu de ce type de situations relatives à la pratique continue de la Cour, la plausibilité de toute spéculation sur la « partialité » objective du juge J.M. et de la formation dans son ensemble envers le requérant est quasi nulle. Ce juge avait exprimé son soutien à la juge M. (dont les relations avec le requérant paraissaient être, disons, problématiques) de nombreuses années auparavant et dans un contexte entièrement différent, et rien n'indique qu'il ait jamais exprimé un avis sur l'affaire dirigée contre M. Morice ou sur la personnalité de celui-ci, ou encore sur tout le contexte politiquement sensible de l'affaire, avant qu'elle ne soit tranchée par la formation dont il faisait partie.

Je ne veux certainement pas dire que, dans un tribunal français (ou autre tribunal national) la « nécessité absolue » d'inclure un juge dans la composition d'un organe judiciaire qui doit statuer sur une affaire précise peut se justifier de manière exhaustive en se bornant par exemple à faire référence à une loi qui prévoit expressément pareille inclusion, tout comme la Convention prévoit que le juge « national » fasse partie de la Grande Chambre. En admettant que pareille loi existe, elle ne serait probablement par irréprochable juridiquement parlant. Cependant – et pas uniquement en théorie – il peut y avoir d'autres raisons (pas seulement de nature juridique mais aussi factuelles) qui obligent à inclure un juge dans une formation ou, pour le dire de façon plus modérée, qui justifient qu'il n'en soit pas exclu. On peut trouver dans la jurisprudence de la Cour des décisions et arrêts où le fait qu'un juge ait pris part précédemment à la même affaire n'a pas été jugé constitutif d'une violation du droit à un procès équitable protégé par la Convention. Pour donner deux exemples, même le simple fait qu'un juge ait déjà pris des décisions au sujet d'une certaine personne « ne peut justifier

en soi des doutes relativement à son impartialité» (*Ökten c. Turquie* (déc.), nº 22347/07, § 41, 3 novembre 2011). Dans une affaire plus ancienne, la Cour a dit: «on ne peut voir un motif de suspicion légitime dans la circonstance que trois des sept membres de la section disciplinaire ont pris part à la première décision» (*Diennet c. France*, 26 septembre 1995, § 38, série A nº 325-A). Il faut statuer sur chaque cas selon ses particularités. En l'espèce, si la question de la «partialité» du juge J.M. avait été soulevée par le requérant au moment voulu, cette allégation aurait été rejetée d'autorité car reposant sur des soupçons illégitimes. Or le requérant n'a pas eu la possibilité de soulever cette question au cours de la procédure interne.

Ainsi, ce qui importe beaucoup plus que le «simple» fait que le juge J.M. ait siégé au sein de la formation est que le Gouvernement n'a pas montré (et n'a même pas cherché à montrer) qu'il y avait des raisons impérieuses rendant sa présence absolument nécessaire (*Fazlı Aslaner c. Turquie*, nº 36073/04, § 40, 4 mars 2014) ou, pour le dire autrement, qu'il était justifié de ne pas l'exclure de la formation. Je pense pour ma part qu'il n'y avait pas le moindre motif de ce genre. Par ailleurs, il ne pouvait guère y avoir de motifs sérieux d'exclure ce juge de la formation pour la seule raison qu'il avait exprimé son soutien à la juge M. de nombreuses années auparavant et dans un contexte entièrement différent. Les deux situations sont sans rapport en dehors du fait qu'elles mettaient en présence les mêmes protagonistes, opposés l'un à l'autre. Mais même ce lien formel a été effacé, ou en tout cas sérieusement atténué, par le long laps de temps écoulé entre les deux événements et par le fait que le requérant lui-même a reconnu que le juge J.M. n'avait pas fait montre de préventions personnelles envers lui (paragraphe 67 de l'arrêt). La présomption d'intégrité des juges compte. Et si elle compte vraiment, eu égard à l'ensemble des circonstances de l'affaire, les allégations quant à la «partialité» du juge J.M. auraient été rejetées si elles avaient été soulevées au cours de la procédure interne. En outre, il n'est pas improbable que le requérant, de manière tout à fait raisonnable, se soit abstenu de soulever la question vu son manque apparent de fondement. Ce qui était vraiment susceptible de le rendre légitimement soupçonneux et l'a rendu tel est qu'il n'avait pas été informé de la composition de la formation judiciaire qui a tranché l'affaire. Le Gouvernement n'a pas donné la moindre raison à cette absence d'information. Le Gouvernement aurait-il obtenu gain de cause face à cette plainte s'il avait fourni une telle explication? En tout état de cause, je suis sûr qu'il n'aurait pas pu trouver une explication plausible, car, même s'il peut exister des motifs impérieux (quoique discutables) de nature juridique ou factuelle pour inclure un certain juge dans une formation judiciaire donnée, il ne peut tout simplement pas y avoir la moindre raison de ne pas communiquer le nom des juges siégeant au

sein de la formation à la personne dont l'affaire va être tranchée par cette formation judiciaire. À cet égard, la thèse du Gouvernement était d'emblée vouée à l'échec. En conséquence, sur les deux circonstances dont je viens de parler, seule la seconde importe, la première n'ayant qu'un caractère accessoire. Celle-ci n'a pas de signification en elle-même mais ne vaut que parce qu'elle est combinée à l'autre. Mais n'est-ce pas ce que la majorité a voulu dire quand elle a admis que la seule présence du juge J.M. « n'[était] pas déterminant[e] au regard de la question de l'impartialité objective sous l'angle de l'article 6 § 1 » ? En d'autres termes, suis-je simplement en train de répéter, avec prolixité, le même argument ? Je ne le pense pas, ou en tout cas telle n'est pas mon intention. Le diable se cache dans les détails. Dans le raisonnement de la majorité, il se cache dans un seul détail, à savoir la prise en considération, au paragraphe 89 de l'arrêt, de l'influence « non établie » du juge J.M. sur l'issue de l'affaire. Je suis convaincu que cette allusion malheureuse aurait dû être omise. Toute spéculation quant à « l'influence réelle » de ce juge sur l'issue de l'affaire jette une ombre inutile et – ce qui est encore plus important – injustifiée sur l'intégrité de ce juge. Enfin, il faut dire que ce constat n'est pas conforme à la jurisprudence et à la mission de la Cour.

3. Mon autre point de désaccord avec la majorité concerne le paragraphe 132 de l'arrêt. La Cour y répète sa déclaration, imprudemment employée entre autres dans l'arrêt de Grande Chambre *Kyprianou c. Chypre* (ainsi que dans quelques arrêts de chambre), à savoir que le « statut spécial » (ou « statut spécifique » au paragraphe 132) des avocats, « intermédiaires entre les justiciables et les tribunaux, leur fait occuper une position centrale dans l'administration de la justice » (*Kyprianou c. Chypre* [GC], n° 73797/01, § 173, CEDH 2005-XIII).

Je ne saurais approuver une telle description. Il s'agit d'une question de principe. Les adjectifs « spécial » ou « spécifique » n'ont pas le sens de « central ». Un avocat représente toujours une partie et n'est par définition pas en mesure d'occuper « une position centrale dans l'administration de la justice ». Une partie n'est jamais « centrale », pas plus que son représentant ne peut être « central ». Ceux qui occupent « une position centrale dans l'administration de la justice » sont les juges (pour de bonnes raisons ou, comme c'est malheureusement parfois le cas, de mauvaises). Les « intermédiaires entre les justiciables et les tribunaux » sont les porte-parole des tribunaux, les représentants de la presse ou – en tant que tels – les journalistes, mais en aucun cas les avocats, qui représentent les parties. Un avocat agit dans l'intérêt d'une partie, pour défendre un client par lequel, en règle générale, il est rémunéré. Un avocat doit tenir compte des intérêts de la partie qu'il représente même lorsqu'ils sont opposés à ceux des « justiciables », la société et l'État. Cela ne vise pas à nier ou diminuer l'importance de la fonction

des avocats. Il est vrai que ceux-ci contribuent à la recherche de la justice et aident les tribunaux à exercer leur mission, mais ils peuvent aussi viser à entraver le cours de la justice pour défendre les intérêts de leurs clients, ce qu'ils font parfois. Cela dépend. Une partie représentée par un avocat peut se trouver dans le prétoire parce qu'elle demande justice mais il est probablement tout aussi fréquent que l'avocat représente une partie à qui l'on réclame justice.

Tout *dictum* est susceptible d'évoluer, dans une future affaire, pour devenir la *ratio* d'un jugement. Concernant ce *dictum* précis, je devrais probablement dire non pas qu'il est susceptible d'évoluer en ce sens, mais qu'il y a un danger qu'il le fasse. La répétition, dans un arrêt supplémentaire de la Grande Chambre de la Cour, du mantra consistant à dire que les avocats occupent ostensiblement « une position centrale dans l'administration de la justice » et sont les « intermédiaires entre les justiciables et les tribunaux », surtout lorsque cette caractéristique n'est attribuée nulle part ailleurs dans la jurisprudence de la Cour à l'autre partie, à savoir l'accusation, déforme la situation. Quant à l'affaire à l'étude, elle aurait pu être tranchée, sans aucun inconvénient pour la conclusion de la Cour, sans recourir à cette répétition non critique.

MORICE v. FRANCE
(Application no. 29369/10)

GRAND CHAMBER

JUDGMENT OF 20 APRIL 2015[1]

1. Judgment delivered by the Grand Chamber following referral of the case in accordance with Article 43 of the Convention.

SUMMARY[1]

Lawyer's conviction for complicity in defamation of investigating judges on account of remarks reported in the press

The conviction of the applicant, a lawyer, and the severe sanction imposed on him for complicity in defamation, entailed a disproportionate interference with his right to freedom of expression. The remarks in question, as reported in the press, did not constitute gravely damaging and essentially unfounded attacks on the action of the courts, but criticisms of judges expressed as part of a debate on a matter of public interest, relating to the functioning of the justice system, and in the context of a case that had received significant media coverage from the outset. While they were certainly harsh, they were nevertheless value judgments with a sufficient "factual basis" (see paragraphs 128, 174 and 177 of the judgment).

Article 10

Freedom of expression – Lawyer's conviction for complicity in defamation of investigating judges on account of remarks reported in the press – Protection of the reputation of others – Protection of the rights of others – Remarks concerning the functioning of the judiciary – Remarks aimed at investigating judge removed from the proceedings – Debate on a matter of public interest – Narrow margin of appreciation – Value judgments – Sufficient factual basis – Remarks to be considered in context of case together with content of letter taken as a whole – Members of the judiciary subject to wider limits of acceptable criticism than ordinary citizens – Nature of remarks not capable of undermining the proper conduct of the judicial proceedings – Use of available remedies – Remarks amounting to criticisms of judges expressed as part of a debate on a matter of public interest, relating to the functioning of the justice system, and in the context of a case that had received significant media coverage from the outset – Severe criminal sanction – Proportionality – Necessary in a democratic society

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Facts

In 1995 Mr Borrel, a judge who had been seconded in the context of cooperation agreements between France and Djibouti, was found dead. The investigation by the Djibouti gendarmerie in the days that followed concluded that he had committed suicide. His widow, disputing the finding of suicide, filed a complaint as a civil party, and appointed the applicant to represent her in the proceedings. Two judicial

1. This summary by the Registry does not bind the Court.

investigations were opened in respect of premeditated murder committed by a person or persons unknown. The judicial investigation was assigned to Ms M., subsequently joined by Mr L.L., investigating judges.

In June 2000 the Indictments Division of the Court of Appeal removed those judges from the case and transferred the investigation to a new investigating judge, Judge P. Shortly afterwards, that Division upheld a request by the applicant for the withdrawal of Judge M. from a high-profile case concerning Scientology.

In September 2000 the applicant and one of his colleagues wrote to the French Minister of Justice in connection with the judicial investigation into Judge Borrel's death. They stated that they were approaching the Minister once again regarding the conduct of Judges M. and L.L., describing it as "completely at odds with the principles of impartiality and fairness", and they asked for an investigation to be carried out by the General Inspectorate of Judicial Services into the "numerous shortcomings ... brought to light in the course of the judicial investigation".

The following day, an article in the newspaper *Le Monde* stated that Mrs Borrel's lawyers had "vigorously criticised" Judge M. to the Minister of Justice, accusing her in particular of conduct which was "completely at odds with the principles of impartiality and fairness", and adding that she had apparently failed to register an item for the case file and to transmit it to her successor.

The two judges filed a criminal complaint as civil parties against the publication director of *Le Monde*, the journalist who had written the article and the applicant, accusing them of the offence of public defamation of a civil servant. The applicant was found guilty of complicity in that offence by the Court of Appeal and was ordered to pay a fine of 4,000 euros (EUR). The sum of EUR 7,500 in damages was awarded to each of the judges, to be paid by the applicant jointly with the two other defendants.

Law

(1) Article 10: The applicant's conviction had constituted an interference with his right to freedom of expression, as guaranteed by Article 10 of the Convention. The interference had been prescribed by law and its aim had been the protection of the reputation or rights of others.

In convicting the applicant, the Court of Appeal had taken the view that the mere fact of asserting that an investigating judge's conduct was "completely at odds with the principles of impartiality and fairness" was a particularly defamatory allegation. That court had added that the applicant's comments concerning the delay in forwarding the video-cassette and his reference to the handwritten card from the public prosecutor of Djibouti to Judge M., in respect of which the applicant had used the term "connivance", merely confirmed the defamatory nature of the accusation, the "veracity" of the allegations not having been established and the applicant's defence of good faith being rejected.

(a) *The applicant's status as a lawyer* – While it was not in dispute that the impugned remarks fell within the context of the proceedings, they had been aimed at investigating judges who had been removed from the proceedings with final effect at the time they were made. The applicant's statements could not therefore have directly contributed to the task of defending his client, since the judicial investigation had by that time been entrusted to another judge who was not the subject of the criticism.

(b) *Contribution to a debate on a matter of public interest* – The applicant's impugned remarks, which concerned the functioning of the judiciary, a matter of public interest, and the handling of the Borrel case – one which had attracted significant media attention – had fallen within the context of a debate on a matter of public interest, thus calling for a high level of protection of freedom of expression, with a particularly narrow margin of appreciation accordingly being afforded to the authorities.

(c) *Nature of the impugned remarks* – The impugned statements had been more value judgments than pure statements of fact, in view of the general tone of the remarks and the context in which they had been made, as they had reflected mainly an overall assessment of the conduct of the investigating judges in the course of the investigation.
The "factual basis" for those value judgments had been sufficient. The failure by the judge to forward the video-cassette had not only been established but it was also sufficiently serious for it to be recorded by Judge P. in the file. As for the handwritten card, in addition to the fact that it had shown a certain friendliness on the part of the public prosecutor of Djibouti towards Judge M., it had accused the civil parties' lawyers of "orchestrating their manipulation".
Lastly, it was an established fact that the applicant had acted in his capacity as lawyer in two high-profile cases in which Judge M. was an investigating judge. In both of these the applicant had succeeded in obtaining findings by the appellate courts that there had been shortcomings in the proceedings, leading to the withdrawal of the cases from Judge M.
Moreover, there had been a sufficiently close connection between the expressions used by the applicant and the facts of the case, and his remarks could not be regarded as misleading or as a gratuitous attack.

(d) *Specific circumstances of the case* – (i) The need to take account of the overall background: The background to the case could be explained not only by the conduct of the investigating judges and by the applicant's relations with one of them, but also by the very specific history of the case, its inter-State dimension and its substantial media coverage. However, the Court of Appeal had attributed an extensive scope to the impugned remark of the applicant criticising an investigating judge for "conduct which [was] completely at odds with the principles of impartiality and fairness", whereas that quotation should have been assessed in the light of the

specific circumstances of the case, especially as it was in reality not a statement made to the author of the article, but an extract from the letter sent by the applicant and his colleague to the Minister of Justice. In addition, at the time when the applicant answered his questions the journalist had already been informed of the letter to the Minister by his own sources. The article's author had been solely responsible for the reference to the disciplinary proceedings against Judge M. in the context of the "Scientology" case. Lawyers could not be held responsible for everything appearing in an "interview" published by the press or for actions by the press.

The Court of Appeal had been required to examine the impugned remarks with full consideration of both the background to the case and the content of the letter, taken as a whole.

The use of the term "connivance" could not therefore constitute "in itself" a serious attack on the honour and reputation of Judge M. and the public prosecutor of Djibouti.

In addition, the applicant's statements could not be reduced to the mere expression of an antagonistic relationship with Judge M. The impugned remarks had formed part of a joint professional initiative taken by two lawyers, on account of facts that were new, established and capable of revealing serious shortcomings in the justice system, involving the two judges who had formerly been conducting the investigation in a case in which the lawyers' clients were civil parties.

While the applicant's remarks certainly had a negative connotation, it had to be pointed out that, notwithstanding their somewhat hostile nature and seriousness, the key question in the statements concerned the functioning of a judicial investigation, which was a matter of public interest, thus leaving little room for restrictions on freedom of expression. In addition, a lawyer should be able to draw the public's attention to potential shortcomings in the justice system and the judiciary might benefit from constructive criticism.

(ii) Maintaining the authority of the judiciary: Judges M. and L.L. were members of the judiciary and were therefore subject to wider limits of acceptable criticism than ordinary citizens; the impugned comments could therefore be directed against them in that capacity.

In addition, the applicant's remarks had not been capable of undermining the proper conduct of the judicial proceedings, in view of the fact that the higher court had withdrawn the case from the two investigating judges concerned by the criticisms.

For the same reasons, and taking account of the foregoing, the applicant's conviction could not serve to maintain the authority of the judiciary.

(iii) Use of available remedies: The referral to the Indictments Division of the Court of Appeal had patently shown that the initial intention of the applicant and

his colleague had been to resolve the matter using the available legal remedies. In reality, it was only after that remedy had been used that the problem complained of had occurred, as recorded by the investigating judge, P., in the file. At that stage the Indictments Division was no longer in a position to examine such complaints, precisely because it had withdrawn the case from Judges M. and L.L. In any event, four and a half years had already elapsed since the opening of the judicial investigation, which had still not been closed at the time of the Court's judgment. For their part, the civil parties and their lawyers had been active in the proceedings. Moreover, the request to the Minister of Justice for an investigation into the new facts had not constituted a judicial remedy – such as to justify possibly refraining from intervention in the press – but a mere request for an administrative investigation subject to the Minister's discretion.
Lastly, neither the Principal Public Prosecutor nor the relevant Bar Council or chairman of the Bar had found it necessary to bring disciplinary proceedings against the applicant on account of his statements in the press, although such a possibility had been open to them.

(iv) Conclusion as to the circumstances of the case: The impugned remarks by the applicant had not constituted gravely damaging and essentially unfounded attacks on the action of the courts, but criticisms levelled at Judges M. and L.L. as part of a debate on a matter of public interest concerning the functioning of the justice system, and in the context of a case which had received wide media coverage from the outset. While those remarks could admittedly be regarded as harsh, they nevertheless constituted value judgments with a sufficient "factual basis".

(e) *Sanctions imposed* – The applicant had received a criminal conviction and had been fined EUR 4,000; he had also been ordered, jointly with the other two defendants, to pay EUR 7,500 in damages to each of the civil parties. Thus the sanction imposed on him had not been the "lightest possible", but, on the contrary, one of some significance, and his status as a lawyer had even been relied upon to justify greater severity
In view of the foregoing, the judgment against the applicant for complicity in defamation could be regarded as a disproportionate interference with his right to freedom of expression, and had not therefore been "necessary in a democratic society" within the meaning of Article 10 of the Convention.
Conclusion: violation (unanimously).

The Court also found, unanimously, that there had been a violation of Article 6 § 1, as the applicant's fears that, before the Court of Cassation, his case had not been given a fair hearing by an impartial tribunal, on account of the presence on

the bench of a judge who had previously and publicly expressed his support for one of the civil parties, could be regarded as objectively justified.

Article 41: EUR 4,270 for pecuniary damage; EUR 15,000 for non-pecuniary damage.

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In the case of Morice v. France,

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

Dean Spielmann, *President*,
Josep Casadevall,
Guido Raimondi,
Isabelle Berro,
Ineta Ziemele,
George Nicolaou,
Luis López Guerra,
Mirjana Lazarova Trajkovska,
Ann Power-Forde,
Zdravka Kalaydjieva,
Julia Laffranque,
Erik Møse,
André Potocki,
Johannes Silvis,
Valeriu Griţco,
Ksenija Turković,
Egidijus Kūris, *judges*,

and Johan Callewaert, *Deputy Grand Chamber Registrar*,

Having deliberated in private on 21 May 2014 and 18 February 2015,

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

PROCEDURE

1. The case originated in an application (no. 29369/10) against the French Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a French national, Mr Olivier Morice ("the applicant"), on 7 May 2010.

2. The applicant was represented by Ms C. Audhoui and Mr J. Tardif, lawyers practising in Paris. The French Government ("the Government") were represented by their Agent, Ms E. Belliard, Director of Legal Affairs, Ministry of Foreign Affairs.

3. The applicant alleged that there had been a breach of the principle of impartiality under Article 6 § 1 of the Convention in proceedings before the Court of Cassation and that his freedom of expression, as guaranteed by Article 10, had been breached on account of his conviction.

4. The application was allocated to the Fifth Section of the Court (Rule 52 § 1 of the Rules of Court). On 11 June 2013 a Chamber of that Section composed Mark Villiger, President, Angelika Nußberger, Boštjan M. Zupančič, Ganna Yudkivska, André Potocki, Paul Lemmens, Aleš Pejchal, judges, and Claudia Westerdiek, Section Registrar, declared the application admissible and delivered a judgment. It found, unanimously, that there had been a violation of Article 6 § 1, and, by a majority, that there had been no violation of Article 10. The partly dissenting opinions of Judges Yudkivska and Lemmens were appended to the judgment.

5. On 3 October 2013 the applicant requested, in accordance with Article 43 of the Convention, that the case be referred to the Grand Chamber. On 9 December 2013 a panel of the Grand Chamber granted the request.

6. The composition of the Grand Chamber was determined in accordance with the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24.

7. The applicant and the Government each filed observations on the merits. In addition, third-party comments were received from the Council of Bars and Law Societies of Europe and from the Paris Bar Association, the National Bar Council and the Conference of Chairmen of French Bars, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3).

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 21 May 2014 (Rule 59 § 3). There appeared before the Court:

(a) *for the Government*

Ms N. Ancel, Head of the Human Rights Section, Ministry of Foreign Affairs and International Development, *Agent*,
Mr A. Letocart, Ministry of Justice
Ms M.-A. Recher, Ministry of Justice,
Ms P. Rouault-Chalier, Ministry of Justice,
Ms E. Topin, Ministry of Foreign Affairs and International Development, *Advisers*;

(b) *for the applicant*

Ms C. Audhoui, member of the Paris Bar,
Mr L. Pettiti, member of the Paris Bar,
Mr N. Hervieu, adviser to a firm of lawyers practising in the *Conseil d'État* and Court of Cassation, *Counsel*,

Mr J. Tardif, member of the Paris Bar,
Ms C. Chauffray, member of the Paris Bar, *Advisers*.

The Court heard addresses by Mr Morice, Mr Pettiti, Mr Hervieu and Ms Ancel.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant, who was born in 1960 and lives in Paris, is a lawyer (*avocat*) and member of the Paris Bar.

A. Death of Judge Borrel and subsequent proceedings

10. On 19 October 1995 Mr Bernard Borrel, a judge who had been seconded by France for the year before as a technical adviser to the Djiboutian Minister of Justice, in the context of cooperation agreements between the two States, was found dead 80 kilometres from the city of Djibouti. His half-naked and partially burnt body was lying some 20 metres below a remote road. The investigation by the Djibouti gendarmerie in the days that followed concluded that he had committed suicide by self-immolation.

11. On 7 December 1995 a judicial investigation was opened at the Toulouse *tribunal de grande instance* to determine the cause of death. Bernard Borrel's body, which was repatriated and interred in Toulouse, underwent an autopsy on 15 February 1996. The report concluded that the death was not suspicious, although the body's state of decomposition did not permit a precise cause to be established.

12. On 3 March 1997 Mrs Elisabeth Borrel, the widow of Bernard Borrel and also a judge, disputing the finding of suicide, filed a complaint as a civil party, in her own name and on behalf of her two minor children, against a person or persons unknown for premeditated murder. She appointed the applicant, Mr Morice, to represent her in the proceedings.

13. On 8 and 23 April 1997 two judicial investigations were opened in respect of premeditated murder committed by a person or persons unknown.

14. In a decision of 30 April 1997, the judicial investigation into the cause of death and the two investigations in respect of premeditated murder were joined.

15. On 29 October 1997 the Court of Cassation accepted a request by the applicant to withdraw the case from the Toulouse court and it was transferred to the *tribunal de grande instance* of Paris, where it was assigned

on 12 October 1997 to Ms M., assisted from 7 January 1998 by Mr L.L., both investigating judges, who were to conduct the judicial investigation jointly.

16. On 19 November 1999 a lawyer at the Brussels Bar informed the police that A., a former senior officer and member of the Djiboutian Presidential Guard, who had found asylum in Belgium, had certain revelations to make concerning Judge Borrel. The information thus disclosed was transmitted to the French authorities via Interpol. A judgment of the Versailles Court of Appeal of 28 May 2009 (see paragraph 18 below) records the following sequence of events: Judges M. and L.L. did not reply, owing to the fact that the witness wished to remain anonymous, and the information was not followed up; the witness's Belgian lawyer thus contacted the applicant, who arranged for the witness to be interviewed by journalists from the daily newspaper *Le Figaro* and the French TV channel TF1, at the end of December 1999; lastly, it was as a result of the publication and broadcasting of that interview in early January 2000 that Judges M. and L.L. decided to go to Belgium to assist the Belgian investigator in taking evidence from the witness.

17. On 31 January 2000 Judges M. and L.L. interviewed the witness in Brussels. It was subsequently alleged by A. that he had been pressurised and intimidated by Judge M. to withdraw his testimony, those complaints being expressly made in a letter of 2 February 2000 from his lawyer to the Crown Prosecutor. In addition, the witness accused the public prosecutor of Djibouti of having threatened him to make him recant his statement, and alleged that the head of the Djibouti secret services had ordered the head of the Presidential Guard, Captain I., to draft a statement discrediting him. Captain I. confirmed A's accusations concerning him.

18. Proceedings were brought in France against the public prosecutor of Djibouti and the head of the country's secret services for the procuring of false evidence, and Judge Borrel's widow and son, the witness A., Captain I., and a French lawyer, A.M., who was implicated, intervened as civil parties. Evidence was taken from Judge M. in her capacity as witness. The public prosecutor and the head of the secret services of Djibouti were sentenced, respectively, to eighteen and twelve months' imprisonment, and ordered to pay damages to the civil parties, in a judgment of the Versailles Criminal Court of 27 March 2008, before being acquitted by the Versailles Court of Appeal on 28 May 2009.

19. On 2 February 2000, in the context of the judicial investigation in respect of premeditated murder, three professional unions of judges and prosecutors, namely the *Syndicat de la magistrature*, the *Association*

professionnelle des magistrats and the *Union syndicale des magistrats*, applied to be joined to the proceedings as civil parties.

20. On 16 March 2000 the applicant, acting on behalf of Mrs Borrel, requested, firstly, that evidence be taken from the witness, A., in Belgium, and, secondly, that a visit to the scene of the crime in Djibouti, in the presence of the civil parties, be organised.

21. In a decision of 17 March 2000, the investigating judges M. and L.L. accepted the request concerning A., finding that a new interview was absolutely necessary. They refused, however, to agree to a site visit, as such a visit had already been made twice, once in 1999 and again one week before the decision in question, as they did not see "how a visit to the site in the presence of the civil party would, at th[at] stage of the proceedings, be helpful for the discovery of the truth". They added that during their visit to Djibouti a few days before, they had been accompanied by two experts, including the director of the Paris Institute of Forensic Medicine, adding that the scene had been filmed and photographed on that occasion.

22. The applicant and another lawyer appealed against that decision. They filed their pleadings with the Indictments Division, as did the lawyer acting for the *Syndicat de la magistrature*, arguing that the last site visit in the presence of an expert could be regarded as a reconstruction from which the civil parties had been excluded, and that the sole aim of the investigation was to demonstrate that the victim had committed suicide. They also requested that the Indictments Division take over the case from the investigating judges and continue the investigation itself.

23. In a judgment of 21 June 2000, the Indictments Division of the Paris Court of Appeal found that after two site visits in the absence of the civil parties, one of which closely resembled a reconstruction, the need to organise an on-site reconstruction in the presence of the civil parties so that they could exercise their rights was indispensable for the discovery of the truth. Accordingly, it set aside the decision of Judges M. and L.L. on that point. In addition, it withdrew the case from them and appointed a new investigating judge, Judge P., to continue the investigation.

24. On 19 June 2007 the Paris public prosecutor, further to the request of the investigating judge then handling the case, on the basis of Article 11, paragraph 3, of the Code of Criminal Procedure, issued a statement to clarify publicly that "whilst suicide had once been the preferred theory, the evidence gathered, especially since 2002, now point[ed] to a criminal act", adding that the experts' reports had determined that "Bernard Borrel was lying on the ground when liquids were poured over him in a random manner".

25. The proceedings are currently still pending.

B. Facts related to the "Scientology" case

26. The Minister of Justice, by acts of 29 June and 16 October 2000, referred to the National Legal Service Commission (*Conseil supérieur de la magistrature* – "the CSM"), in its capacity as a disciplinary board for judges, certain shortcomings attributable to Judge M. in the judicial investigation into the "Scientology" case for which she was responsible and in which the applicant also represented the civil parties. Judge M. was criticised for not devoting the necessary care and attention to the case file, leaving it practically untouched for five years; for having recourse to a friendly-settlement procedure which went beyond the jurisdiction of an investigating judge; and for not making copies of all the documents in the case file, thus making it impossible to reconstruct the file after its partial disappearance from her chambers. Judge M. requested that the referral to the CSM be declared null and void, particularly on account of the fact that it had been made public by the director of the Minister's private office at a press conference, even before she had been personally notified of the decision. In parallel, on 18 October 2000, the Indictments Division of the Paris Court of Appeal upheld a request by the applicant for the withdrawal of the "Scientology" case from Judge M.

27. On 4 July 2000, at a general meeting of judges of the Paris *tribunal de grande instance*, the issue of the disciplinary proceedings against Judge M. was raised, in particular because they had been announced in the press whereas the judge concerned had not been officially informed and the president of that court had not yet been notified. During that meeting a judge, J.M., stated as follows:

> "We are not prohibited, as grassroots judges, from saying that we stand by Judge [M.]. It is not forbidden to say that Judge [M.] has our support and trust."

28. The general meeting drafted the following motion, which was adopted unanimously:

> "The general meeting of judges of the Paris *tribunal de grande instance* held on 4 July 2000, without disputing the authority conferred on the Minister of Justice to take disciplinary proceedings in the conditions prescribed by law, is surprised to learn from the press that such proceedings have been initiated against Judge [M.], investigating judge in Paris, whereas to date neither the judge herself nor her judicial hierarchy have been officially informed thereof."

29. In the context of a magazine interview published in July-August 2000, the chair of the *Syndicat de la magistrature*, a civil party in the Borrel case, criticised the "lack of impartiality on the part of Judge M. in the Borrel and [L.] cases", adding that the judges who had signed the motion "could not have been unaware that in two sensitive cases, the Borrel case and the [L.] case, her impartiality was seriously called into question".

30. In a judgment of 5 January 2000, the Paris *tribunal de grande instance*, in a case brought by the applicant as counsel acting for two civil parties, found the State liable for gross negligence on the part of the courts service on account of the disappearance of the so-called "Scientology" file from the office of Judge M. It awarded damages to the complainants.

31. On 13 December 2001 the CSM dismissed a plea of nullity from Judge M. and, on the merits, while reproaching her for a certain lack of rigour or a failure to keep track of the case sufficiently, did not impose any disciplinary penalty on her.

C. Criminal proceedings against the applicant

32. On 1 August 2000 Judge P., who had been appointed to replace Judges M. and L.L., drafted a report in which he noted the following chain of events. In response to the applicant's request concerning the video-recording made in Djibouti in March 2000 and cited by Judges M. and L.L. in their decision of 17 March 2000, Judge P. replied that it was not in the judicial investigation file and was not registered as an exhibit; on the same day, Judge P. asked Judge M. whether she still had the video-cassette; Judge M. promptly gave him a closed and undated envelope with her name on, showing no sign of having been placed under seal, bearing the address of Judge M. as addressee and that of the public prosecutor of Djibouti as sender; the envelope contained a video-cassette and a handwritten card with the letter head of the public prosecutor of Djibouti, these items then being taken by Judge P. and placed under seal. The public prosecutor's card addressed to Judge M. read as follows (translated from French).

> "Hi Marie-Paule,
>
> As agreed, I am sending you the video-cassette of the Goubet site visit. I hope the picture will be clear enough.
>
> I watched the show *Sans aucun doute* [Without any doubt] on TF1. I noticed once again how Mrs Borrel and her lawyers were determined to carry on orchestrating their manipulation.
>
> I'll call you soon.
>
> Say hello to Roger if he's back, and also to J.C. [D.].
>
> Speak to you soon.
>
> Best wishes,
>
> DJAMA."

33. On 6 September 2000 the applicant and another lawyer, Mr L. de Caunes, wrote a letter to the Minister of Justice to complain of

the facts recorded in the report of the investigating judge P. dated 1 August 2000, on account of the "conduct of Judges [M.] and [L.L.], [which was] completely at odds with the principles of impartiality and fairness". They asked for an "investigation to be carried out by the General Inspectorate of Judicial Services into the numerous shortcomings which [had] been brought to light in the course of the judicial investigation". They stated that the form and substance of the card addressed by the public prosecutor of Djibouti to Judge M. revealed a complicit intimacy that was surprising and regrettable, as the public prosecutor was directly subordinate to the executive, of which the head was "suspected very openly and very seriously of being the instigator of Bernard Borrel's murder".

34. Furthermore, extracts from that letter were included, together with statements made by the applicant to the journalist, in an article in the newspaper *Le Monde* published on 7 September and dated Friday 8 September 2000. The article read as follows.

> "THE LAWYERS acting for the widow of Judge Bernard Borrel, who was found dead in Djibouti in 1995 in mysterious circumstances, vigorously criticised Judge [M.], from whom the case was withdrawn last spring, in a letter to the Minister of Justice on Wednesday 6 September. The judge is accused by Olivier Morice and Laurent de Caunes of 'conduct which is completely at odds with the principles of impartiality and fairness', apparently having failed to register an item for the case file and to transmit it to her successor.
>
> The two lawyers, who had not been authorised to go to Djibouti in March for a second site visit, asked on 1 August to consult the video-recording made on that occasion. Judge [P.], who has been handling the case since its withdrawal from [Judges M. and L.L.] on 21 June, told them that the cassette was not in the case file and was not 'registered in the file as an exhibit'. The judge immediately called his colleague, who gave him the cassette later that day. 'Judges [M.] and [L.L.] had been sitting on the cassette', protests Olivier Morice, 'and had forgotten to place it under seal, for over a month after the case was withdrawn from them'.
>
> To make matters worse, in the envelope Judge [P.] found a handwritten and rather friendly note from Djama [S.], the public prosecutor of Djibouti. 'Hi Marie-Paule, as agreed I am sending you the video-cassette of the Goubet site visit' the note reads. 'I hope the picture will be clear enough. I watched the show *Sans aucun doute* (Without any doubt) on TF1. I noticed once again how Mrs Borrel and her lawyers were determined to carry on orchestrating their manipulation. I'll call you soon. Say hello to Roger [L.L.] if he's back, and also to J.-C. [D.] [deputy public prosecutor in Paris]. Speak to you soon. Best wishes, Djama.'
>
> Mrs Borrel's lawyers are obviously furious. 'This letter shows the extent of the connivance between the Djibouti public prosecutor and the French judges', exclaims Mr Morice, 'and one cannot but find it outrageous'. They have asked Elisabeth Guigou for an investigation by the General Inspectorate of Judicial Services. The Minister of

> Justice had not received their letter on Thursday 7 September. Judge [M.] already has disciplinary proceedings pending against her before the National Legal Service Commission (CSM), in particular for the disappearance of documents from the investigation file in the Scientology case (see *Le Monde* of 3 July)."

35. Judges M. and L.L. filed a criminal complaint as civil parties against a person or persons unknown for false accusations. On 26 September 2000 the Paris public prosecutor's office opened a judicial investigation for false accusations. On 5 November 2000 the Court of Cassation appointed an investigating judge in Lille, who, on 15 May 2006, made a discontinuance order, which was upheld by the Investigation Division of the Douai Court of Appeal on 19 June 2007.

36. In addition, on 12 and 15 October 2000 Judges M. and L.L. filed a criminal complaint as civil parties against the publication director of *Le Monde*, the journalist who had written the article and the applicant, accusing them of public defamation of a civil servant.

37. In an order of 2 October 2001, an investigating judge at the Nanterre *tribunal de grande instance* committed the applicant and the two other defendants to stand trial before the Criminal Court on account of the following passages from the impugned article.

> "The judge [M.] is accused by Olivier Morice and Laurent de Caunes of 'conduct which is completely at odds with the principles of impartiality and fairness', apparently having failed to register an item for the case file and to transmit it to her successor."

> "'Judges [M.] and [L.L.] had been sitting on the cassette', protests Olivier Morice, 'and had forgotten to place it under seal, for over a month after the case was withdrawn from them'."

> "To make matters worse, in the envelope Judge [P.] found a handwritten and rather friendly note."

> "Mrs Borrel's lawyers are obviously furious. 'This letter shows the extent of the connivance between the Djibouti public prosecutor and the French judges', exclaims Mr Morice, 'and one cannot but find it outrageous'."

38. In a judgment of 4 June 2002, the Nanterre Criminal Court dismissed the pleas of nullity which had been raised by the defendants, in particular on the basis of the immunity provided for by section 41 of the Freedom of the Press Act of 29 July 1881 on judicial proceedings and pleadings filed in court, on account of the fact that the article had merely reiterated the content of the letter to the Minister of Justice. The court took the view, on that point, that the letter in question was not an act of referral to the CSM and that its content had to be regarded as purely informative, with the result that it was not covered by immunity.

39. The court then observed that the defamatory nature of the comments had not been "meaningfully disputed" and that the applicant stood by the content of his allegations, which he considered to be well founded. Turning then to each of the impugned comments, to ascertain whether the charge of defamation was made out, and to assess the significance and seriousness thereof, the court first noted that "the accusation of impartiality [*sic*] and unfairness proffered against a judge clearly constitute[d] a particularly defamatory allegation, because it [was] tantamount to calling into question her qualities, her moral and professional rigour, and ultimately her capacity to discharge her duties as a judge". It further took the view that the comments on the failure to forward the video-cassette were also defamatory as they suggested that there had at least been some negligence or a form of obstruction. As to the term "connivance", the court found that the use of that word clearly and directly suggested that the judges had been collaborating with an official of a foreign country to act in a biased and unfair manner, this being exacerbated by the implication in the article that there was serious evidence of such conduct, because the Minister of Justice had been requested to initiate an investigation.

40. As to the applicant's guilt, the court found that it was, in any event, established that the journalist had become privy to the letter sent to the Minister of Justice through his own sources and that he had sought confirmation and comments from the applicant, with whom he had had a telephone conversation. As the applicant had been aware that his statements to the journalist would be made public, the court took the view that he was therefore guilty of complicity in public defamation, unless the court were to accept his offer to prove the veracity of the allegations or his defence of good faith. However, the court dismissed the applicant's various offers to bring evidence, pointing out that in order to be accepted "the evidence to be adduced must be flawless and complete and relate directly to all the allegations found to be defamatory". As to the applicant's good faith, it found that "the highly virulent attacks on the professional and moral integrity of the investigating judges ... clearly overstepped the right of legitimately permissible free criticism" and that the profound disagreements between Mrs Borrel's lawyers and the investigating judges could not justify a total lack of prudence in their remarks.

41. As regards the sanction, the court expressly took into account the applicant's status as a lawyer and the fact that he could therefore not have been "unaware of the significance and seriousness of totally imprudent comments", finding it appropriate that "the sanction for such criminal misconduct had to be a fine of a sufficiently high amount". It sentenced him to a fine of 4,000 euros (EUR), and ordered him to pay, jointly with

the other defendants, EUR 7,500 in damages to each of the two judges in question, together with EUR 3,000 in costs. It also ordered the insertion of a notice in the newspaper *Le Monde*, of which the cost was to be shared between the defendants. An appeal was lodged against the judgment by the applicant, his co-defendants, the two judges with civil-party status and the public prosecutor.

42. In a judgment of 28 May 2003, the Versailles Court of Appeal found that the summonses issued on the basis of L.L.'s complaint were null and void and that his action was time-barred, and it acquitted the three defendants under that head. It further upheld the convictions of the three defendants in respect of Judge M.'s complaint, together with the amount of the fine imposed on the applicant and the damages awarded to the judge, to whom it also awarded EUR 5,000 in court costs, in addition to the order to publish a notice in the daily newspaper *Le Monde*. Both the applicant and Judge L.L. appealed on points of law.

43. On 12 October 2004 the Court of Cassation quashed the judgment in its entirety and remitted the case to the Rouen Court of Appeal.

44. On 25 April 2005 the Rouen Court of Appeal took note of the fact that the three defendants waived any claim of nullity in respect of the summonses issued on the basis of Judge L.L.'s complaint and it adjourned the proceedings on the merits.

45. On 8 June 2005 the President of the Criminal Division of the Court of Cassation dismissed applications from the three defendants and the civil parties for the immediate examination of their appeals on points of law.

46. In a judgment of 16 July 2008, after a number of adjournments and the holding of a hearing on 30 April 2008, the Rouen Court of Appeal upheld the dismissal by the Nanterre *tribunal de grande instance* of the immunity objection, and also upheld the defendants' convictions for complicity in the public defamation of civil servants in the applicant's case. It ordered the applicant to pay a fine of EUR 4,000 and upheld the award of EUR 7,500 in damages to each of the judges, to be paid by the defendants jointly, together with the order to publish a notice in the daily newspaper *Le Monde*. As regards costs, it ordered the three defendants to pay EUR 4,000 to Judge L.L. and the applicant alone to pay EUR 1,000 to Judge M.

47. In its reasoning, the Court of Appeal firstly took the view that to say that in handling a case an investigating judge had shown "conduct which [was] completely at odds with the principles of impartiality and fairness", or in other words conduct incompatible with professional ethics and her judicial oath, was a particularly defamatory accusation as it was tantamount to accusing her of lacking integrity and of deliberately failing in her duties

as a judge, thus questioning her capacity to discharge those duties. It further found that the applicant's comments concerning the delay in forwarding the video-cassette amounted to accusing the judges of negligence in the handling of the case, thereby discrediting the professional competence of the judges and implying that the latter had deliberately kept hold of the cassette after the case was withdrawn from them, with the intention, at least, of causing obstruction. Allegedly, it was only because the lawyers had raised the matter with Judge P., followed by that judge's request to Judge M., that the item of evidence had finally been obtained on 1 August 2000. The Court of Appeal added that such assertions, attributing to those judges a deliberate failure to perform the duties inherent in their office and a lack of integrity in the fulfilment of their obligations, constituted factual accusations which impugned their honour and reputation. It found this to be all the more true as the applicant, referring to the handwritten card from the public prosecutor of Djibouti to Judge M., had emphasised this atmosphere of suspicion and the negligent conduct of the judges by stating that this document proved the extent of the "connivance" between them. The court noted, on that point, that the word "connivance" represented in itself a serious attack on the honour and reputation of Judge M. and the public prosecutor of Djibouti. It merely served to confirm the defamatory nature of the previous comments, especially as the article added that the applicant had asked the Minister of Justice for an inspection by the General Inspectorate of Judicial Services.

48. The Court of Appeal thus concluded that the comments were defamatory and that the veracity of the defamatory allegations had not been established. It took the view, on that point, that there was no evidence that Judge L.L. had been in possession of the video-cassette or that he had even been informed of its arrival, so he was not concerned by the delay in forwarding it; that the judgment of the Indictments Division of 21 June 2000, withdrawing the case from the two judges, merely expressed disapproval of the judges' refusal to hold a reconstruction in the presence of the civil parties; that it had not been established that the video-cassette had reached Judge M. before the case was withdrawn from her or that it had been in her possession when the investigation was transferred to Judge P.; that there was nothing to suggest that Judge M. had acted with obstructive intent or that she had been unfair in her handling of the cassette; that the handwritten card addressed to Judge M. from the public prosecutor of Djibouti did not prove that there was any connivance between them, as friendly greetings and the use of the familiar form "*tu*" in contacts between legal officials did not necessarily reflect a complicit intimacy, and the possibility that they shared the same opinion did not prove any complicity or connivance on the

part of the French judges such as to undermine the judicial investigation procedure, regardless of the conduct of the Djibouti public prosecutor in this case; that the letter from the lawyer representing witness A. addressed to the Crown Prosecutor in Belgium, complaining that Judge M. had put pressure on his client, was not sufficiently conclusive in itself to show that Judge M. had accepted the theory of suicide or that she was hindering the establishment of the truth, even though Judge M. had acknowledged that she had told the Belgian police that A. was an unreliable witness; and, lastly, that the numerous press articles carried no evidential weight as regards the conduct and attitude of the judges in their handling of the case.

49. As regards the applicant's defence of good faith, the Court of Appeal to which the case had been remitted noted that he had referred to the duties that were inherent in his profession and the results obtained in the case since the withdrawal of the case from Judges M. and L.L., as shown by the public prosecutor's press statement of 19 June 2007; he had further relied on the judgment of the Douai Court of Appeal, also of 19 June 2007, upholding the decision to discontinue the proceedings started by the judges' complaint alleging false accusation and on the conviction of the Djibouti public prosecutor by the Criminal Court of Versailles on 27 March 2008 for procuring a person to give false evidence.

50. It observed that at the time the offence in question was committed, on 7 September 2000, the applicant had secured the withdrawal of the case from Judges M. and L.L. and that Judge P. had been in possession of the video-cassette since 1 August 2000. It took the view that the applicant had engaged in highly virulent attacks on the professional and moral integrity of the two judges, in comments that seriously questioned their impartiality and intellectual honesty, clearly overstepping the right to free criticism and no longer being of any procedural relevance. The Court of Appeal further found: that the decision in the applicant's favour to discontinue the proceedings for false accusation initiated against him as a result of the judges' complaint was not incompatible with his bad faith; that the excessive nature of the comments made by the applicant revealed the intensity of the conflict between him and the two judges, in particular Judge M., and were tantamount to an *ex post facto* settling of scores, as shown by the publication of the article on 7 September 2000, after the Indictments Division of the Paris Court of Appeal had received, on 5 September, the file in the "Scientology" case, in which Judge M. was suspected of being responsible for the disappearance of evidence; and that this showed, on the part of the applicant, personal animosity and an intention to discredit those judges, in particular Judge M., with whom he had been in conflict in various cases, thus ruling out any good faith on his part.

51. The applicant, his two co-defendants and Judge M. all lodged an appeal on points of law against that judgment. In his pleadings, the applicant relied, as his first ground of appeal, on Article 10 of the Convention and the immunity provided for in section 41 of the Freedom of the Press Act, arguing that this provision sought to safeguard defence rights and protected lawyers in respect of any oral or written comments made in the context of any type of judicial proceedings, in particular of a disciplinary nature. As his second ground of appeal, he relied on Article 10 of the Convention, asserting that: the impugned comments concerned a case that had been receiving media coverage for some time, involving the suspicious circumstances in which a French judge seconded to Djibouti had been found dead "from suicide" and the questionable manner in which the judicial investigation had been conducted, with a clear bias against the civil party's theory of premeditated murder; having regard to the importance of the subject of general interest in the context of which the comments had been made, the Court of Appeal was not entitled to find that he had overstepped the bounds of his freedom of expression; the Court of Appeal had not examined his good faith in the light of the comments that had been published in *Le Monde*, but in relation to the content of the letter to the Minister of Justice and it was not entitled to make any assessment concerning the judges' conduct criticised therein; unless all lawyers were to be banned from speaking about pending cases, no personal animosity could be inferred from the mere fact that he had had a disagreement with one of the judges in the context of another set of proceedings; good faith was not subject to the current situation or to the fact that the issue had been "made good" by the withdrawal of the case from the judges, the lack of necessity of the comments not being incompatible with good faith; lastly, opinions expressed regarding the functioning of a fundamental institution of the State, as was the case regarding the handling of a criminal investigation, were not subject to a duty of prudence or limited to theoretical and abstract criticism, but could be personal where they had a sufficient factual basis.

52. The appeals were initially supposed to be heard by a reduced bench of Section I of the Criminal Division of the Court of Cassation, as shown by the reporting judge's report of 21 July 2009, the Court of Cassation's online workflow for the case, and the three notices to parties issued on 15 September, and 14 and 27 October 2009, respectively, the last two of those documents having been sent after the date of the hearing. Consequently, Mr J.M. (see paragraph 27 above), who had become a judge at the Court of Cassation, assigned to the Criminal Division, and who was neither the Division President, nor the senior judge (*doyen*), nor the reporting judge, was not supposed to sit in that case.

53. In a judgment of 10 November 2009, the Court of Cassation, in a formation eventually consisting of ten judges, including Mr J.M., dismissed the appeals on points of law. As regards the grounds raised by the applicant, it found that the objection of jurisdictional immunity had been validly rejected, as the fact of making public the letter to the Minister of Justice did not constitute an act of referral to the CSM and was not part of any proceedings involving the exercise of defence rights before a court of law. As to the various arguments expounded under the applicant's second ground of appeal, it took the view that the Court of Appeal had justified its decision, finding as follows:

> "[W]hile everyone has the right to freedom of expression and while the public has a legitimate interest in receiving information on criminal proceedings and on the functioning of the courts, the exercise of those freedoms carries with it duties and responsibilities and may be subject, as in the present case where the admissible limits of freedom of expression in criticising the action of judges have been overstepped, to such restrictions or penalties as are prescribed by law and are necessary in a democratic society for the protection of the reputation and rights of others."

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW

A. Applicable domestic law on defamation

54. The relevant provisions of the Freedom of the Press Act of 29 July 1881 read as follows.

Section 23

> "Anyone who, by uttering speeches, cries or threats in a public place or assembly, or by means of a written or printed text, drawing, engraving, painting, emblem, image, or any other written, spoken or pictorial item sold or distributed, offered for sale or exhibited in a public place or assembly, or by means of a placard or notice exhibited in a place where it can be seen by the public, has directly and successfully incited the perpetrator or perpetrators to commit a serious crime or major offence [*crime ou délit*], and if the incitement has been acted upon, shall be punished as an accessory to the said offence.
>
> This provision shall also be applicable where the incitement has been followed only by an attempt to commit a serious crime [*crime*] under Article 2 of the Criminal Code."

Section 29

> "The making of any factual allegation or imputation that damages the honour or reputation of the person or body to whom the fact in question is attributed shall constitute defamation [*diffamation*]. The direct publication or reproduction of such an allegation or imputation shall be punishable, even where it is expressed in sceptical terms or made about a person or body that is not expressly named but is identifiable by the terms of the offending speeches, shouts, threats, written or printed matter, placards or posters.

The use of abusive or contemptuous language or invective not containing an allegation of any fact shall constitute an insult [*injure*]."

Section 31

"Where defamation is committed by the same means by reference to the functions or capacity of one or more ministers or ministry officials, one or more members of one of the two legislative chambers, a civil servant, ..., the offence shall be punishable by the same penalty. ..."

Section 41

"... No proceedings for defamation, insult or abuse shall arise from any faithful record of judicial proceedings drawn up in good faith, or from any statements made or pleadings filed in a court of law.

Courts examining the merits of the case may nevertheless order the exclusion of the insulting, contemptuous or defamatory statements, and award damages against the person concerned.

Defamatory allegations that are unrelated to the case may, however, give rise to criminal prosecution or civil actions by the parties, where such actions have been left open to them by the courts, and, in any event, to civil action by third parties."

Section 55

"Where the defendant wishes to be allowed to prove the veracity of the defamatory allegations, in accordance with section 35 hereof, he shall, within ten days from the service of the summons, notify the public prosecutor or the complainant, at the address for service designated thereby, depending on whether the proceedings have been initiated by the former or the latter, of:

(1) The allegations as given and described in the summons of which he seeks to prove the veracity;

(2) Copies of the documents;

(3) The names, occupations and addresses of the witnesses he intends to call for the said purpose.

The said notice shall contain the choice of the address for service in the proceedings before the criminal court, and all requirements shall be met on pain of forfeiting the right to bring evidence."

B. Code of Criminal Procedure

55. Article 11 of the Code of Criminal Procedure provides as follows:

Article 11

"Except where the law provides otherwise and without prejudice to the rights of the defence, proceedings in the course of the preliminary and judicial investigations shall be conducted in secret.

Any person contributing to such proceedings shall be bound by a duty of professional secrecy under the conditions and subject to the penalties set out in Articles 226-13 and 226-14 of the Criminal Code.

However, in order to prevent the dissemination of incomplete or inaccurate information, or to put an end to a breach of the peace, the public prosecutor may, of his own motion or at the request of the judicial authority responsible for pre-trial investigation or the parties, make public any objective elements from the proceedings that do not convey any judgment as to the merits of the charges brought against the individuals concerned."

C. Exercise of the legal profession

56. Recommendation Rec(2000)21 of the Council of Europe's Committee of Ministers to member States on the freedom of exercise of the profession of lawyer (adopted on 25 October 2000) states as follows.

" ... Desiring to promote the freedom of exercise of the profession of lawyer in order to strengthen the rule of law, in which lawyers take part, in particular in the role of defending individual freedoms;

Conscious of the need for a fair system of administration of justice which guarantees the independence of lawyers in the discharge of their professional duties without any improper restriction, influence, inducement, pressure, threats or interference, direct or indirect, from any quarter or for any reason;

...

Principle I – General Principles on the freedom of exercise of the profession of lawyer

1. All necessary measures should be taken to respect, protect and promote the freedom of exercise of the profession of lawyer without discrimination and without improper interference from the authorities or the public, in particular in the light of the relevant provisions of the European Convention on Human Rights. ..."

57. The Basic Principles on the Role of Lawyers (adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana, Cuba, from 27 August to 7 September 1990) state, in particular:

"16. Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.

...

22. Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential."

58. The Council of Bars and Law Societies of Europe (CCBE) has adopted two founding texts: the Code of Conduct for European Lawyers, which dates back to 28 October 1988 and has undergone a number of amendments, and the Charter of Core Principles of the European Legal Profession, which was adopted on 24 November 2006. The Charter, which is not conceived as a code of conduct, contains a list of ten core principles common to the national and international rules regulating the legal profession.

"(a) the independence of the lawyer, and the freedom of the lawyer to pursue the client's case;

(b) the right and duty of the lawyer to keep clients' matters confidential and to respect professional secrecy;

(c) avoidance of conflicts of interest, whether between different clients or between the client and the lawyer;

(d) the dignity and honour of the legal profession, and the integrity and good repute of the individual lawyer;

(e) loyalty to the client;

(f) fair treatment of clients in relation to fees;

(g) the lawyer's professional competence;

(h) respect towards professional colleagues;

(i) respect for the rule of law and the fair administration of justice; and

(j) the self-regulation of the legal profession."

59. Lastly, there is a practical guide to the international principles concerning the independence and responsibility of judges, lawyers and prosecutors, produced by the International Commission of Jurists (initially in 2004, the most recent version being issued on 22 July 2009), which contains many significant and relevant international documents.

D. Relations between judges and lawyers

60. The relevant passages of Opinion no. (2013) 16 on the relations between judges and lawyers, adopted by the Consultative Council of European Judges (CCJE) on 13-15 November 2013, read as follows.

"6. Within the framework of their professional obligation to defend the rights and interests of their clients, lawyers must also play an essential role in the fair administration of justice. Paragraph 6 of the Commentary on the Charter of Core

Principles of the European Legal Profession of the CCBE defines the lawyer's role as follows: *'The lawyer's role, whether retained by an individual, a corporation or the state, is as the client's trusted adviser and representative, as a professional respected by third parties, and as an indispensable participant in the fair administration of justice. By embodying all these elements, the lawyer, who faithfully serves his or her own client's interests and protects the client's rights, also fulfils the functions of the lawyer in Society – which are to forestall and prevent conflicts, to ensure that conflicts are resolved in accordance with recognised principles of civil, public or criminal law and with due account of rights and interests, to further the development of the law, and to defend liberty, justice and the rule of law'*. As it is stated in paragraph 1.1 of the Code of Conduct for European Lawyers of the CCBE, respect for the lawyer's professional function is an essential condition for the rule of law and democracy in society. The UN Basic Principles on the Role of Lawyers state that adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession. Principle 12 stipulates that lawyers shall at all times maintain the honour and dignity of their profession as essential agents of the administration of justice.

7. Judges and lawyers must be independent in the exercise of their duties, and must also be, and be seen to be, independent from each other. This independence is affirmed by the statute and ethical principles adopted by each profession. The CCJE considers such independence vital for the proper functioning of justice.

The CCJE refers to Recommendation CM/Rec (2010)12, paragraph 7, which states that the independence of judges should be guaranteed at the highest possible legal level. The independence of lawyers should be guaranteed in the same way.

...

9. Two areas of relations between judges and lawyers may be distinguished:

– on the one hand, the relations between judges and lawyers which stem from the procedural principles and rules of each state and which will have a direct impact on the efficiency and quality of judicial proceedings. In the conclusions and recommendations set out in its Opinion No. 11 (2008) on the quality of judicial decisions, the CCJE pointed out that the standard of quality of judicial decisions will clearly be the result of interactions between the numerous actors in the judicial system;

– on the other hand, the relations which result from the professional conduct of judges and lawyers and which require mutual respect for the roles played by each side and a constructive dialogue between judges and lawyers.

...

19. Judges and lawyers each have their own set of ethical principles. However, several ethical principles are common to both judges and lawyers, e.g. compliance with the law, professional secrecy, integrity and dignity, respect for litigants, competence, fairness and mutual respect.

20. The ethical principles of judges and lawyers should also concern themselves with the relations between the two professions.

...

With regard to lawyers, paragraphs 4.1, 4.2, 4.3 and 4.4 of the CCBE Code of Conduct for European Lawyers express the following principles: a lawyer who appears, or takes part in a case, before a court or tribunal must comply with the rules of conduct applied before that court or tribunal. A lawyer must always have due regard for the fair conduct of the proceedings. A lawyer shall, while maintaining due respect and courtesy towards the court, defend the interests of the client honourably and fearlessly without regard to the lawyer's own interests or to any consequences to him- or herself or to any other person. A lawyer shall never knowingly give false or misleading information to the court.

21. The CCJE considers that the relations between judges and lawyers should be based on the mutual understanding of each other's role, on mutual respect and on independence *vis-à-vis* each other.

The CCJE accordingly considers it necessary to develop dialogues and exchanges between judges and lawyers at a national and European institutional level on the issue of their mutual relations. The ethical principles of both judges and lawyers should be taken into account. In this regard, the CCJE encourages the identification of common ethical principles, such as the duty of independence, the duty to sustain the rule of law at all times, co-operation to ensure a fair and swift conduct of the proceedings and permanent professional training. Professional associations and independent governing bodies of both judges and lawyers should be responsible for this process.

...

24. Relations between judges and lawyers should always preserve the court's impartiality and image of impartiality. Judges and lawyers should be fully conscious of this, and adequate procedural and ethical rules should safeguard this impartiality.

25. Both judges and lawyers enjoy freedom of expression under Article 10 of the Convention.

Judges are, however, required to preserve the confidentiality of the court's deliberations and their impartiality, which implies, *inter alia*, that they must refrain from commenting on proceedings and on the work of lawyers.

The freedom of expression of lawyers also has its limits, in order to maintain, as is provided for in Article 10, paragraph 2 of the Convention, the authority and impartiality of the judiciary. Respect towards professional colleagues, respect for the rule of law and the fair administration of justice – the principles (h) and (i) of the Charter of Core Principles of the European Legal Profession of the CCBE – require abstention from abusive criticism of colleagues, of individual judges and of court procedures and decisions."

E. The decriminalisation of defamation

61. Recommendation 1814 (2007) of the Parliamentary Assembly of the Council of Europe, "Towards decriminalisation of defamation", states, *inter alia*, as follows.

> "1. The Parliamentary Assembly, referring to its Resolution 1577 (2007) entitled 'Towards decriminalisation of defamation', calls on the Committee of Ministers to urge all member states to review their defamation laws and, where necessary, make amendments in order to bring them into line with the case law of the European Court of Human Rights, with a view to removing any risk of abuse or unjustified prosecutions;
>
> 2. The Assembly urges the Committee of Ministers to instruct the competent intergovernmental committee, the Steering Committee on the Media and New Communication Services (CDMC) to prepare, following its considerable amount of work on this question and in the light of the Court's case law, a draft recommendation to member states laying down detailed rules on defamation with a view to eradicating abusive recourse to criminal proceedings.
>
> ..."

62. The response of the Committee of Ministers, adopted at the 1,029th meeting of the Ministers' Deputies (11 June 2008), reads as follows.

> "1. The Committee of Ministers has studied Parliamentary Assembly Recommendation 1814 (2007) entitled 'Towards decriminalisation of defamation' with great attention. It has communicated the recommendation to the governments of member states as well as to the Steering Committee on the Media and New Communication Services (CDMC), the European Committee on Crime Problems (CDPC), the Steering Committee for Human Rights (CDDH) and the Council of Europe Commissioner for Human Rights, for information and possible comments. The comments received are contained in the appendix.
>
> 2. By decision of 24 November 2004, the Committee of Ministers instructed the Steering Committee on Mass Media (CDMM), which subsequently became the Steering Committee on the Media and New Communication Services (CDMC), *inter alia*, to look into 'the alignment of laws on defamation with the relevant case law of the European Court of Human Rights, including the issue of decriminalisation of defamation'. It took note of the reply received in September 2006 and of the fact that the CDMC considered it desirable that member states should take a proactive approach in respect of defamation by examining, even in the absence of judgments of the European Court of Human Rights concerning them directly, domestic legislation against the standards developed by the Court and, where appropriate, aligning criminal, administrative and civil legislation with those standards. In the above-mentioned document, the CDMC also considered that steps should be taken to ensure that the application in practice of laws on defamation fully complies with those standards.
>
> 3. The Committee of Ministers endorses this view, as well as the Parliamentary Assembly's call on member states to take such measures, with a view to removing all risk of abuse or unjustified prosecutions.

4. Bearing in mind the role of the European Court of Human Rights in developing general principles on defamation through its case law and its power to adjudicate claims of violations of Article 10 in specific cases, the Committee of Ministers does not consider it advisable at this point in time to develop separate detailed rules on defamation for member states.

5. Finally, the Committee of Ministers considers that there is no need at present to revise its Recommendation No. R (97) 20 on hate speech or to prepare guidelines on this subject. More efforts could instead be made by member states to give the recommendation more visibility and to make better use of it."

F. Judgment of the International Court of Justice (ICJ) of 4 June 2008 in the case of *Djibouti v. France*

63. In its judgment of 4 June 2008 in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, the ICJ noted that it was not its task to determine the facts and establish responsibilities in the Borrel case and, in particular, the circumstances in which Bernard Borrel had met his death, but added that the dispute between the two States had originated in that case, as a result of the opening of a number of judicial proceedings, in France and in Djibouti, and the resort to bilateral treaty mechanisms for mutual assistance between the parties. The ICJ observed in particular that, although the subject of the dispute was described in Djibouti's application as the transmission by the French authorities of the Borrel case file to Djibouti, taken as a whole the application had a wider scope, which included the summonses sent to the Djiboutian President and those sent to two other Djiboutian officials, together with the arrest warrants subsequently issued against the latter.

64. The ICJ found, in particular, that the decision by the French investigating judge to refuse the request for mutual assistance had been justified by the fact that the transmission of the Borrel case file was considered to be "contrary to the essential interests of France", in that the file contained declassified "defence secret" documents, together with information and witness statements in respect of another case in progress. It took the view that those reasons fell within the scope of Article 2 (c) of the Convention on Mutual Assistance in Criminal Matters, which allowed a requested State to refuse to execute letters rogatory if it considered that such assistance would be likely to prejudice the sovereignty, the security, the *ordre public* or other essential interests of the nation. The ICJ further decided not to order the transmission of the Borrel file with certain pages removed, as Djibouti had

requested in the alternative. It held, however, that France had failed in its obligation to give reasons for its refusal to execute the letter rogatory, while rejecting Djibouti's other submissions concerning the summonses addressed to the President and the two other senior Djiboutian officials.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

65. The applicant claimed that, before the Court of Cassation, his case had not been examined fairly by an impartial tribunal, having regard to the presence on the bench of a judge who had previously and publicly expressed his support for one of the civil parties, Judge M. He relied on Article 6 § 1 of the Convention, of which the relevant part reads as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law."

A. The Chamber judgment

66. After noting that the applicant had not been in a position to request the judge's withdrawal, as he had not been informed before the hearing of the change in the composition of the bench that was to examine his appeal on points of law and that the procedure was mainly written, the Chamber examined the complaint in terms of objective impartiality. It noted that Judge J.M., one of the judges who had sat on the bench of the Criminal Division of the Court of Cassation ruling on an appeal from Judge M. and from the applicant stemming from a dispute between them, had, nine years earlier, publicly expressed his support for and trust in Judge M. in connection with another case in which she had been the investigating judge and the applicant had been acting for a civil party. Having regard to the facts, there was clear opposition between the applicant and Judge M., both in the case for which she had received the support of Judge J.M. and in the case in which J.M. was sitting as a judge of the Court of Cassation. Moreover, J.M.'s support had been expressed in an official and quite general context, at the general meeting of the judges of the Paris *tribunal de grande instance*. The Chamber found that there had been a violation of Article 6 § 1, as serious doubts could be raised as to the impartiality of the Court of Cassation and the applicant's fears in that connection could be regarded as objectively justified.

B. The parties' submissions before the Grand Chamber

1. The applicant

67. The applicant recognised that it was not established that Judge J.M. had displayed any personal bias against him, but argued that regardless of his personal conduct, his very presence on the bench created a situation which rendered his fears objectively justified and legitimate. In his submission, the fact that J.M. had sat on the bench of the Criminal Division of the Court of Cassation sufficed in itself to show that there had been a violation of Article 6 § 1 of the Convention. Judge J.M. had in the past expressed his support for Judge M., when the latter was conducting the judicial investigation in the "Scientology" case, in response to criticisms of her professional conduct from the civil parties, whose representatives included the applicant, and by the public prosecutor. The applicant pointed out that Judge M. had ultimately been taken off the case at his request and that on 5 January 2000 the French State had been found liable for failings in the public justice system.

68. He argued that he had not been in a position to seek the withdrawal of Judge J.M., as he had not known, and could not reasonably have known, that this judge was going to sit in his case: the report of the reporting judge, the online workflow for the case and the notices to the lawyers had all given the same information, namely that the Criminal Division was to sit as a reduced bench. The reduced bench comprised the President of the Division, the senior judge (*doyen*) and the reporting judge, and as Judge J.M. occupied none of those positions he could not have been expected to sit.

69. On the merits, the applicant did not claim that Judge J.M. had displayed any personal bias against him and was not calling into question that judge's right to freedom of expression. He complained merely of Judge J.M.'s presence on the bench, which in his view rendered his fears of a lack of impartiality objectively justified and legitimate. In view of the support expressed by J.M. in favour of Judge M. in the context of another high-profile case with the same protagonists, there was serious doubt as to the impartiality of the Criminal Division and his fears in that connection could be regarded as objectively justified.

2. The Government

70. The Government observed that there was no question of any lack of subjective impartiality on the part of Judge J.M. and that it was therefore necessary to determine whether the circumstances of the case were such as to raise serious doubts regarding the Court of Cassation's objective impartiality. Referring to the effect of the statement made in July 2000 by Judge J.M.,

who at the time had been serving on the Paris *tribunal de grande instance*, they pointed out that the statement, made many years before the hearing of the Criminal Division, concerned a different case from the present one and that the terms used reflected a personal position which related only to the conditions in which disciplinary proceedings against a fellow judge had become known. The Government concluded that those remarks, which were limited in scope and had been made a long time before, were not sufficient to establish that, in his capacity as judge of the Court of Cassation, J.M. lacked objective impartiality.

71. The Government further stated that appeals on points of law were extraordinary remedies and that the Court of Cassation's oversight was restricted to compliance with the law. Moreover, it was an enlarged bench of the Criminal Division, comprising ten judges, that had considered the case.

72. The Government accordingly argued that Article 6 § 1 of the Convention had not been breached.

C. The Court's assessment

1. General principles

73. The Court reiterates that impartiality normally denotes the absence of prejudice or bias and its existence or otherwise can be tested in various ways. According to the Court's settled case-law, the existence of impartiality for the purposes of Article 6 § 1 must be determined according to a subjective test where regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case; and also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality (see, for example, *Kyprianou v. Cyprus* [GC], no. 73797/01, § 118, ECHR 2005-XIII, and *Micallef v. Malta* [GC], no. 17056/06, § 93, ECHR 2009).

74. As to the subjective test, the principle that a tribunal must be presumed to be free of personal prejudice or partiality is long-established in the case-law of the Court (see *Kyprianou*, § 119, and *Micallef*, § 94, both cited above). The personal impartiality of a judge must be presumed until there is proof to the contrary (see *Hauschildt v. Denmark*, 24 May 1989, § 47, Series A no. 154). As regards the type of proof required, the Court has, for example, sought to ascertain whether a judge has displayed hostility or ill will for personal reasons (see *De Cubber v. Belgium*, 26 October 1984, § 25, Series A no. 86).

75. In the vast majority of cases raising impartiality issues the Court has focused on the objective test (see *Micallef*, cited above, § 95). However, there is no watertight division between subjective and objective impartiality since the conduct of a judge may not only prompt objectively held misgivings as to impartiality from the point of view of the external observer (objective test) but may also go to the issue of his or her personal conviction (subjective test) (see *Kyprianou*, cited above, § 119). Thus, in some cases where it may be difficult to procure evidence with which to rebut the presumption of the judge's subjective impartiality, the requirement of objective impartiality provides a further important guarantee (see *Pullar v. the United Kingdom*, 10 June 1996, § 32, *Reports of Judgments and Decisions* 1996-III).

76. As to the objective test, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his or her impartiality. This implies that, in deciding whether in a given case there is a legitimate reason to fear that a particular judge or a body sitting as a bench lacks impartiality, the standpoint of the person concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (see *Micallef*, cited above, § 96).

77. The objective test mostly concerns hierarchical or other links between the judge and other protagonists in the proceedings (ibid., § 97). It must therefore be decided in each individual case whether the relationship in question is of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal (see *Pullar*, cited above, § 38).

78. In this connection even appearances may be of a certain importance or, in other words, "justice must not only be done, it must also be seen to be done" (see *De Cubber*, cited above, § 26). What is at stake is the confidence which the courts in a democratic society must inspire in the public. Thus, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw (see *Castillo Algar v. Spain*, 28 October 1998, § 45, *Reports* 1998-VIII, and *Micallef*, cited above, § 98).

2. Application of those principles in the present case

79. In the present case, the fear of a lack of impartiality lay in the fact that Judge J.M., who sat on the Court of Cassation bench which adopted the judgment of 10 December 2009, had expressed his support for Judge M. nine years earlier, in the context of disciplinary proceedings that had been brought against her on account of her conduct in the "Scientology" case. Speaking as a judge and a colleague in the same court, in the course of a general meeting of judges of the Paris *tribunal de grande instance* on 4 July 2000, at which he had subsequently voted in favour of the motion of support for Judge M., J.M. had stated: "We are not prohibited, as grassroots

judges, from saying that we stand by Judge [M.]. It is not forbidden to say that Judge [M.] has our support and trust" (see paragraphs 27-28 above).

80. The Grand Chamber notes at the outset that the applicant acknowledged in his observations that it was not established that Judge J.M. had displayed any personal bias against him. He argued merely that regardless of his personal conduct, the very presence of J.M. on the bench created a situation which rendered his fears objectively justified and legitimate (see paragraph 67 above).

81. In the Court's view, the case must therefore be examined from the perspective of the objective impartiality test, and more specifically it must address the question whether the applicant's doubts, stemming from the specific situation, may be regarded as objectively justified in the circumstances of the case.

82. Accordingly, the Court firstly takes the view that the language used by Judge J.M. in support of a fellow judge, Judge M., who was precisely responsible for the bringing of criminal proceedings against the applicant in the case now in issue, was capable of raising doubts in the defendant's mind as to the impartiality of the "tribunal" hearing his case.

83. Admittedly, the Government argued in their observations, among other things, that the remarks by J.M. were not sufficient to establish a lack of objective impartiality on his part, as they had been made a long time before and the words used reflected a personal position which concerned only the conditions in which the information regarding the bringing of disciplinary proceedings against a colleague of the same court had been forthcoming.

84. The Court takes the view, however, that the very singular context of the case cannot be overlooked. It would firstly point out that the case concerned a lawyer and a judge, who had been serving in that capacity in connection with two judicial investigations in particularly high-profile cases: the Borrel case, in the context of which the applicant's impugned remarks had been made, and the "Scientology" case, which had given rise to the remarks by J.M. It further notes, like the Chamber, that Judge M. was already conducting the investigation in the Borrel case, with its significant media coverage and political repercussions, when J.M. publicly expressed his support for her in the context of the "Scientology" case (see also paragraph 29 above). As emphasised by the Chamber, J.M. had then expressed his view in an official setting, at the general meeting of judges of the Paris *tribunal de grande instance*.

85. The Court further observes that the applicant, who in both cases was the lawyer acting for civil parties who criticised the work of Judge M., was subsequently convicted on the basis of a complaint by the latter:

accordingly, the professional conflict took on the appearance of a personal conflict, as Judge M. had applied to the domestic courts seeking redress for damage stemming from an offence that she accused the applicant of having committed.

86. The Court would further emphasise, on that point, that the judgment of the Court of Appeal to which the case had been remitted itself expressly established a connection between the applicant's remarks in the proceedings in question and the "Scientology" case, concluding that this suggested, on the part of the applicant, an "*ex post facto* settling of scores" and personal animosity towards Judge M., "with whom he had been in conflict in various cases" (see paragraph 50 above).

87. It was precisely that judgment of the Court of Appeal which the applicant appealed against on points of law and which was examined by the bench of the Criminal Division of the Court of Cassation on which Judge J.M. sat. The Court does not agree with the Government's argument to the effect that this situation does not raise any difficulty, since an appeal on points of law is an extraordinary remedy and the review by the Court of Cassation is limited solely to the observance of the law.

88. In its case-law the Court has emphasised the crucial role of cassation proceedings, which form a special stage of the criminal proceedings with potentially decisive consequences for the accused, as in the present case, because if the case had been quashed it could have been remitted to a different court of appeal for a fresh examination of both the facts and the law. As the Court has stated on many occasions, Article 6 § 1 of the Convention does not compel the Contracting States to set up courts of appeal or of cassation, but a State which does institute such courts is required to ensure that persons having access to the law enjoy before such courts the fundamental guarantees in Article 6 (see, among other authorities, *Delcourt v. Belgium*, 17 January 1970, § 25, Series A no. 11; *Omar v. France*, 29 July 1998, § 41, *Reports* 1998-V; *Guérin v. France*, 29 July 1998, § 44, *Reports* 1998-V; and *Louis v. France*, no. 44301/02, § 27, 14 November 2006), and this unquestionably includes the requirement that the court must be impartial.

89. Lastly, the Court takes the view that the Government's argument to the effect that J.M. was sitting on an enlarged bench comprising ten judges is not decisive for the objective-impartiality issue under Article 6 § 1 of the Convention. In view of the secrecy of the deliberations, it is impossible to ascertain J.M.'s actual influence on that occasion. Therefore, in the context thus described (see paragraphs 84-86 above), the impartiality of that court could have been open to genuine doubt.

90. Furthermore, the applicant had not been informed that Judge J.M. would be sitting on the bench and had no reason to believe that he would do

so. The Court notes that the applicant had, by contrast, been notified that the case would be examined by a reduced bench of the Criminal Division of the Court of Cassation, as is confirmed by the reporting judge's report, the Court of Cassation's online workflow for the case and three notices to parties, including two that were served after the date of the hearing (see paragraph 52 above). The applicant thus had no opportunity to challenge J.M.'s presence or to make any submissions on the issue of impartiality in that connection.

91. Having regard to the foregoing, the Court finds that in the present case the applicant's fears could have been considered objectively justified.

92. The Court therefore concludes that there has been a violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

93. The applicant alleged that his criminal conviction had entailed a violation of his right to freedom of expression as provided for by Article 10 of the Convention, which reads as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. The Chamber judgment

94. The Chamber found that there had been no violation of Article 10 of the Convention. It noted that the applicant had not confined himself to factual statements concerning the ongoing proceedings, but had accompanied them with value judgments which cast doubt on the impartiality and fairness of a judge.

95. The Chamber, after noting that the investigating judge in question was no longer handling the case, took the view, firstly, that the applicant should have waited for the outcome of his request addressed the previous day to the Minister of Justice seeking an investigation by the General Inspectorate of Judicial Services into the alleged numerous shortcomings in the judicial investigation and, secondly, that the applicant had already

successfully used a legal remedy to seek to cure any defects in the proceedings and the judge concerned by his remarks had been taken off the case. In view of the foregoing and the use of terms that the Chamber found particularly harsh, it took the view that the applicant had overstepped the limits that lawyers had to observe in publicly criticising the justice system. It added that its conclusion was reinforced by the seriousness of the accusations made in the article, and that, also having regard to the chronology of the events, it could be inferred that the applicant's remarks were driven by a degree of personal animosity towards the judge. As to the "proportionality" of the sanction, the Chamber found that a fine of EUR 4,000, together with an award of EUR 7,500 in damages to each of the judges, did not appear excessive.

B. The parties' submissions before the Grand Chamber

1. The applicant

96. The applicant argued that the Court's case-law guaranteed strong protection to the freedom of expression of lawyers, who played a key role in the administration of justice and the upholding of the rule of law, with any restriction having to remain exceptional. Such protection could be explained by two reasons: firstly, no special circumstances could justify affording a wide margin of appreciation to States, bearing in mind that European and international texts, on the contrary, protected lawyers in the activity of defending their clients; secondly, their freedom of expression was linked to their clients' right to a fair trial under Article 6 of the Convention. He further observed that the right of lawyers to make press statements as part of their clients' defence was expressly acknowledged and that, in principle, there was, at European level, significant tolerance of lawyers' criticism of judges, even when made in a public and media setting. He submitted, however, that the Chamber judgment highlighted some major uncertainties and vagaries in the case-law that affected the exercise of such freedom, especially outside the courtroom. He hoped that his case would enable the Grand Chamber to clarify the interpretation of the Convention on that point and to secure the protection of lawyers' speech.

97. He proposed in this connection a formal approach to lawyers' freedom of expression, based on the defence and interests of their clients, to ensure special protection in this context for the purposes of Article 10 of the Convention. Such an approach would also have the effect of dispelling the ambiguity surrounding the status of lawyers, who participated in the smooth running of the justice system but, on the other hand, did not have to adopt a conciliatory posture *vis-à-vis* that system and its members, as

their primary role was to defend their clients. Being a key witness to the proceedings, lawyers should be afforded a functional protection that was not limited to the courtroom and was as broad as possible, in order to contribute effectively to defending their clients and informing the public. Such a functional approach would also make it possible to take effective action in response to any excesses and abuses committed by lawyers in breach of professional ethics and to preserve the necessary protection of judges from frivolous accusations. Any abuse of the primary purpose of the strengthened protection of the lawyer's freedom of expression, namely to uphold the rights of the defence, could thus entail sanctions.

98. In the present case, the applicant observed that his conviction could be regarded as an interference with the exercise of his right to freedom of expression. He did not dispute the fact that it was prescribed by law, namely by sections 23, 29 and 31 of the Act of 29 July 1881.

99. Whilst he did not deny, either, that it pursued the legitimate aim of the protection of the reputation or rights of others, in his view the idea that the criminal proceedings against him sought to "maintain the authority and impartiality of the judiciary" should be seriously called into question, as the impugned remarks were, on the contrary, intended to strengthen, rather than undermine, such authority. The applicant further submitted that the Chamber had wrongly placed on the same footing, on the one hand, the freedom of expression of lawyers and the public's right to be informed about matters of general interest, and on the other, the dignity of the legal profession and the good reputation of judges; while the former were rights guaranteed by Article 10 of the Convention, the latter were merely interests that might warrant a restriction, which had to remain exceptional.

100. As to the interference and whether it was necessary in a democratic society, the applicant took the view that it did not correspond to any pressing social need and that it was not proportionate to the aims pursued.

101. The argument that there was no pressing social need was mainly supported by the context in which the remarks were made, because the case had received significant media coverage, as the Court had previously noted in its judgment in *July and SARL Libération v. France* (no. 20893/03, ECHR 2008) and as confirmed by the Chamber in paragraph 76 of its judgment. In addition, the status of the victim, the place and circumstances of his death, the diplomatic ramifications of the case, and the suspicions that the current President of the Republic of Djibouti might have been involved as the instigator, all showed that the case concerned a matter of general interest requiring strong protection of freedom of expression. Moreover, on 19 June 2007 the Paris public prosecutor had issued a press release stating that the theory of suicide had now been discounted in favour

of a criminal explanation. That statement had been made at the request of the investigating judge under Article 11, paragraph 3, of the Code of Criminal Procedure (permitting the public disclosure of details of the case to avoid the dissemination of incomplete or inaccurate information, or to put an end to a breach of public order). The case was so sensitive that the investigation was now being handled by three investigating judges.

102. The applicant argued that the remarks regarding the shortcomings in the justice system, in the context of the lawyer's duty to defend a client, could be deemed to merit even stronger protection. He denied going beyond the limits of permissible criticism: his comments concerned only the professional conduct of Judges M. and L.L., which was so crucial for the civil parties; the remarks had a sufficient factual basis which lay in two proven facts, firstly, the fact that the video-cassette in issue had not been transmitted to the new investigating judge with the rest of the case file and, secondly, the existence of the handwritten card from the prosecutor of Djibouti to Judge M.; moreover, the proceedings brought against the applicant and his colleague Mr L. de Caunes by Judges M. and L.L. for false accusation, following the letter sent by the lawyers to the Minister of Justice, had resulted in a discontinuance order, which had been upheld on appeal.

103. As to the accusation that he had shown personal animosity, the applicant rejected this, pointing out that only the content and subject of the impugned remarks should be taken into account, not any intentions that might be wrongly attributed to him. The applicant added that he was not responsible for the reference to the disciplinary proceedings pending against Judge M. and he noted that, in any event, Judge L.L. had also lodged a criminal complaint, without there being any suggestion of personal animosity towards that judge as well. The applicant also denied that any insults or abuse could be detected in the remarks published in *Le Monde*. Lastly, he submitted that he was merely defending his client's position in public, keeping her interests in mind without going beyond the scope of his duty of defence. He was of the view, in that connection, that this could not have influenced the ministerial or judicial authorities and he moreover challenged the idea that legal action by a lawyer on behalf of his client should preclude any comments in the press where the case aroused public interest. He asserted that, on the contrary, a lawyer was entitled to decide freely on his defence strategy for the benefit of his client.

104. Lastly, the applicant submitted that the sanction imposed had been particularly disproportionate. The criminal sanction had consisted of a fine of EUR 4,000, which was higher than the fine imposed on the journalist and director of *Le Monde* (respectively EUR 3,000 and EUR 1,500). In the civil part of the judgment, in addition to the sums awarded to cover the

costs of Judges M. and L.L., he had been ordered to pay, jointly with his co-defendants, EUR 7,500 in damages to each of the two judges. Lastly, the publication of a notice in *Le Monde*, with a fine of EUR 500 per day in the event of delay, had been ordered. He submitted that such sanctions were unjustified and disproportionate and that they would inevitably have a significant and regrettable chilling effect on all lawyers.

2. The Government

105. The Government did not deny that the applicant's conviction constituted an interference with the exercise of his right to freedom of expression. They took the view, however, that this interference was prescribed by law, since its legal basis lay in section 23 and sections 29 et seq. of the Act of 29 July 1881, and that it pursued a legitimate aim. On that latter point they argued that it sought to maintain the authority and impartiality of the judiciary, and to ensure the protection of the reputation or rights of others, since the statements had been directed at judges in the exercise of their duties and also undermined the confidence of citizens in the judiciary.

106. As to whether the interference was necessary in a democratic society, the Government were of the view that there was a fundamental difference between lawyers and journalists because of the former's position as officers of the court (*auxiliaires de justice*). They occupied a central position as intermediaries between the public and the courts and their activities helped to ensure that justice was administered effectively and dispassionately. A balance had to be struck between the legitimate aim of informing the public about matters of general interest, including issues relating to the functioning of the justice system, and the requirements stemming from the proper administration of justice, on the one hand, and the dignity of the legal profession and the reputation of the judiciary, on the other.

107. The Government noted two different situations in the Court's case-law on freedom of expression: the participation of lawyers in debates on matters of general interest unrelated to any pending proceedings, where freedom of expression was particularly broad; and statements made by lawyers in their role of defending clients, where they had a wide freedom of expression in the courtroom. That freedom of expression in defending a client in pending proceedings did have certain limits, however, in order to preserve judicial authority, such as, for example, where the lawyer made statements critical of the justice system before even using the legal remedies available to him to rectify the shortcomings in question. The Government submitted that lawyers, as officers of the court, were thus obliged to use legal proceedings to correct any alleged errors; by contrast, harsh criticism in the press, where legal means could be used instead, was not justified by the

requirements of the effective defence of the lawyer's client and cast doubt on the probity of the justice system.

108. In the present case the Government took the view that there had been numerous possible judicial remedies open to the applicant for the effective defence of his client and that he had in fact made use of them. His statements in the media could therefore only have been for the purpose of informing the public about a subject of general interest, but, as they concerned an ongoing case, he should have spoken with moderation.

109. In examining the impugned remarks, the Government referred to the margin of appreciation afforded to States in such matters. The article in question concerned a particularly sensitive case which, from the outset, had received significant media coverage. In their view, it could be seen from the article in *Le Monde* that the offending remarks were aimed, unequivocally, at the two judges and were phrased in terms that impugned their honour. The applicant had not confined himself to a general criticism of the institutions but had expressed biased views, without the slightest prudence. In the Government's submission, he had not made factual statements regarding the functioning of the judicial system, but rather value judgments that cast serious doubt on the investigating judges' integrity. The Government stated that the domestic courts had carefully examined each of the statements in question to establish whether they went beyond the limits of acceptable criticism. They further submitted that the evidence produced by the applicant was devoid of probative value.

110. Concerning the applicant's unsuccessful defence of good faith, based on the duties inherent in his responsibility to defend his client's interests, the Government observed that the French courts had assessed good faith in the light of Article 10 of the Convention and the four criteria that had to be fulfilled concurrently: the legitimacy of the aim pursued, the absence of personal animosity, the seriousness of the investigation carried out or of the evidence obtained by the author of the comments and, lastly, the prudence shown in expressing them. The domestic courts had taken the view that those conditions had not been fulfilled in the present case and had regarded the applicant's remarks as a settling of scores with a judge. The applicant was at fault not for expressing himself outside the courtroom, but for using excessive comments, whereas he could have expressed himself without impugning the honour of State officials.

111. The Government submitted that such attacks on judges did not contribute either to a clear public understanding of the issues, since the judicial authority had no right of reply, or to the proper conduct of the judicial proceedings in a context in which the investigating judge who was the subject of the harsh criticism had already been removed from the case. In

their view, neither was it a matter of zealous defence by a lawyer of his client, because there were judicial remedies that he could have used to submit his complaint. The Government referred to the Court's inadmissibility decision in *Floquet and Esménard v. France* ((dec.), nos. 29064/08 and 29979/08, 10 January 2012), which concerned comments made by journalists in the Borrel case, particularly as, in the present case, it was not a journalist but a lawyer who was the author of the impugned statements, and moreover in a case that was pending in the domestic courts.

112. As to the sanction imposed on the applicant, the Government were of the view that it could not be regarded as excessive or such as to have a chilling effect on the exercise of freedom of expression. They thus submitted that there had been no violation of Article 10 of the Convention.

C. Observations of the third-party interveners before the Grand Chamber

1. Observations of the Council of Bars and Law Societies of Europe (CCBE)

113. The CCBE observed that the Court's judgment in the present case would most certainly have a considerable impact on the conditions of interpretation and application of the standards of conduct imposed on European lawyers and more particularly with regard to their freedom of speech and expression in the context of the exercise of defence rights. Lawyers held a key position in the administration of justice and it was necessary to protect their specific status. Being the cornerstone of a democratic society, freedom of expression had a particular characteristic as regards lawyers, who had to be able to carry on their profession without hindrance; if the use of their speech were to be censored or restricted, the real and effective defence of the citizen would not be guaranteed.

114. The CCBE referred to the Court's case-law to the effect that a restriction of freedom of expression would entail a violation of Article 10 unless it fell within the exceptions mentioned in paragraph 2 of that Article. The examination criteria related to the existence of an interference, its legal foreseeability, whether it was necessary in a democratic society to meet a "pressing social need" and the specific circumstances of the case. In the CCBE's view, these criteria were all the more valid where a lawyer defending Convention rights was concerned.

115. The limits to freedom of expression had firstly to be reasonably foreseeable, with a more restrictive and precise definition of the criteria relating to the restrictions that could be placed on lawyers' freedom of expression. The CCBE noted discrepancies in the assessment by the various

Sections of the Court: in a related case (see *July and SARL Libération*, cited above) the Court had found a violation of Article 10, whereas the Chamber in the present case had found no violation. In the CCBE's view such discrepancies in assessment appeared to be the result of different approaches to the remarks of a lawyer: a degree of immunity applied to any views, however harsh, on the justice system or a court, whilst criticism of a judge did not enjoy such immunity. Such a distinction was extremely difficult to apply and gave rise to almost insurmountable problems, on account of the interdependence between the general and the personal in the conduct of proceedings, together with the fact that, in an inquisitorial system, judicial office could not be separated from the institution itself.

116. As the present case concerned freedom of expression outside the courtroom, the limits also had to take account of the fact that in sensitive and high-profile cases, and especially in those where reasons of State were at stake, lawyers often had no choice but to speak publicly to voice concerns regarding a hindrance to the proper conduct of the proceedings. In such cases, lawyers should have the same freedom of speech and expression as journalists. To restrict their freedom of expression, particularly when the proceedings were part of an inquisitorial system as in France, would prevent them from contributing to the proper administration of justice and ensuring public confidence therein.

117. The CCBE observed that as soon as a case attracted media attention, and, more particularly, where reasons of State were at stake, the rights of the defence, in certain cases, could only be meaningfully safeguarded by means of a public statement, even one that was somewhat vocal. Referring to the Court's findings in *Mor v. France* (no. 28198/09, § 42, 15 December 2011), it took the view that the fact that neither the competent judicial authority nor the professional disciplinary body had initiated proceedings would provide a foreseeable test in relation to the uncertainties surrounding any inappropriate action by a judge, whose office could not be distinguished from the judicial authority itself.

2. Joint observations of the Paris Bar Association, the National Bar Council and the Conference of Chairmen of French Bars

118. These third-party interveners pointed out, firstly, that until recently the issue of a lawyer's freedom of speech had arisen only inside the courtroom, and that in the context of defending a client at a hearing, the lawyer was protected by immunity from legal proceedings, an immunity which covered pleadings and oral argument before a court, under section 41 of the Act of 29 July 1881. This immunity authorised remarks which could be considered offensive, defamatory or injurious.

119. In their view, the point of principle in the present case was the lawyer's freedom of expression to defend his client when he was addressing the press, where the case had attracted a certain level of public interest. The resulting issue was how to determine when comments became excessive, however strong they might be, if they affected an opponent, a judge or a fellow lawyer.

120. Every lawyer, however well known, was the custodian of the client's word. When a case came to public attention, it was the lawyer's responsibility to continue to defend that client, whether by taking any necessary *ad hoc* proceedings or by adding his own voice to the media storm, as had become the norm. This was no longer a lawyer's right but a duty attached to his position, whether the story of the case broke some time before any public hearing, as was often the case, or later.

121. Lawyers were entitled to criticise the court's ruling and to relay any criticism their clients might wish to make. The lawyer's comments were then necessarily interpreted and received by the public as partial and subjective. The parallel between the judge's duty of discretion and the lawyer's freedom of speech was not convincing. Whilst the word of the judge would be received as objective, the words of the lawyer were taken as the expression of a protest by a party. It was not unusual, therefore, for a judge to be obliged to remain silent, whilst comments by a lawyer, for a party to the proceedings, would in no way disrupt the independence and authority of the justice system.

122. The third-party interveners observed that, while the French courts had always strictly applied the immunity referred to in section 41 of the 1881 Act to judicial comments alone, they were not unaware that lawyers had to contend with certain developments when their cases attracted media attention. They cited a recent example from a high-profile case where a lawyer had been prosecuted for defaming a lawyer for the opposing party. The Paris *tribunal de grande instance* had accepted his plea of good faith, even though his comments had been particularly excessive and based only on his personal belief, as "they came from a passionate lawyer who dedicated all of his energy to defending his client and who could not restrict his freedom of expression on the sole ground that he was referring to his case in front of journalists rather than addressing judges" (final judgment of the Seventeenth Division of the Paris *tribunal de grande instance* of 20 October 2010). The distinction between judicial and extrajudicial expression had therefore become outdated. The word of a lawyer was in fact based on a duty to inform; like journalists, lawyers were also "watchdogs of democracy".

123. The third-party interveners submitted, lastly, that there was an obligation of proportionality in such matters both for lawyers and for the

State. Lawyers had a very difficult role and this duty of proportionality reflected their duties of sensitivity and moderation, from which they could depart only where this was justified by the defence of their client and by the attacks or pressure they were under. As regards the State, the third-party interveners were of the view that lawyers should normally be granted immunity where their comments, however excessive, were linked to the defence of their client's interests. Any restriction on their right to express their views should be exceptional, the test being whether or not the comments were detachable from the defence of the client. The margin of freedom of expression for lawyers, which had to remain as broad as that of journalists, should take account of the constraints faced by them and the increased media attention, with a press that was increasingly curious and probing.

D. The Court's assessment

1. General principles

(a) Freedom of expression

124. The general principles concerning the necessity of an interference with freedom of expression, reiterated many times by the Court since its judgment in *Handyside v. the United Kingdom* (7 December 1976, Series A no. 24), were summarised in *Stoll v. Switzerland* ([GC] no. 69698/01, § 101, ECHR 2007-V) and restated more recently in *Animal Defenders International v. the United Kingdom* ([GC], no. 48876/08, § 100, ECHR 2013), as follows.

> "(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'. As set forth in Article 10, this freedom is subject to exceptions, which ... must, however, be construed strictly, and the need for any restrictions must be established convincingly ...
>
> (ii) The adjective 'necessary', within the meaning of Article 10 § 2, implies the existence of a 'pressing social need'. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a 'restriction' is reconcilable with freedom of expression as protected by Article 10.

> (iii) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient' ... In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts ..."

125. Moreover, as regards the level of protection, there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on matters of public interest (see *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 61, ECHR 1999-IV; *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 46, ECHR 2007-IV; and *Axel Springer AG v. Germany* [GC], no. 39954/08, § 90, 7 February 2012). Accordingly, a high level of protection of freedom of expression, with the authorities thus having a particularly narrow margin of appreciation, will normally be accorded where the remarks concern a matter of public interest, as is the case, in particular, for remarks on the functioning of the judiciary, even in the context of proceedings that are still pending in respect of the other defendants (see *Roland Dumas v. France*, no. 34875/07, § 43, 15 July 2010, and *Gouveia Gomes Fernandes and Freitas e Costa v. Portugal*, no. 1529/08, § 47, 29 March 2011). A degree of hostility (see *E.K. v. Turkey*, no. 28496/95, §§ 79-80, 7 February 2002) and the potential seriousness of certain remarks (see *Thoma v. Luxembourg*, no. 38432/97, § 57, ECHR 2001-III) do not obviate the right to a high level of protection, given the existence of a matter of public interest (see *Paturel v. France*, no. 54968/00, § 42, 22 December 2005).

126. Furthermore, in its judgments in *Lingens v. Austria* (8 July 1986, § 46, Series A no. 103) and *Oberschlick v. Austria (no. 1)* (23 May 1991, § 63, Series A no. 204), the Court drew a distinction between statements of fact and value judgments. The existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 (see *De Haes and Gijsels v. Belgium*, 24 February 1997, § 42, *Reports* 1997-I). However, where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient "factual basis" for the impugned statement: if there is not, that value judgment may prove excessive (see *De Haes and Gijsels*,

cited above, § 47; *Oberschlick v. Austria (no. 2)*, 1 July 1997, § 33, *Reports* 1997-IV; *Brasilier v. France*, no. 71343/01, § 36, 11 April 2006; and *Lindon, Otchakovsky-Laurens and July*, cited above, § 55). In order to distinguish between a factual allegation and a value judgment it is necessary to take account of the circumstances of the case and the general tone of the remarks (see *Brasilier*, cited above, § 37), bearing in mind that assertions about matters of public interest may, on that basis, constitute value judgments rather than statements of fact (see *Paturel*, cited above, § 37).

127. Lastly, the nature and severity of the sanctions imposed are also factors to be taken into account when assessing the proportionality of the interference. As the Court has previously pointed out, interference with freedom of expression may have a chilling effect on the exercise of that freedom. The relatively moderate nature of the fines does not suffice to negate the risk of a chilling effect on the exercise of freedom of expression, this being all the more unacceptable in the case of a lawyer who is required to ensure the effective defence of his clients (see *Mor*, cited above, § 61). Generally speaking, while it is legitimate for the institutions of the State, as guarantors of the institutional public order, to be protected by the competent authorities, the dominant position occupied by those institutions requires the authorities to display restraint in resorting to criminal proceedings (see *Castells v. Spain*, 23 April 1992, § 46, Series A no. 236; *Incal v. Turkey*, 9 June 1998, § 54, *Reports* 1998-IV; *Lehideux and Isorni v. France*, 23 September 1998, § 57, *Reports* 1998-VII; *Öztürk v. Turkey* [GC], no. 22479/93, § 66, ECHR 1999-VI; and *Otegi Mondragon v. Spain*, no. 2034/07, § 58, ECHR 2011).

(b) Maintaining the authority of the judiciary

128. Questions concerning the functioning of the justice system, an institution that is essential for any democratic society, fall within the public interest. In this connection, regard must be had to the special role of the judiciary in society. As the guarantor of justice, a fundamental value in a State governed by the rule of law, it must enjoy public confidence if it is to be successful in carrying out its duties. It may therefore prove necessary to protect such confidence against gravely damaging attacks that are essentially unfounded, especially in view of the fact that judges who have been criticised are subject to a duty of discretion that precludes them from replying (see *Prager and Oberschlick v. Austria*, 26 April 1995, § 34, Series A no. 313; *Karpetas v. Greece,* no. 6086/10, § 68, 30 October 2012; and *Di Giovanni v. Italy*, no. 51160/06, § 71, 9 July 2013).

129. The phrase "authority of the judiciary" includes, in particular, the notion that the courts are, and are accepted by the public at large as being, the

proper forum for the resolution of legal disputes and for the determination of a person's guilt or innocence on a criminal charge; further, that the public at large have respect for and confidence in the courts' capacity to fulfil that function (see *Worm v. Austria*, 29 August 1997, § 40, *Reports* 1997-V, and *Prager and Oberschlick*, cited above).

130. What is at stake is the confidence which the courts in a democratic society must inspire not only in the accused, as far as criminal proceedings are concerned (see *Kyprianou*, cited above, § 172), but also in the public at large (see *Kudeshkina v. Russia*, no. 29492/05, § 86, 26 February 2009, and *Di Giovanni*, cited above).

131. Nevertheless – save in the case of gravely damaging attacks that are essentially unfounded – bearing in mind that judges form part of a fundamental institution of the State, they may as such be subject to personal criticism within the permissible limits, and not only in a theoretical and general manner (see *July and SARL Libération*, cited above, § 74). When acting in their official capacity they may thus be subject to wider limits of acceptable criticism than ordinary citizens (ibid.).

(c) The status and freedom of expression of lawyers

132. The specific status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. They therefore play a key role in ensuring that the courts, whose mission is fundamental in a State based on the rule of law, enjoy public confidence (see *Schöpfer v. Switzerland*, 20 May 1998, §§ 29-30, *Reports* 1998-III; *Nikula v. Finland*, no. 31611/96, § 45, ECHR 2002-II; *Amihalachioaie v. Moldova*, no. 60115/00, § 27, ECHR 2004-III; *Kyprianou*, cited above, § 173; *André and Another v. France*, no. 18603/03, § 42, 24 July 2008; and *Mor*, cited above, § 42). However, for members of the public to have confidence in the administration of justice they must have confidence in the ability of the legal profession to provide effective representation (see *Kyprianou*, cited above, § 175).

133. That special role of lawyers, as independent professionals, in the administration of justice entails a number of duties, particularly with regard to their conduct (see *Van der Mussele v. Belgium*, 23 November 1983, Series A no. 70; *Casado Coca v. Spain*, 24 February 1994, § 46, Series A no. 285-A; *Steur v. the Netherlands*, no. 39657/98, § 38, ECHR 2003-XI; *Veraart v. the Netherlands*, no. 10807/04, § 51, 30 November 2006; and *Coutant v. France* (dec.), no. 17155/03, 24 January 2008). Whilst they are subject to restrictions on their professional conduct, which must be discreet, honest and dignified, they also enjoy exclusive rights and privileges that

may vary from one jurisdiction to another – among them, usually, a certain latitude regarding arguments used in court (see *Steur*, cited above).

134. Consequently, freedom of expression is applicable also to lawyers. It encompasses not only the substance of the ideas and information expressed but also the form in which they are conveyed (see *Foglia v. Switzerland*, no. 35865/04, § 85, 13 December 2007). Lawyers are thus entitled, in particular, to comment in public on the administration of justice, provided that their criticism does not overstep certain bounds (see *Amihalachioaie*, cited above, §§ 27-28; *Foglia*, cited above, § 86; and *Mor*, cited above, § 43). Those bounds lie in the usual restrictions on the conduct of members of the Bar (see *Kyprianou*, cited above, § 173), as reflected in the ten basic principles enumerated by the CCBE for European lawyers, with their particular reference to "dignity", "honour" and "integrity" and to "respect for ... the fair administration of justice" (see paragraph 58 above). Such rules contribute to the protection of the judiciary from gratuitous and unfounded attacks, which may be driven solely by a wish or strategy to ensure that the judicial debate is pursued in the media or to settle a score with the judges handling the particular case.

135. The question of freedom of expression is related to the independence of the legal profession, which is crucial for the effective functioning of the fair administration of justice (see *Siałkowska v. Poland*, no. 8932/05, § 111, 22 March 2007). It is only in exceptional cases that restriction – even by way of a lenient criminal penalty – of defence counsel's freedom of expression can be accepted as necessary in a democratic society (see *Nikula*, cited above, § 55; *Kyprianou*, cited above, § 174; and *Mor*, cited above, § 44).

136. A distinction should, however, be drawn depending on whether the lawyer expresses himself in the courtroom or elsewhere.

137. As regards, firstly, the issue of "conduct in the courtroom", since the lawyer's freedom of expression may raise a question as to his client's right to a fair trial, the principle of fairness thus also militates in favour of a free and even forceful exchange of argument between the parties (see *Nikula*, cited above, § 49, and *Steur*, cited above, § 37). Lawyers have the duty to "defend their clients' interests zealously" (see *Nikula*, cited above, § 54), which means that they sometimes have to decide whether or not they should object to or complain of the conduct of the court (see *Kyprianou*, cited above, § 175). In addition, the Court takes into consideration the fact that the impugned remarks are not repeated outside the courtroom and it makes a distinction depending on the person concerned; thus, a prosecutor, who is a "party" to the proceedings, has to "tolerate very considerable criticism by ... defence counsel", even if some of the terms are inappropriate, provided they do not concern his general professional or other qualities (see *Nikula*,

cited above, §§ 51-52; *Foglia*, cited above, § 95; and *Roland Dumas*, cited above, § 48).

138. Turning now to remarks made outside the courtroom, the Court reiterates that the defence of a client may be pursued by means of an appearance on the television news or a statement in the press, and through such channels the lawyer may inform the public of shortcomings that are likely to undermine pre-trial proceedings (see *Mor*, cited above, § 59). The Court takes the view, in this connection, that a lawyer cannot be held responsible for everything published in the form of an "interview", in particular where the press has edited the statements and he or she has denied making certain remarks (see *Amihalachioaie*, cited above, § 37). In the above-cited *Foglia* case, it also found that lawyers could not justifiably be held responsible for the actions of the press (see *Foglia*, cited above, § 97). Similarly, where a case is widely covered in the media on account of the seriousness of the facts and the individuals likely to be implicated, a lawyer cannot be penalised for breaching the secrecy of the judicial investigation where he or she has merely made personal comments on information which is already known to the journalists and which they intend to report, with or without those comments. Nevertheless, when making public statements, a lawyer is not exempted from his duty of prudence in relation to the secrecy of a pending judicial investigation (see *Mor*, cited above, §§ 55-56).

139. Lawyers cannot, moreover, make remarks that are so serious that they overstep the permissible expression of comments without a sound factual basis (see *Karpetas*, cited above, § 78; see also *A. v. Finland* (dec.), no. 44998/98, 8 January 2004), nor can they proffer insults (see *Coutant*, cited above). In the circumstances in *Gouveia Gomes Fernandes and Freitas e Costa* (cited above, § 48), the use of a tone that was not insulting but caustic, or even sarcastic, in remarks about judges was regarded as compatible with Article 10. The Court assesses remarks in their general context, in particular to ascertain whether they can be regarded as misleading or as a gratuitous personal attack (see *Ormanni v. Italy*, no. 30278/04, § 73, 17 July 2007, and *Gouveia Gomes Fernandes and Freitas e Costa*, cited above, § 51) and to ensure that the expressions used have a sufficiently close connection with the facts of the case (see *Feldek v. Slovakia*, no. 29032/95, § 86, ECHR 2001-VIII, and *Gouveia Gomes Fernandes and Freitas e Costa*, cited above).

2. Application of those principles in the present case

140. Turning to the present case, the Court observes that the applicant received a criminal conviction, with an order to pay damages and costs, on account of his remarks concerning the proceedings in the Borrel case, as reproduced in an article in the daily newspaper *Le Monde*, which contained

the text of a letter sent by the applicant and his colleague to the Minister of Justice seeking an administrative investigation, together with statements that he had made to the journalist who wrote the impugned article.

141. The Court notes at the outset that it is not in dispute between the parties that the applicant's criminal conviction constituted an interference with the exercise of his right to freedom of expression, as guaranteed by Article 10 of the Convention. That is also the Court's opinion.

142. It further observes that the interference was prescribed by law, namely by sections 23, 29 and 31 of the Act of 29 July 1881, as the applicant acknowledged.

143. The parties also agreed that the aim of the interference was the protection of the reputation or rights of others. The Court does not see any reason to adopt a different view. While the applicant wished to qualify the point that the proceedings against him also sought to "maintain the authority and impartiality of the judiciary" (see paragraph 99 above), this question relates to the "necessity" of the interference and cannot affect the fact that it pursued at least one of the "legitimate aims" covered by paragraph 2 of Article 10.

144. It remains therefore to be examined whether the interference was "necessary in a democratic society" and this requires the Court to ascertain whether it was proportionate to the legitimate aim pursued and whether the grounds given by the domestic courts were relevant and sufficient.

145. The Court notes that, in convicting the applicant, the Court of Appeal took the view that to say that an investigating judge had shown "conduct which [was] completely at odds with the principles of impartiality and fairness" was in itself a particularly defamatory accusation (see paragraph 47 above). That court added that the applicant's comments concerning the delay in forwarding the video-cassette and his reference to the handwritten card from the public prosecutor of Djibouti to Judge M., in respect of which the applicant had used the term "connivance", merely confirmed the defamatory nature of the accusation (ibid.), the "veracity" of the allegations not having been established (see paragraph 48 above) and the applicant's defence of good faith being rejected (see paragraph 49 above).

(a) The applicant's status as a lawyer

146. The Court observes, firstly, that the remarks in question stemmed both from statements made at the request of the journalist who wrote the article and from the letter to the Minister of Justice. The remarks were made by the applicant in his capacity as a lawyer acting for the civil party and concerned matters relating to the proceedings in the Borrel case.

147. In this connection the Court notes at the outset that the applicant has invited it to clarify its case-law concerning the exercise of freedom of expression by a lawyer, particularly outside the courtroom, and to afford the greatest possible protection to comments by lawyers (see paragraphs 96, 97 and 102 above). The Government, for their part, while taking the view that their status as officers of the court fundamentally distinguished lawyers from journalists (see paragraph 106 above), identified various situations in which freedom of expression would be "particularly broad", "wide", or, on the contrary, subject to "certain limits" (see paragraph 107 above).

148. The Court would refer the parties to the principles set out in its case-law, particularly with regard to the status and freedom of expression of lawyers (see paragraphs 132-39 above), with emphasis on the need to distinguish between remarks made by lawyers inside and outside the courtroom. Moreover, in view of the specific status of lawyers and their position in the administration of justice (see paragraph 132 above), the Court takes the view, contrary to the argument of the CCBE (see paragraph 116 above), that lawyers cannot be equated with journalists. Their respective positions and roles in judicial proceedings are intrinsically different. Journalists have the task of imparting, in conformity with their duties and responsibilities, information and ideas on all matters of public interest, including those relating to the administration of justice. Lawyers, for their part, are protagonists in the justice system, directly involved in its functioning and in the defence of a party. They cannot therefore be equated with an external witness whose task it is to inform the public.

149. The applicant argued that his statements, as published in the newspaper *Le Monde*, served precisely to fulfil his task of defending his client – a task that was for him to determine. However, while it is not in dispute that the impugned remarks fell within the context of the proceedings, they were aimed at investigating judges who had been removed from the proceedings with final effect at the time they were made. The Court therefore fails to see how his statements could have directly contributed to his task of defending his client, since the judicial investigation had by that time been entrusted to another judge who was not the subject of the criticism.

(b) Contribution to a debate on a matter of public interest

150. The applicant further relied on his right to inform the public of shortcomings in the handling of ongoing proceedings and to contribute to a debate on a matter of public interest.

151. On that point, the Court notes, firstly, that the applicant's remarks were made in the context of the judicial investigation opened following the death of a French judge, Bernard Borrel, who had been seconded to the

Djibouti Ministry of Justice as a technical adviser. The Court has already had occasion to note the significant media interest shown in this case from the outset (see *July and SARL Libération*, cited above, § 67), thus reflecting its prominence in public opinion. Like the applicant, the Court notes, moreover, that the justice system also contributed to informing the public of this case, as the investigating judge handling the case in 2007 asked the public prosecutor to issue a press release, under Article 11, paragraph 3, of the Code of Criminal Procedure, to announce that the suicide theory had been dismissed in favour of one of premeditated murder (see paragraphs 24 and 55 above).

152. In addition, as the Court has previously found, the public have a legitimate interest in the provision and availability of information regarding criminal proceedings (see *July and SARL Libération*, cited above, § 66) and remarks concerning the functioning of the judiciary relate to a matter of public interest (see paragraph 125 above). The Court has in fact already been called upon on two occasions, in *Floquet and Esménard* and *July and SARL Libération* (both cited above), to examine complaints relating to the Borrel case and to the right to freedom of expression in respect of comments on the handling of the judicial investigation, finding in each of those cases that there was a debate on a matter of public interest.

153. Accordingly, the Court takes the view that the applicant's impugned remarks, which also concerned, as in the said judgments in *Floquet and Esménard* and *July and SARL Libération*, the functioning of the judiciary and the handling of the Borrel case, fell within the context of a debate on a matter of public interest, thus calling for a high level of protection of freedom of expression, with a particularly narrow margin of appreciation accordingly being afforded to the authorities.

(c) The nature of the impugned remarks

154. The Court notes that after the applicant's remarks had been found "particularly defamatory" he had been unable to establish their veracity on the basis of evidence that, according to the Criminal Court, had to "be flawless and complete and relate directly to all the allegations found to be defamatory" (see paragraph 40 above). His defence of good faith was also rejected. On that point, the Criminal Court and the Court of Appeal took the view, in particular, that the attacks on the professional and moral integrity of Judges M. and L.L. clearly overstepped the right of permissible criticism (see paragraphs 40 and 50 above). In addition, while the Criminal Court took the view that the profound disagreements between Mrs Borrel's lawyers and the investigating judges could not justify a total lack of prudence in their expression, the Court of Appeal concluded that the decision in the

applicant's favour to discontinue the proceedings brought against him by the two judges did not rule out bad faith on his part. It held that the applicant's personal animosity and the wish to discredit the judges, in particular Judge M., stemmed from the excessive nature of his comments and from the fact that the article on the Borrel case had been published at the same time as the bringing of proceedings against Judge M. before the Indictment Division in connection with the "Scientology" case (ibid.).

155. As the Court has already observed, it is necessary to distinguish between statements of fact and value judgments (see paragraph 126 above). The existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof; a requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 (ibid.). In addition, the existence of procedural safeguards for the benefit of a defendant in defamation proceedings is among the factors to be taken into account in assessing the proportionality of an interference under Article 10. In particular, it is important for the defendant to be afforded a realistic chance to prove that there was a sufficient factual basis for his allegations (see, among other authorities, *Steel and Morris v. the United Kingdom*, no. 68416/01, § 95, ECHR 2005-II; *Andrushko v. Russia*, no. 4260/04, § 53, 14 October 2010; *Dilipak and Karakaya v. Turkey*, nos. 7942/05 and 24838/05, § 141, 4 March 2014; and *Hasan Yazıcı v. Turkey*, no. 40877/07, § 54, 15 April 2014). No such chance was afforded in the present case.

156. The Court takes the view that, in the circumstances of the case, the impugned statements were more value judgments than pure statements of fact, in view of the general tone of the remarks and the context in which they were made, as they reflected mainly an overall assessment of the conduct of the investigating judges in the course of the investigation.

157. It thus remains to be examined whether the "factual basis" for those value judgments was sufficient.

158. The Court is of the opinion that this condition was fulfilled in the present case. After the case had been withdrawn from Judges M. and L.L. by the Indictments Division of the Paris Court of Appeal (see paragraph 23 above), it became apparent that an important item of evidence in the file, namely a video-cassette recorded during a visit by the judges, accompanied by experts, to the scene of the death, even though it had been referred to in the last decision given by those judges, had not been forwarded with the investigation file to the judge appointed to replace them. That fact was not only established but it was also sufficiently serious to justify the drafting by Judge P. of a report in which he recorded the following: firstly, the video-cassette did not appear in the investigation file and was not registered as

an exhibit; and secondly, it had been given to him in an envelope, which showed no sign of having been placed under seal, bearing the name of Judge M. as addressee and also containing a handwritten card with the letter head of the public prosecutor of Djibouti, written by him and addressed to Judge M. (see paragraph 32 above).

159. Moreover, in addition to the fact that the card showed a certain friendliness on the part of the public prosecutor of Djibouti towards Judge M. (see paragraph 32 above), it accused the civil parties' lawyers of "orchestrating their manipulation". The Court would emphasise in this connection that, not only have the Djibouti authorities supported the theory of suicide from the outset, but also a number of representatives of that State have been personally implicated in the context of the judicial investigation conducted in France, as can be seen in particular from the judgment of the International Court of Justice (see paragraphs 63-64 above) and from the proceedings brought on a charge of procuring of false evidence (see paragraph 18 above).

160. Lastly, it has been established that the applicant acted in his capacity as a lawyer in two high-profile cases in which Judge M. was an investigating judge. In both of them the applicant succeeded in obtaining findings by the appellate courts that there had been shortcomings in the proceedings, leading to the withdrawal of the cases from Judge M. (see paragraphs 22-23 and 26 above). In the context of the first case, known as the "Scientology" case, the applicant additionally secured a ruling that the French State was liable for the malfunctioning of the justice system (see paragraph 30 above).

161. It further considers that the expressions used by the applicant had a sufficiently close connection with the facts of the case, in addition to the fact that his remarks could not be regarded as misleading or as a gratuitous attack (see paragraph 139 above). It reiterates in this connection that freedom of expression "is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb". Similarly, the use of a "caustic tone" in comments aimed at a judge is not incompatible with the provisions of Article 10 of the Convention (see, for example, *Gouveia Gomes Fernandes and Freitas e Costa*, cited above, § 48).

(d) The specific circumstances of the case

(i) The need to take account of the overall background

162. The Court reiterates that, in the context of Article 10 of the Convention, it must take account of the circumstances and overall background against which the statements in question were made (see, among

many other authorities, *Lingens*, cited above, § 40, and Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, § 62, ECHR 1999-III). In the present case, the background can be explained not only by the conduct of the investigating judges and by the applicant's relations with one of them, but also by the very specific history of the case, its inter-State dimension and its substantial media coverage. The Court would observe, however, that the Court of Appeal attributed an extensive scope to the impugned remark of the applicant criticising an investigating judge for "conduct which [was] completely at odds with the principles of impartiality and fairness", finding that this was in itself a particularly defamatory accusation, tantamount to saying that there had been a breach of professional ethics and of the judicial oath on the part of that judge (see paragraph 47 above). That quotation should, however, have been assessed in the light of the specific circumstances of the case, especially as it was in reality not a statement made to the author of the article, but an extract from the letter sent by the applicant and his colleague, Mr L. de Caunes, to the Minister of Justice on 6 September 2000. In addition, at the time when the applicant answered his questions the journalist had already been informed of the letter to the Minister of Justice, not by the applicant himself, but by his own sources, as the Criminal Court acknowledged (see paragraph 40 above). The applicant further argued, without this being in dispute, that the article's author was solely responsible for the reference to the disciplinary proceedings against Judge M. in the context of the "Scientology" case. In that connection, the Court reiterates that lawyers cannot be held responsible for everything appearing in an "interview" published by the press or for actions by the press.

163. The Court of Appeal was thus required to examine the impugned remarks with full consideration of both the background to the case and the content of the letter, taken as a whole.

164. For the same reasons, since the impugned remarks could not be assessed out of context, the Court cannot share the view of the Paris Court of Appeal that the use of the term "connivance" constituted "in itself" a serious attack on the honour and reputation of Judge M. and the public prosecutor of Djibouti (see paragraph 47 above).

165. As to the question of personal animosity on the part of the applicant towards Judge M., on account of conflicts in the context of the Borrel and "Scientology" cases, the Court takes the view that this aspect was insufficiently relevant and serious to warrant the applicant's conviction. In any event, since the courts acknowledged the existence of conflicts between the two protagonists, and in view of the particular circumstances of the present case, such a reproach of personal animosity could have been made as

much to Judge M. as to the applicant (see, *mutatis mutandis*, *Paturel*, cited above, § 45), especially as before filing a complaint against the applicant for complicity in defamation Judge M. had already unsuccessfully filed a complaint against him for false accusation (see paragraph 35 above). The Court of Appeal's reliance on the applicant's personal animosity is also at least undermined, if not contradicted, by other factors. Firstly, the remark concerning "conduct which [was] completely at odds with the principles of impartiality and fairness" was directed not only at Judge M., but also at Judge L.L., in respect of whom the applicant was not accused of showing any personal animosity. Furthermore, while the proceedings against the applicant concerned the above-cited extract from the letter to the Minister of Justice, that letter had in reality been signed and sent by two lawyers, the applicant and his colleague, Mr L. de Caunes. In the case of the latter, however, not only has he not been prosecuted for remarks that were attributable as much to him as to the applicant, he has not been accused of showing any animosity towards Judge M. or Judge L.L.

166. In conclusion, the Court considers that the applicant's statements could not be reduced to the mere expression of personal animosity, that is to say an antagonistic relationship between two individuals, the applicant and Judge M. The impugned remarks fell, in reality, within a broader context, also involving another lawyer and another judge. In the Court's opinion, that fact is capable of supporting the idea that the remarks were not part of any personal action on the part of the applicant, out of a desire for vengeance, but rather formed part of a joint professional initiative by two lawyers, on account of facts that were new, established and capable of revealing serious shortcomings in the justice system, involving the two judges who had formerly been conducting the investigation in a case in which the two lawyers' clients were civil parties.

167. In addition, while the applicant's remarks certainly had a negative connotation, it should be pointed out that, notwithstanding their somewhat hostile nature (see *E.K. v. Turkey*, cited above, §§ 79-80) and seriousness (see *Thoma*, cited above), the key question in the statements concerned the functioning of a judicial investigation, which was a matter of public interest, thus leaving little room for restrictions on freedom of expression. In addition, a lawyer should be able to draw the public's attention to potential shortcomings in the justice system; the judiciary may benefit from constructive criticism.

(ii) Maintaining the authority of the judiciary

168. The Government relied on the fact that the judicial authorities had no right of reply. It is true that the particular task of the judiciary in society

requires judges to observe a duty of discretion (see paragraph 128 above). However, that duty pursues a specific aim, as noted by the third-party interveners: the speech of judges, unlike that of lawyers, is received as the expression of an objective assessment which commits not only the person expressing himself, but also, through him, the entire justice system. Lawyers, for their part, merely speak in their own name and on behalf of their clients, thus also distinguishing them from journalists, whose role in the judicial debate and purpose are intrinsically different. Nevertheless, while it may prove necessary to protect the judiciary against gravely damaging attacks that are essentially unfounded, bearing in mind that judges are prevented from reacting by their duty of discretion (see paragraph 128 above), this cannot have the effect of prohibiting individuals from expressing their views, through value judgments with a sufficient factual basis, on matters of public interest related to the functioning of the justice system, or of banning any criticism of the latter. In the present case, Judges M. and L.L. were members of the judiciary and were thus both part of a fundamental institution of the State: they were therefore subject to wider limits of acceptable criticism than ordinary citizens and the impugned comments could therefore be directed against them in that capacity (see paragraphs 128 and 131 above).

169. The Court further finds, contrary to what has been argued by the Government, that the applicant's remarks were not capable of undermining the proper conduct of the judicial proceedings, in view of the fact that the higher court had withdrawn the case from the two investigating judges concerned by the criticisms. Neither the new investigating judge nor the higher courts were targeted in any way by the impugned remarks.

170. Nor can it be considered, for the same reasons and taking account of the foregoing, that the applicant's conviction could serve to maintain the authority of the judiciary. The Court would nevertheless emphasise the importance, in a State governed by the rule of law and in a democratic society, of maintaining the authority of the judiciary. In any event, the proper functioning of the courts would not be possible without relations based on consideration and mutual respect between the various protagonists in the justice system, at the forefront of which are judges and lawyers.

(iii) The use of available remedies

171. With regard to the Government's argument as to the possibility of using available remedies, the Court finds it pertinent but not sufficient in the present case to justify the applicant's conviction. It first notes that the use of available remedies, on the one hand, and the right to freedom of expression, on the other, do not pursue the same aim and are not interchangeable. That being said, the Court takes the view that the defence of a client by his lawyer

must be conducted not in the media, save in very specific circumstances (see paragraph 138 above), but in the courts of competent jurisdiction, and this involves using any available remedies. It notes that in the present case the referral to the Indictments Division of the Paris Court of Appeal patently showed that the initial intention of the applicant and his colleague was to resolve the matter using the available remedies. It was, in reality, only after that remedy had been used that the problem complained of occurred, as recorded by the investigating judge P. in his official report of 1 August 2000 (see paragraph 32 above). At that stage the Indictments Division was no longer in a position to examine such complaints, precisely because it had withdrawn the case from Judges M. and L.L. The Court further notes that, in any event, four and a half years had already elapsed since the opening of the judicial investigation, which has still not been closed to date. It also observes that the civil parties and their lawyers took an active part in the proceedings and, in particular, that they succeeded, according to the judgment of the Versailles Court of Appeal of 28 May 2009, in having a material witness examined in Belgium in spite of a lack of interest in him on the part of the investigating judges M. and L.L. (see paragraph 16 above).

172. Moreover, the request for an investigation made to the Minister of Justice complaining of these new facts was not a judicial remedy – such as to justify possibly refraining from intervention in the press – but a mere request for an administrative investigation subject to the discretionary decision of the Minister of Justice. The Court notes in this connection that the domestic judges themselves, both at first instance and on appeal, took the view that the letter could not enjoy the immunity afforded to judicial acts, the Criminal Court having found that its content was purely informative (see paragraphs 38 and 46 above). The Court observes that it has not been argued that this request was acted upon and, in addition, it notes that Judges M. and L.L. clearly did not see it as the normal use of a remedy available under domestic law, but as an act justifying the filing of a complaint for false accusation (see paragraph 35 above).

173. Lastly, the Court finds that neither the Principal Public Prosecutor nor the relevant Bar Council or chairman of the Bar found it necessary to bring disciplinary proceedings against the applicant on account of his statements in the press, although such a possibility was open to them (see *Mor*, cited above, § 60).

(iv) Conclusion as to the circumstances of the present case

174. The Court is of the view that the impugned remarks by the applicant did not constitute gravely damaging and essentially unfounded attacks on

the action of the courts, but criticisms levelled at Judges M. and L.L. as part of a debate on a matter of public interest concerning the functioning of the justice system, and in the context of a case which had received wide media coverage from the outset. While those remarks could admittedly be regarded as harsh, they nevertheless constituted value judgments with a sufficient "factual basis".

(e) The sanctions imposed

175. As to the sentences imposed, the Court reiterates that, in assessing the proportionality of the interference, the nature and severity of the penalties imposed are also factors to be taken into account (see, for example, *Sürek*, cited above, § 64; *Chauvy and Others v. France*, no. 64915/01, § 78, ECHR 2004-VI; and *Mor*, cited above, § 61). In the present case, the Court of Appeal sentenced the applicant to pay a fine of EUR 4,000. This amount corresponds precisely to that fixed by the first-instance court, where the judges had expressly taken into account the applicant's status as a lawyer to justify their severity and to impose on him "a fine of a sufficiently high amount" (see paragraph 41 above). In addition to ordering the insertion of a notice in the newspaper *Le Monde*, the court ordered him to pay, jointly with the journalist and the publication director, EUR 7,500 in damages to each of the two judges, together with EUR 4,000 to Judge L.L. in costs. The Court notes, moreover, that the applicant alone was ordered to pay a sum to Judge M. in respect of costs, amounting to EUR 1,000.

176. The Court reiterates that even when the sanction is the lightest possible, such as a guilty verdict with a discharge in respect of the criminal sentence and an award of only a "token euro" in damages (see *Mor*, cited above, § 61), it nevertheless constitutes a criminal sanction and, in any event, that fact cannot suffice, in itself, to justify the interference with the applicant's freedom of expression (see *Brasilier*, cited above, § 43). The Court has emphasised on many occasions that interference with freedom of expression may have a chilling effect on the exercise of that freedom (see, *mutatis mutandis*, *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 114, ECHR 2004-XI, and *Mor*, cited above) – a risk that the relatively moderate nature of a fine would not suffice to negate (see *Dupuis and Others v. France*, no. 1914/02, § 48, 7 June 2007). It should also be noted that imposing a sanction on a lawyer may have repercussions that are direct (disciplinary proceedings) or indirect (in terms, for example, of their image or the confidence placed in them by the public and their clients). The Court would, moreover, reiterate that the dominant position of the State institutions requires the authorities to show restraint in resorting to criminal proceedings (see paragraph 127 above). The Court observes, however, that

in the present case the applicant's punishment was not confined to a criminal conviction: the sanction imposed on him was not the "lightest possible", but was, on the contrary, of some significance, and his status as a lawyer was even relied upon to justify greater severity.

3. Conclusion

177. In view of the foregoing, the Court finds that the judgment against the applicant for complicity in defamation can be regarded as a disproportionate interference with his right to freedom of expression, and was not therefore "necessary in a democratic society" within the meaning of Article 10 of the Convention.

178. Accordingly, there has been a violation of Article 10 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

179. 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

180. The applicant claimed 4,270 euros (EUR) in respect of pecuniary damage, corresponding to the amounts he was ordered to pay on account of the judgment against him, and EUR 20,000 in respect of non-pecuniary damage on account of the violation of Articles 6 and 10 of the Convention.

181. The Government did not comment on those claims before the Grand Chamber.

182. The Court observes that the applicant was ordered to pay a fine of EUR 4,000, together with the sum of EUR 1,000 in respect of Judge M.'s costs and expenses, in addition to an award of EUR 7,500 in damages to each of the judges to be paid jointly with the other two co-defendants, and EUR 4,000 in respect of Judge L.L.'s costs (see paragraph 46 above). It thus takes the view that there is a sufficient causal link between the alleged pecuniary damage and the violation found under Article 6 and, especially, under Article 10 of the Convention. It is thus appropriate to order, under the head of pecuniary damage, the reimbursement of the sums that the applicant was required to pay, within the limit indicated in his claim, namely EUR 4,270, which corresponds to the amount of the fine, plus taxes and court courts, that was paid to the Treasury.

183. The Court further finds that the applicant clearly sustained non-pecuniary damage on account of his criminal conviction and, ruling on an equitable basis, it awards him EUR 15,000 on that basis.

B. Costs and expenses

184. The applicant claimed EUR 26,718.80 in respect of costs and expenses for the proceedings before the Court.

185. The Government made no comment on this claim before the Grand Chamber.

186. The Court reiterates that costs and expenses will not be awarded under Article 41 unless it is established that they were actually incurred, were necessarily incurred and were also reasonable as to quantum (see, among many other authorities, *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 54, ECHR 2000-XI; *Beyeler v. Italy* (just satisfaction) [GC], no. 33202/96, § 27, 28 May 2002; and *Kurić and Others v. Slovenia* (just satisfaction) [GC], no. 26828/06, ECHR 2014).

187. In the present case, taking account of the documents in its possession and the above-mentioned criteria, the Grand Chamber finds it reasonable to award EUR 14,400 on that basis to the applicant.

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
2. *Holds* that there has been a violation of Article 10 of the Convention;
3. *Holds*

   (a) that the respondent State is to pay the applicant, within three months, the following amounts:

   (i) EUR 4,270 (four thousand two hundred and seventy euros), plus any tax that may be chargeable, in respect of pecuniary damage;

   (ii) EUR 15,000 (fifteen thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

   (iii) EUR 14,400 (fourteen thousand four hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

   (b) that from the expiry of the above-mentioned three months until

settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 23 April 2015.

Johan Callewaert
Deputy Registrar

Dean Spielmann
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) concurring opinion of Judge Nicolaou;
(b) concurring opinion of Judge Kūris.

D.S.
J.C.

CONCURRING OPINION OF JUDGE NICOLAOU

Judge M. of the Paris *tribunal de grand instance* had, for some time, already been seised as investigating judge of the so-called "Scientology" case when, in 1997, she was assigned, jointly with a colleague, the unrelated Borrel case, a particularly sensitive case which has given rise to the present proceedings before the Court. The applicant acted as lawyer for the civil parties in both cases and was dissatisfied with Judge M.'s conduct of the respective investigations, although not for exactly the same reasons.

In June 2000, at a time when important developments were taking place in the Borrel case, an unpleasant turn of events occurred in the "Scientology" case. Following a suit brought by the applicant, as counsel, in which the State had been found liable for gross negligence in respect of the handling of the "Scientology" file, disciplinary proceedings were brought against Judge M. in that connection. It was said that she had failed to show the requisite care and attention, leaving the case practically untouched for five years; that, in a friendly-settlement procedure to which she had had recourse, she had overstepped the bounds of her jurisdiction; and that she had not prepared copies of all the documents in the file, thus making its reconstruction impossible after parts of it had disappeared from her chambers. These matters were referred to the disciplinary board for judges by decision of the Minister of Justice.

Unfortunately, the Minister's decision was made public at a press conference given by the director of her private office before Judge M. herself and the court's president had been notified. This prior publicity sparked off a protest on the part of judges serving in the same court. They expressed sympathy for their colleagues who had been snubbed in this way and reasserted the right of judges to be treated with due respect; a right that can be no less than that which is owed to members of the public. At a general meeting held a few days later, the judges of that court unanimously adopted the following motion:

> "The general meeting of judges of the Paris *tribunal de grande instance* held on 4 July 2000, without disputing the authority conferred on the Minister of Justice to take disciplinary proceedings in the conditions prescribed by law, is surprised to learn from the press that such proceedings have been initiated against Judge [M.], investigating judge in Paris, whereas to date neither the judge herself nor her judicial hierarchy have been officially informed thereof."

The present Article 6 § 1 issue turns on what one of the judges said at that meeting. He expressed himself in this way:

> "We are not prohibited, as grassroots judges, from saying that we stand by Judge [M.]. It is not forbidden to say that Judge [M.] has our support and trust."

Nine years later the Court of Cassation, sitting in a formation of ten members, heard at final instance the applicant's appeal against conviction on a criminal charge brought against him for statements he had made about Judge M. in connection with the present case, i.e., the Borrel case. The judge who had made the above-quoted statement about the way in which the Ministry of Justice had acted in the "Scientology" case and who, in the meantime, had risen to become a judge of the Court of Cassation, was a member of the formation which heard the appeal. The applicant has acknowledged that it has not been shown that there was any actual bias on the part of the judge. He submitted, however, that his very presence on the bench had been enough to create, in an objective sense, a legitimate fear or suspicion of a lack of impartiality.

The Grand Chamber agrees with that proposition. It takes the view that the language that had been used by the judge in question in support of Judge M. was capable of raising doubts in the applicant's mind regarding the impartiality of the Court of Cassation. It considers that this is supported by the "very singular context of the case" (see paragraph 84 of the present judgment), comprising as it does the interplay of various relations and factors, and particularly by the fact that the professional conflict between Judge M. and the applicant had taken on the appearance of a personal conflict, since it was the former who had filed the complaint against the latter. Further, the Grand Chamber observes that the Court of Appeal had itself seen a connection between the two cases to which an *"ex post facto* settling of scores" could be ascribed.

The essential question is whether one can have a reasonable doubt regarding the impartiality of the Court of Cassation by reason of the inclusion in its composition of the judge in question. It remains unknown whether that judge had any recollection of what he had actually said nine years earlier or whether it occurred to him, when seised of the case, that anything he had done or said in relation to Judge M. might be taken to reflect on his impartiality. If he had thought about it at all, one would have expected him to inform the other members of the bench. It is not known whether he did or did not remember or, if he did, whether he thought there was cause to reflect on the matter. It may be that he did not; or it may be that he did but that the bench thought nothing of it, for otherwise one would have expected the matter to be resolved quite simply by his withdrawal from the case, or otherwise by a decision of the court after giving the applicant an opportunity to be heard.

The Government have not suggested that in such cases the French system provides a means of redress of which the applicant should have availed himself. It must therefore be understood that the applicant had no way of

bringing the matter before the Court of Cassation when, after judgment was handed down, he became aware of the participation of the judge in question (compare *In Re Pinochet* [1999] UKHL 52 (15 January 1999), where the House of Lords, faced with a similar situation, set aside its own judgment). The Court is, therefore, in the unhappy position of having to examine the matter at first instance.

The integrity of judicial proceedings must be demonstrated to all in no uncertain terms. In order to achieve this, it is necessary to adopt a concept of reasonableness that is as broad as possible, one that would encompass and accommodate even the most fastidious view of the appearance of things. It is "of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done" (per Lord Hewart in *Rex v. Sussex Justices, ex parte McCarthy* [1924] KB 256, at 259). At the same time it is necessary to firmly exclude fanciful interpretations or propositions that are wholly unrealistic.

In the present case there is no indication whatsoever that the judge in question had any connection with Judge M. other than that which all the other judges attending the meeting also had with her as a colleague. He used the first-person plural form, thus expressing collegial, not personal, support. He spoke in the context of a meeting of judges at which they collectively remonstrated about what was certainly a cavalier attitude on the part of the relevant ministry towards them. That attitude, having a more immediate and direct impact on Judge M., could be perceived as denoting contemptuous disregard for her. In this situation, language such as that used by the judge in question would merely be aimed at redressing the balance. He could certainly have made a better choice of words; but no one should have thought that his statement was intended to express a view on the merits of the pending disciplinary proceedings or, in other words, a value judgment on the manner in which Judge M. had acted. Moreover, what was said related exclusively to how Judge M. had, up until that point, dealt with the "Scientology" case. It had nothing at all to do with what was to happen later in the Borrel case. Nine years had passed since that statement had been made and, presumably, people had gone their separate ways. There is absolutely nothing to suggest that the Court of Cassation judge had any reason to hold, or that he might have held, any view as to how Judge M. had behaved or conducted her investigations in any of the cases assigned to her.

Are judges then to be so distrusted that one might, in such circumstances, legitimately think that a judge's impartiality could be doubted? To answer this question the Court must discern what view the public at large take of the integrity of judges. That is determinative of the respect in which they may be held and of the confidence that may or may not be reposed

in them. Within limits, the greater the confidence the less one would be inclined to think that certain circumstances give rise to suspicion. Judges will themselves have contributed, over time, to the manner in which they are perceived. The concept of objective impartiality cannot, in my opinion, consist of a mere abstraction devised solely from principle, without regard to social realities which set practical standards. Judges may not be perfect – indeed, not all judges are perfect – but, even so, I have found it difficult to accept that one could seriously have thought that there was, in the present case, the possibility of an appearance of bias. One could, however, look at the matter from another angle and say that even in a hypothetical world of perfect judges, enjoying unbounded confidence and respect, it would still be necessary to demonstrate that the justice system itself is in this regard immaculate and is a system from which the faintest hint of doubt is excluded – a rather absolutist approach for which I have little sympathy.

Whichever may be the best approach to the matter under consideration, I have finally decided that the view taken by all the other members of the Grand Chamber as to what the result should be might conceivably be shared by right-minded persons today and, therefore, on such a question of assessment, it was right to defer to that view.

CONCURRING OPINION OF JUDGE KŪRIS

1. My disagreement with the majority concerns two issues. Neither of them are to be considered so prominent as to cast doubt on the overall finding of a violation of Articles 6 § 1 and 10 of the Convention, to which I subscribe.

2. The reasoning, as laid out in paragraphs 89 to 91 of the judgment, includes two factual circumstances that are important for the finding of a violation of Article 6 § 1. The first is that Judge J.M. was a member of the bench which had decided the applicant's case, although it is explicitly acknowledged that "it is impossible to ascertain [his] actual influence on that occasion". The argument that Judge J.M. was merely one of ten judges in that formation "is not decisive for the objective-impartiality issue under Article 6 § 1", it being his "unascertained influence" which is regarded as tainting the impartiality of that court with "a genuine doubt" (see paragraph 89 of the judgment). In this context, the point about impartiality being "open to a genuine doubt" is meant to refer to the objective impartiality of Judge J.M. himself and, by extension, that of the whole bench. The Court is not willing to openly question Judge J.M.'s subjective impartiality; rather it is of the view that the fact that the applicant could have thought that he had some grounds on which to question Judge J.M.'s subjective impartiality had a bearing on the objective impartiality of that judge and of the formation as a whole. Although the Court does not question Judge J.M.'s subjective impartiality explicitly and directly, it does so implicitly and indirectly, because the very hint of that judge's influence on the outcome of the case suggests that it could also have been such as to determine a conclusion which was unfavourable to the applicant and that, but for that influence, the outcome might have been different.

The second circumstance is that the applicant had not been informed that Judge J.M. would be sitting on the bench in his case. On the contrary, the information available to him at the material time gave him no reason to expect that this particular judge would be in the composition of the judicial body which had to decide his case. Because of this concealment (whatever the reason), the applicant "had no opportunity to challenge [Judge] J.M.'s presence or to make any submissions on the issue of the judicial body's impartiality in that connection" (see paragraph 90 of the judgment and paragraph 52 referred to therein).

In my opinion, the first of these two circumstances is by itself of no legal importance. We do not and cannot know whether any opinion that Judge J.M. may have expressed in the deliberations in that case was at all

unfavourable to the applicant. Thus, it is mere speculation that the judge could have had a greater or lesser influence on the outcome of the applicant's case. One could equally speculate on the lack of impartiality of – as they are routinely called – "national" judges of this Court, in cases against the State in respect of which they were elected, because when a case which has been decided by the Chamber is referred to the Grand Chamber under Article 43 of the Convention, such judge finds himself or herself in the situation where he or she has already sat in that case as a member of the Chamber. However, such speculation is rebutted by reference to Article 26 § 4 of the Convention, which explicitly requires that the judge elected in respect of the High Contracting Party concerned be an *ex officio* member of the Grand Chamber. Accordingly, the inclusion of the "national" judge in the composition of the Grand Chamber is, in the most formal way, compelled by the Convention itself and is, in this respect, absolutely necessary.

In view of such situations pertaining to the continuous practice of this Court, the plausibility of any speculation regarding the objective "partiality" of Judge J.M. and the whole bench *vis-à-vis* the applicant is close to zero. That judge had expressed his support for Judge M. (whose relationship with the applicant appeared to be, so to say, problematic) many years before and in an entirely different context, and there are no indications that he had ever expressed an opinion on Mr Morice's case or personality, or on the whole politically sensitive context of that case, prior to its being decided by the bench of which he was part.

I am certainly not implying that in a French (or other national) court the "absolute necessity" of the inclusion of a particular judge in the composition of a judicial body which has to decide a particular case can be substantiated exhaustively by, say, mere reference to a statute which explicitly requires such inclusion, in the same way that the Convention requires inclusion of "national" judges in the Grand Chamber. Even had such a statute been in place, it probably would have been legally reproachable. However – and not merely in theory – there can be other reasons (not only of a formal legal but also of a factual nature) which would compel the inclusion of a particular judge in the composition of a bench or, to put it in a somewhat milder way, justify his or her non-exclusion therefrom. In the Court's case-law, one can find decisions and judgments where the previous involvement of a judge in the same case had not amounted to a violation of the right to a fair trial protected by the Convention. To give just a couple of examples, even the mere fact that a judge had already taken decisions regarding a particular person "cannot in itself be regarded as justifying doubts as to his or her impartiality" (see *Ökten v. Turkey* (dec.), no. 22347/07, § 41, 3 November 2011); in an even earlier case the Court had held that "no ground for

legitimate suspicion [could] be discerned in the fact that three of the seven members of the disciplinary section had taken part in the first decision" (see *Diennet v. France*, 26 September 1995, § 38, Series A no. 325-A). Every case has to be decided on its own merits. In the present case, had the issue of Judge J.M.'s "partiality" been raised by the applicant in the proper course, such allegation would have been authoritatively dismissed as based on an illegitimate suspicion. However, the applicant was denied any opportunity to raise this issue in the domestic proceedings.

Thus, much more important than the "bare" fact of Judge J.M.'s presence on the bench is that the Government failed (or did not even attempt) to show that there were compelling reasons making that presence absolutely necessary (see *Fazlı Aslaner v. Turkey*, no. 36073/04, § 40, 4 March 2014) or, put otherwise, making his non-exclusion from the composition justified. I personally believe that there were no such grounds whatsoever. On the other hand, there could also hardly have been any weighty grounds to exclude that judge from the composition solely on the basis that he had expressed his support for Judge M. many years before and in an entirely different context. The two situations were unrelated, save for the fact that they involved opposition between the same protagonists, but even this formal connection had been erased, or at least substantially alleviated, by the long time-span between the two events and by the fact that even the applicant himself admitted that Judge J.M. had not displayed any personal bias against him (see paragraph 67 of the present judgment). The presumption of judicial integrity should matter. And if it really does, given all the circumstances of the case, allegations as to Judge J.M.'s "partiality" should have been dismissed, had they been raised in the domestic proceedings. Moreover, it is not unlikely that the applicant, reasonably enough, would not have raised this issue at all, in view of its apparent groundlessness. What really could and did make him legitimately suspicious was the fact that the composition of the judicial body which decided his case had not been made known to him. The Government failed to give any explanation for this non-disclosure. Could the Government have succeeded in respect of this complaint had they provided such an explanation? I am sure that, in any event, they could not have found a plausible one, for even if there may be compelling reasons (however debatable) of a formal legal or factual nature for the inclusion of a given judge in a particular judicial composition, there simply cannot be any reason whatsoever for not making the names of those on the bench known to the person whose case that judicial body is to decide. In this respect, the Government's case was destined to fail from the outset.

Consequently, of the two circumstances discussed here, only the second one matters, whereas the first is merely ancillary in nature. In the

combination of the two, it has no independent significance. But is that not what the majority meant when admitting that the mere presence of Judge J.M. was "not decisive for the objective-impartiality issue under Article 6 § 1"? In other words, am I simply repeating, in a more long-winded manner, essentially the same argument? I think I am not, or at least that is not my intention. The devil hides in the detail. In the majority's reasoning, it hides in one single detail, which is the consideration, in paragraph 89 of the judgment, of Judge J.M.'s "unascertained influence" on the outcome of the applicant's case. I am sure that this unfortunate hint should have been omitted. Any speculation about that judge's "actual influence" on the outcome of the case casts an unnecessary and – even more importantly – unjustified shadow of doubt on that judge's integrity. This finding, last but not least, is not in line with the Court's case-law and mission.

3. My other disagreement with the majority relates to paragraph 132 of the judgment. Therein the Court repeats its *dictum*, incautiously employed, *inter alia*, in the Grand Chamber judgment in *Kyprianou v. Cyprus* (as well as in some Chamber cases), that the "special status" (or "specific status" here in paragraph 132) of lawyers gives them "a central position in the administration of justice" as "intermediaries between the public and the courts" (see *Kyprianou v. Cyprus* [GC], no. 73797/01, § 173, ECHR 2005-XIII).

I cannot agree with such a characteristic. This is a matter of principle. The adjectives "special" or "specific" do not mean "central". A lawyer always represents a party and by definition is not able to occupy "a central position in the administration of justice". A party is never "central", nor can its representative be. Those with a "central position in the administration of justice" are the judges (for good or, as is unfortunately sometimes the case, for ill). The "intermediaries between the public and the courts" are the courts' spokespersons, press representatives or – in their own right – journalists, but in no way lawyers, who represent parties. A lawyer acts in a party's interests, for the benefit of a client and, as a rule, is remunerated by the latter. A lawyer has to heed the represented party's interests even when they are in opposition to those of "the public", i.e., society and the State. This is not meant to deny or diminish the importance of the function of lawyers. It is true that they can and do contribute to seeking justice and help courts to exercise their mission, but lawyers may also aim at obstructing the pursuit of justice in the interests of their clients – and occasionally do so. It depends. A party represented by a lawyer may find himself or herself in the courtroom because he or she seeks justice, but it is probably no less frequent for the lawyer to represent a party against whom justice is sought.

Every *dictum* has the potential to be developed, in some future case, into a *ratio*. Regarding this particular *dictum*, I should probably say "danger" rather than "potential". Repetition, in yet another judgment of this Court's Grand Chamber, of the mantra about lawyers ostensibly occupying "a central position in the administration of justice" and of being "intermediaries between the public and the courts", especially when such a characteristic is not, in the Court's case-law, attributed anywhere to the other party, i.e., the prosecution, distorts the picture. As to the case at hand, it could have been decided, with no disadvantage to the Court's findings, without recourse to this uncritical repetition.

Y. v. SLOVENIA
(Application no. 41107/10)

FIFTH SECTION

JUDGMENT OF 28 MAY 2015[1]

1. English original. Extracts.

SUMMARY[1]

Failure to protect victim's personal integrity in criminal proceedings concerning sexual abuse

The personal integrity of the victims of crime in criminal proceedings must, by the very nature of the situation, be primarily protected by the public authorities conducting the proceedings. In this regard, the authorities are required to ensure that other participants in the proceedings called upon to assist them in the investigation or the decision-making process also treat victims and other witnesses with dignity and do not cause them unnecessary inconvenience (see paragraph 112 of the judgment).

Article 8

Respect for private life – Failure to protect victim's personal integrity in criminal proceedings concerning sexual abuse – Fair balance between rights of victims of crime and rights of defence – Rights of victims of sexual abuse including protection from intimidation and further victimisation during testimony

*

* *

Facts

In 2001, at the age of 14, the applicant was allegedly a victim of repeated sexual assaults by a family friend, X. Following a criminal complaint by the applicant's mother, investigations started in 2003 and criminal proceedings were brought against X in 2007. In 2009, having held twelve hearings in total, the domestic courts acquitted X of all charges on the ground that some of the applicant's allegations concerning X's physical condition had been disproved by an expert, thus making it impossible, in the domestic courts' view, to prove X's guilt beyond reasonable doubt. The State Prosecutor's appeal against that judgment was rejected in 2010, as was the applicant's request to the Supreme State Prosecutor for the protection of legality a few months later.

Law

Article 8: The Court had to examine whether the respondent State had afforded sufficient protection of the applicant's right to respect for her private life, and especially for her personal integrity, with respect to the manner in which she had been questioned during the criminal proceedings against her alleged sexual abuser.

1. This summary by the Registry does not bind the Court.

In so doing, it had to strike a fair balance between the rights of the applicant as a victim called upon to testify in criminal proceedings, protected by Article 8, and those of the defence, namely the right of the accused under Article 6 § 3 (d) to call and cross-examine witnesses. Unlike the position in other similar cases previously examined by the Court, which had all been brought by the accused persons, in the present case the Court had to examine this issue from the perspective of the alleged victim.

In the instant case, the interests of securing a fair trial had required X to be provided with an opportunity to cross-examine the applicant, especially as the applicant's testimony at the trial provided the only direct evidence in the case and the other evidence presented was conflicting. However, given that criminal proceedings concerning sexual offences were perceived as a very unpleasant and prolonged experience by the victims, and that a direct confrontation between those charged with sexual abuse and their alleged victims involved a risk of further traumatisation, personal cross-examination by the defendant had to be subject to the most careful assessment by the national courts. Indeed, several international instruments, including European Union law, provided that certain rights should be granted to victims of, *inter alia*, sexual abuse, including the right to protection from the State from intimidation and repeat victimisation when providing testimony of the abuse. In this respect, the Court noted that the applicant's questioning had stretched over four trial hearings held over seven months, a lengthy period which in itself raised concerns, especially given the absence of any apparent reason for the long intervals between the hearings. Moreover, at two of the hearings, X had personally cross-examined the applicant, continuously contesting the veracity of her answers and addressing her with questions of a personal nature. In the Court's view, those questions were aimed at attacking the applicant's credibility as well as at degrading her character. However, despite the duty incumbent on the judicial authorities to oversee the form and content of X's questions and comments and, if necessary, to intervene, the presiding judge's intervention had been insufficient to mitigate what had clearly been a distressing experience for the applicant.

As to the applicant's claim that X's counsel should have been disqualified from the proceedings as he had been consulted by her on the sexual assaults shortly after the alleged events took place, the Court found that the applicable domestic law, or the manner in which it had been applied in the present case, had not taken sufficient account of the applicant's interests. This was because the negative psychological effect of being cross-examined by X's counsel had considerably exceeded the apprehension the applicant would have experienced if she had been questioned by another lawyer. Moreover, any information X's counsel might have received from her in his capacity as a lawyer should have been treated as confidential and should not have been used to benefit a person with adverse interests in the same matter.

The Court also noted the inappropriateness of the questions put to the applicant by the expert in gynaecology appointed by the district court to establish whether she

had engaged in sexual intercourse at the material time. In this regard, the authorities were required to ensure that all participants in the proceedings called upon to assist them in the investigation or the decision-making process treated victims and other witnesses with dignity and did not cause them unnecessary inconvenience. However, the appointed expert in gynaecology not only lacked proper training in conducting interviews with victims of sexual abuse, but had also addressed the applicant with accusatory questions and remarks exceeding the scope of his task and of his medical expertise. Consequently, the applicant had been put in a defensive position unnecessarily adding to the stress of the criminal proceedings.

Even though the domestic authorities had taken a number of measures to prevent further traumatisation of the applicant, such measures had ultimately proved insufficient to afford her the protection necessary to strike an appropriate balance between her rights and interests protected by Article 8 and X's defence rights protected by Article 6.

Conclusion: violation (six votes to one).

Case-law cited by the Court

A.M. v. Italy, no. 37019/97, ECHR 1999-IX
Aigner v. Austria, no. 28328/03, 10 May 2012
Brandstetter v. Austria, 28 August 1991, Series A no. 211
Doorson v. the Netherlands, 26 March 1996, *Reports of Judgments and Decisions* 1996-II
Engel and Others v. the Netherlands, 8 June 1976, Series A no. 22
S.N. v. Sweden, no. 34209/96, ECHR 2002-V
Saïdi v. France, 20 September 1993, Series A no. 261-C
Schenk v. Switzerland, 12 July 1988, Series A no. 140
White v. Sweden, no. 42435/02, 19 September 2006
X and Y v. the Netherlands, 26 March 1985, Series A no. 91

In the case of Y. v. Slovenia,

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

Mark Villiger, *President*,
Angelika Nußberger,
Boštjan M. Zupančič,
Ganna Yudkivska,
André Potocki,
Helena Jäderblom,
Aleš Pejchal, *judges*,
and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 31 March 2015,

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

PROCEDURE

1. The case originated in an application (no. 41107/10) against the Republic of Slovenia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Slovenian national, Y. ("the applicant"), on 17 July 2010. The President of the Section acceded to the applicant's request not to have her name disclosed (Rule 47 § 4 of the Rules of Court).

2. The applicant was represented by Mr J. Ahlin, a lawyer practising in Ljubljana. The Slovenian Government ("the Government") were represented by their Agent, Ms B. Jovin Hrastnik, State Attorney.

3. The applicant alleged that the criminal proceedings concerning the sexual assaults against her had been unreasonably delayed, lacked impartiality, and exposed her to several traumatic experiences violating her personal integrity.

4. On 20 February 2012 the Government were given notice of the application.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The background

5. The applicant was born in Ukraine in 1987 and arrived in Slovenia in 2000 with her sister and her mother, who had married a Slovenian.

6. Between July and December 2001, at the age of 14, she was allegedly repeatedly sexually assaulted by a family friend, X, 55 years old at the time, who together with his wife often took care of her and helped her in preparations for beauty contests.

7. In July 2002 the applicant told her mother about the alleged sexual assaults by X, but was unwilling to talk about them with anyone else.

8. On 15 July 2002 a priest gave a statement to the Maribor police, in which he said that the applicant's mother had told him of her concern that the applicant had been raped by X.

B. The police investigation

9. On 16 July 2002 the applicant's mother lodged a criminal complaint against X, in which she alleged that X had forced the applicant to engage in sexual intercourse with him on several occasions.

10. On 17 July 2002 the applicant was questioned by Maribor police officers and described how X had forced her to engage in various sexual activities. As regards the time frame of the assaults, the applicant stated that X had first attempted to kiss her before July 2001, when she had started modelling for fashion shows. She proceeded to give an account of a number of occasions when X had sexually assaulted her. On one occasion X had lain on top of her while she was sleeping at his house and attempted to have sexual intercourse with her, spreading her legs with one hand and putting his other hand over her mouth to prevent her from screaming, but he was interrupted by his younger son coming up the stairs. On another occasion, when they were at a swimming pool, he had groped her in the water. On yet another occasion X had allegedly taken the applicant to an abandoned workshop owned by his family and performed oral sex on her. Moreover, according to the applicant, X had forced her to perform oral sex on him at least three times, once at his home, once at his company's garage, and the third time in his van, which he had parked in the woods near the town. On that last occasion, the applicant had allegedly tried to escape; however, being unfamiliar with the surroundings, she had come back to the van. The applicant stated that X had on several occasions attempted to have intercourse with her, but that she had not been certain whether he had managed to achieve penetration. She further stated that she had tried to defend herself by crying and pushing X away, but without success.

11. The applicant was also examined by an expert in gynaecology, who found that her hymen was intact. Moreover, in the course of July and August 2002 the police questioned X, who denied any sexual relations with the applicant, and three other people.

12. Following a series of unsuccessful attempts to obtain specific information from the police as regards the progress of the investigation, the applicant's mother complained to the Maribor District State Prosecutor's Office ("the State Prosecutor's Office").

13. On 27 June 2003 the State Prosecutor's Office sent a letter to the Maribor police, urgently requesting a copy of the criminal complaint lodged against X.

14. On 18 August 2003 the police sent a report to the State Prosecutor's Office stating that the applicant had failed to provide a detailed account of her allegations or to indicate the locations where the alleged rapes had taken place. The police noted that the applicant had given the impression of being under severe psychological stress and in fear of her mother's reaction. They concluded that it was impossible to confirm her allegation of rape, and equally impossible to establish the reasons for her serious emotional distress.

C. The judicial investigation

15. On 28 August 2003 the State Prosecutor's Office lodged a request for a judicial investigation in respect of X based on charges of sexual assault on a minor below the age of 15. The request alleged that X had forced the applicant to engage in oral sex and had had sexual intercourse with her on at least three occasions, despite her refusal and attempted resistance.

16. On 7 January 2005 X was summoned to appear before the investigating judge of the Maribor District Court. He refused to give an oral statement. On 10 March 2005 X, represented by a lawyer, submitted a written statement in which he denied the charges. He also submitted a medical report which indicated that he had a disability to his left arm since birth.

17. On 26 May 2005 the investigating judge issued a decision to open a criminal investigation in respect of X. An appeal by X against this decision was rejected by the pre-trial panel of the Maribor District Court.

18. On 17 October 2005 the applicant was examined as a witness before the Ljubljana District Court, which had been asked to carry out the witness examination because the applicant lived in the area. The examination resumed on 8 November 2005. Neither X nor his counsel was informed of this examination. The applicant testified in detail as to when, where and how the alleged offences had taken place. She first described the assault which had occurred in X's house, while she had been sleeping there, reiterating that X had been disturbed by his son. According to the applicant's statement, the second assault had occurred when, instead of driving the applicant home, X had parked in the woods and started to kiss her forcefully. X had then undressed the applicant, parted her legs with one hand and held her wrists

with the other and again attempted to have intercourse with her, but there had been no penetration. The applicant further recounted that X had on another occasion taken her to the family's abandoned workshop and had performed oral sex on her. She stated that she had attempted to free herself of his grip, but that X had again pinned her wrists down and also slapped her across the face. Again, vaginal intercourse had been attempted but had not actually occurred. X had ordered her not to talk to anyone about this, or he would have her and her family deported from Slovenia. The applicant added that she remembered these three occasions well and the events had occurred just as she described them, and that there had been a number of other similar incidents between July and December 2001.

19. On 13 and 20 December 2005 X's wife and another witness were examined by the investigating judge of the Maribor District Court.

20. On 13 January 2006 the Koper District Court, at the request of the Maribor District Court, examined witness D., who testified that the applicant had told her of the alleged rape.

21. On 14 April 2006 the investigating judge examined witness H., who was an employee of the company owned by X and his wife. H. testified that she had not seen X behaving improperly towards the applicant on the company's premises.

22. On 16 May 2006 the investigating judge appointed an expert in gynaecology, B., in order to establish the probability that the applicant had engaged in sexual intercourse in the period between July and December 2001. The latter carried out a consultation with the applicant, who refused a clinical examination. She told B., among other things, that despite the attempts made by X there had been no actual sexual penetration. During the consultation, B. confronted the applicant with an orthopaedics report stating that X could not have used his left arm in the ways described by her, to which the applicant answered that she had seen X use it to lift heavy items. B. also presented the applicant with the police report stating that she had not been able to give a detailed account of the sexual assaults and specific locations, and asked her why she had not defended herself against X, for instance by scratching or biting. The applicant replied that she had not defended herself and had been unable to do so. On 19 June 2006 the expert prepared his report, which was based on the evidence in the file, including a gynaecological report from 2002 which showed that the applicant's hymen was intact at that time, and his conversation with the applicant. He found that there was nothing to indicate with certainty that the applicant had had sexual intercourse with X at the material time. In addition to his medical opinion, the expert commented that there were certain inconsistencies in

the applicant's account of the events in issue. It can be seen from the report that neither of the alleged inconsistencies was related to any medical issue.

23. On 20 June 2006 the investigating judge appointed an expert in clinical psychology, R. The latter, after holding a consultation with the applicant, submitted her report on 4 July 2006, and concluded as follows.

> "Since 2001 Y. has shown all the symptoms of a victim of sexual and other kinds of abuse (emotional, behavioural and physical symptoms) ...
>
> In addition to the emotional consequences, the girl shows very typical behavioural patterns relating to the abuse experienced by her, and also some physical symptoms (disturbed sleep, nightmares, collapsing). The symptoms are indicated in the report ...
>
> The gravity of the consequences – physical and sexual in particular – is difficult to assess at the present time. But, like the short-term ones, the long-term consequences can be predicted. Their real extent will become apparent at key stages of the girl's life and in stressful situations ...
>
> Because of these effects, which are most serious in her psychological sphere ... it is of very marginal importance whether during the perpetrator's violent behaviour the child victim experienced hymen defloration or not ...
>
> Sexual behavioural patterns can only be assessed properly by an expert in clinical psychology ..."

24. On 15 September 2006 the State Prosecutor's Office indicted X for sexual assault of a child below the age of 15 under Article 183 §§ 1 and 2 of the Criminal Code. An objection by X to the indictment was rejected by the pre-trial panel of the Maribor District Court on 20 October 2006.

D. The trial

25. The Maribor District Court scheduled a hearing for 27 June 2007. However, the hearing was adjourned at X's request on the basis of a document which showed that he was now on sick leave for several weeks.

26. A hearing was then scheduled for 3 October 2007, but adjourned at X's counsel's request. The next hearing was to be held on 12 November 2007. However, owing to the absence of a jury member, the hearing was adjourned. Subsequently, X informed the court that he was about to go on a business trip, for which reason the next hearing was postponed until 16 January 2008.

27. On 16 January 2008 X failed to appear before the court. On 17 January 2008 he submitted a sick-leave certificate.

28. On 25 January 2008 X's counsel informed the court that X had revoked his power of attorney and that he would be represented by another lawyer, M., from then on. However, the court received no new power of attorney authorising M. to act as X's counsel. Since X was accused of a criminal offence requiring mandatory representation, on 28 January 2008 the court appointed M. as counsel for X.

29. On 14 March 2008 the court held a hearing, from which the public was excluded on the grounds of protection of privacy and public morals. The court heard evidence from X. At the hearing the applicant's counsel sought to have M., X's counsel, disqualified on the ground that in 2001 the applicant and her mother had sought advice from him on the matters in issue. Furthermore, the applicant's mother had been intimately involved with him. M. denied that he had ever seen the applicant or her mother and said that he only knew that the lawyer at whose firm he had been working at that time had represented the applicant's mother's estranged husband in divorce proceedings. The panel dismissed the application, ruling that no statutory grounds existed for disqualifying M. as counsel.

30. On 14 March 2008 X submitted written pleadings, claiming that he would have been unable to use physical force on the applicant, as he had a serious disability to his left arm since birth and it was 15 cm shorter than his right arm. He alleged that he had practically no use of his disabled arm. Moreover, he asserted that he and his family had been helping the applicant and her sister integrate into their new community and learn Slovenian, while their mother had been busying herself with her private activities. According to X, the charges of sexual assault were prompted by the applicant's mother, who wished to extort money from him.

31. On 14 April 2008 the court held a second hearing in the case. X was questioned by the State Prosecutor, mostly about the use of his left arm, and in this connection conceded that, although he usually drove automatic cars, he did occasionally drive a smaller manual transmission car. However, when asked whether he had ever driven a truck, X replied that this had no bearing on the case, acknowledging nevertheless that he had a licence to drive all categories of road vehicles. Then the applicant was summoned to testify, the court granting her request for X to be absent from the hearing room. While recounting the instances of sexual abuse by X, the applicant cried repeatedly and the hearing was adjourned for a few minutes on that account. X's counsel, M., then questioned the applicant, asking her how tall she had been and how much she had weighed at the material time. The applicant became very agitated and asked M. why, having been the first to hear her story, he was asking those questions and was now acting as X's counsel. M. commented that this was part of the tactics. The hearing was then adjourned owing to the applicant's distress.

32. On 9 May 2008 the court held a third hearing. The questioning of the applicant continued in the absence of X. When asked how she felt about the situation with hindsight, she cried and said that no one had helped her and that the proceedings had been dragging on for several years, during which she had had to keep reliving the trauma.

33. On 27 August 2008 the applicant lodged a supervisory appeal under the Protection of the Right to a Hearing without Undue Delay Act of 2006 ("the 2006 Act") with a view to accelerating the proceedings.

34. On 26 September 2008 the court held a fourth hearing, from which the public was excluded, at which X personally asked the applicant over a hundred questions, starting with a comment in the form of a question: "Is it true that you have told and showed me that you could cry on cue and that then everybody would believe you?" It does not appear from the record of the hearing that the applicant made any reply. X then asked the applicant a series of questions aimed at proving that they had seen each other mainly at gatherings of their families or when the applicant, in need of transport or other assistance, had actively sought his company. Among the questions asked by X were the following: "Is it true that I could not have abused you on the evening of the event as you stated on 14 April?", "Is it true that if I had wished to satisfy my sexual needs, I would have called you at least once?"; "Why did you call me in September and ask me to take you out of town if I had already raped you five times before that date?", "Why were you calling me, because I certainly never called you?", and "Is it true that you specifically asked that we drive out of town alone, because you wished to talk to me and to celebrate your success at a beauty pageant?" The applicant insisted that she had not called X, nor had she initiated any outings with him, but that he had called her. X also asked the applicant whether she had told him that, once she had a boyfriend, she would always be on top, as she wanted to be the mistress.

35. Moreover, X claimed that the charges of rape were fabrications by the applicant's mother. Hence, he asked the applicant numerous questions about her mother, including about her knowledge of Slovenian, her work, and her personal relationships. Furthermore, X confronted the applicant with the medical report which indicated that he had a serious disability to his left arm. The applicant insisted that she had seen X using his left arm in his daily life, including while driving cars, lifting and carrying his children and their school bags, and carrying boxes and bottles. Throughout the questioning, X disputed the accuracy and credibility of the applicant's answers, extensively commenting on the circumstances described by her and rejecting her version of events. He continued to do so even after the presiding judge explained to him that he would have the opportunity to make his comments after the applicant's questioning.

36. During the cross-examination, X repeated a number of questions and was eventually warned against doing so by the presiding judge. Moreover, the presiding judge ruled out of order seven questions that she perceived had no bearing on the case in issue.

37. On three occasions, when the applicant became agitated and started crying, the court ordered a short recess. After one of these recesses, X asked the applicant whether she would feel better if they all went to dinner, just as they used to, and maybe then she would not cry so much.

38. At one point the applicant requested the court to adjourn the hearing as the questions were too stressful for her. However, after being told by X that the next hearing could not be held until after 19 November 2008 when he would be back from a business trip, the applicant said, while crying, that he should continue with his questioning as she wanted to get it over with. Eventually, after four hours of cross-examination of the applicant, the presiding judge adjourned the hearing until 13 October 2008.

39. X's wife, mother-in-law and an employee of his company were examined at the next hearing, all three of them asserting that X had very little use of his left arm and certainly could not lift any burdens.

40. On 24 November 2008 a sixth hearing was held. The questioning of the applicant by X took an hour and a half. When questioned by X's counsel, M., the applicant again asserted that she had told him the whole story a long time ago. M. denied this, stating that if he had been informed he would have advised the applicant to go to hospital and to the police. Once the applicant's questioning was over, her mother was questioned, mostly about her private relationships.

41. At the end of the hearing, X's counsel, M., confirmed that he had encountered the applicant's mother when he was working at a law firm with a lawyer who had represented her in certain court proceedings. He also stated that he would inform the court within three days as to whether he would request leave to withdraw from representing X in the proceedings in issue. On 25 November 2008 M. requested leave from the court to withdraw from the case, as he had been personally affected by certain statements made by the applicant's mother.

42. At a hearing of 15 December 2008, the court dismissed the request by X's counsel, M., finding that there were no statutory grounds disqualifying him from representing X. The expert in gynaecology, B., was examined as a witness. He acknowledged that in order to clarify the circumstances he had also addressed certain issues in his report that had not been part of the investigating judge's request. Moreover, he reiterated that the applicant's hymen had been intact at the material time.

43. On 22 January 2009 the court held an eighth hearing in the case and examined the expert in clinical psychology, R., who again stated that sexual abuse which had happened long ago could not be proved by any material evidence, and that only the psychological consequences could be

assessed. She further reiterated that the applicant displayed clear symptoms of sexual abuse.

44. On 20 February 2009 the court appointed T., another expert in gynaecology, to give an opinion on whether the applicant could have had sexual intercourse at the material time, given the results of her medical examination (see paragraph 11 above). On 10 March 2009 the expert submitted his report, which stated that those results were not inconsistent with the applicant's account of the events in issue.

45. On 16 March 2009 the court held a hearing at which it appointed N., an orthopaedics expert, to prepare an opinion as to whether, in view of his disabled left arm, X could have performed the acts described by the applicant.

46. On 5 May 2009 N. submitted his report, in which he found that X's left arm was severely disabled, and that for those reasons some of the events could not have happened in the way described by the applicant.

47. On 8 June 2009 the court held a hearing at which N. was questioned. Further to questions put by the applicant's counsel, N. explained that he had based his opinion on the documents in X's medical file, the X-rays brought to him by X, and an examination of X.

48. A hearing was held on 9 July 2009. The applicant requested that N. be questioned further.

49. On 29 September 2009 the court held the twelfth and last hearing in the case. At the hearing the applicant and the State Prosecutor questioned N., who stated, *inter alia*, that X could only use his left arm to assist the right arm in carrying out specific tasks, and that he had practically no strength in his left arm. In the expert's opinion, X would not have been able to spread the applicant's legs with his left arm, and neither would he have been able to take off his trousers as alleged by her. After being asked by the prosecutor whether his assessment was based on the assumption that the applicant had used all her strength to resist X, N. stated: "I did not base my conclusion on that assumption, as I did not know whether she had resisted or whether she had willingly submitted." After being asked whether the applicant, who was 14 years old at the time, could have resisted X, who had allegedly been lying on top of her, he said he believed so. N. also testified that although X had more than ordinary strength in his right arm, he could not have assaulted the applicant in the way she alleged.

50. After the examination of N., the applicant, who had sought and obtained an opinion from another orthopaedist outside the court proceedings which indicated that X might still have limited use of his left arm, asked for another orthopaedics expert to be appointed, on the ground that there was doubt about N.'s conclusions. This request was rejected by

the court as unnecessary, as was the applicant's request for the court also to call as witnesses her sister and her mother's former husband, who had allegedly seen X rowing with both arms. A request by the prosecutor for the applicant to be examined again was also rejected.

51. At the end of the hearing, the court pronounced judgment, acquitting X of all charges. In view of this verdict, the court recommended that the applicant pursue her claim for damages, which she had submitted in the course of the proceedings, before the civil court.

52. On 15 December 2009 the applicant lodged a new supervisory appeal under the 2006 Act. On 22 December 2009 she received a reply from the court informing her that the reasoning of the judgment had been sent to her that day.

53. In the written grounds of the judgment, the court explained that the expert orthopaedics report contested X's ability to carry out certain acts described by the applicant, for which he would have had to use both arms. As explained by the expert, X was not capable of even moving his left hand in a position which would have allowed him to take his trousers off or spread the applicant's legs. According to the court, the fact that some of the applicant's allegations were disproved by the expert raised some doubts as to her entire version of the events. On the basis of the principle that any reasonable doubt should benefit the accused (*in dubio pro reo*), the court had acquitted X. As regards the report by the expert in clinical psychology, R., which found that the applicant had suffered sexual abuse, the court noted that it could not ignore the judgment delivered in another set of proceedings concerning the applicant's mother's estranged husband, in which the competent court had accepted that he had engaged in sexual activity in front of the applicant and her sister and had also behaved inappropriately towards the applicant.

54. On 30 December 2009 the State Prosecutor lodged an appeal, in which she criticised the court for not considering the fact that owing to his age, gender and body mass X was much stronger than the applicant, and was also in a position of power on account of his economic and social status. Moreover, she pointed out that X had operated manual transmission vehicles, which required him to use both his arms. The prosecutor further argued that the criminal offence in question did not require the sexual act to have been committed by force; it was sufficient that the applicant opposed it. She also stressed that the proceedings had already been pending for eight years, which had aggravated the trauma suffered by the applicant.

55. The appeal was dismissed by the Maribor Higher Court on 26 May 2010, which found that the reasoning of the first-instance court's judgment was clear and precise regarding the doubt that X had committed the alleged criminal acts.

56. The applicant subsequently asked the Supreme State Prosecutor to lodge a request for the protection of legality (an extraordinary remedy). On 28 July 2010 the Supreme State Prosecutor informed the applicant that the above-mentioned request could only concern points of law and not the facts, which the applicant had called into question.

E. Compensation for delays in the criminal proceedings

57. On 11 February 2011 the applicant and the government reached an out-of-court settlement under the 2006 Act in the amount of 1,080 euros (EUR), covering all pecuniary and non-pecuniary damage incurred by the applicant as a result of a violation of her right to a trial without undue delay in the criminal proceedings in issue. The applicant also received EUR 129.60 in respect of the costs incurred in the proceedings.

II. RELEVANT LAW AND PRACTICE

A. Relevant domestic criminal law

58. Article 183 §§ 1 and 2 of the Criminal Code regulating the criminal offence of sexual assault on a person younger than 15 years, as in force at the material time, reads as follows:

> "1. A person who engages in sexual intercourse or any other sexual act with a person of the opposite or same sex who is not yet 15 years old, and where the maturity of the perpetrator and that of the victim are obviously disproportionate, shall be punished with one to eight years' imprisonment.
>
> 2. A person who commits the above act against a person who is not yet ten years old, or against a vulnerable person who is not yet 15 years old, or by using force or threat to life or limb, shall be punished with imprisonment of three years or more ..."

59. Section 148 of the 1994 Criminal Procedure Act, as in force at the material time, provides that the police, having concluded the preliminary investigation of an alleged criminal offence, will draw up a criminal complaint based on the information collected and send it to the State Prosecutor's Office. However, even if the information gathered does not appear to provide any grounds for such a criminal complaint to be made, the police must submit a report on their actions to the State Prosecutor.

60. As regards the protection of under-age victims of criminal offences of a sexual nature during judicial investigations, the Criminal Procedure Act includes a number of provisions aiming to protect under-age victims of or witnesses to criminal proceedings. In proceedings regarding criminal offences against sexual integrity, minors must, from the initiation of the criminal proceedings onwards, have counsel to protect their rights. Under-age victims who have no lawyer are assigned one by the trial court. Moreover,

the defendant cannot be present during the examination of witnesses below the age of 15 who claim to be victims of criminal offences against sexual integrity. In this regard, section 240 of the Act provides that minors, especially those who have been affected by the criminal offence, should be examined with consideration for their age, to avoid any harmful effects on their mental state.

61. In order to ensure the smooth running of a judicial investigation, the parties and the victim may, under section 191 of the Criminal Procedure Act, complain to the president of the court charged with the investigation of any delays or other irregularities. Upon the examination of the complaint, the president is required to inform the complainant of any steps taken in this regard.

62. As to the time frame for scheduling a criminal trial, section 286(2) of the Criminal Procedure Act provides that the presiding judge shall schedule a first hearing within two months of receipt of an indictment. If he or she fails to do so, he or she must inform the president of the court accordingly, and the latter is required to take the necessary steps to schedule a hearing.

63. As regards the conduct of the hearing, section 295 of the Criminal Procedure Act provides that the public may be excluded from the hearing if so required, for example, for the protection of the personal or family life of the defendant or the victim. In accordance with section 299 of the Act, the presiding judge conducts the hearing, grants the parties the right to address the court, and questions the defendant, witnesses and experts. Moreover, it is the presiding judge's duty to ensure that the case is presented fully and clearly, that the truth is established, and that any obstacles protracting the proceedings are eliminated.

64. The defendant may be temporarily removed from the courtroom if a witness refuses to testify in his or her presence. The witness's statement is then read to him or her and he or she is entitled to put questions to the witness. Nonetheless, pursuant to section 334(2) of the Criminal Procedure Act, the presiding judge will prohibit any questions that have already been asked, that bear no relation to the case, or that in themselves suggest how they should be answered.

B. Relevant domestic civil law and practice

1. Civil action for compensation

65. Article 148 of the Code of Obligations regulating the liability of legal persons for damage inflicted by one of their subsidiary bodies, which also applies to the determination of the State's liability for damages, provides that a legal person is liable for damage inflicted on a third party by one of its

subsidiary bodies in the exercise of its functions or in connection therewith. In order for a claimant to be awarded compensation for damage inflicted by the State, he or she is required to prove all four elements of the State's liability, that is, unlawfulness of the State's action, existence of damage, causal link, and negligence or fault on the part of the State.

66. By virtue of Article 179 of the Code of Obligations, which constitutes the statutory basis for awarding compensation for non-pecuniary damage, such compensation may be awarded in the event of the infringement of a person's personality rights, as well as for physical or mental distress suffered due to the reduction of life activities, disfigurement, defamation, death of a close relative, or fear, provided that the circumstances of the case, and in particular the level and duration of the distress and fear caused thereby, justify an award.

67. According to the decision of the Supreme Court no. II Ips 305/2009, an award of compensation for non-pecuniary damage is strictly limited to the categories of damage specified in the Code of Obligations, adhering to the principle of *numerus clausus*. The Supreme Court thus decided that non-pecuniary damage resulting from an excessive length of proceedings could not be classified among the categories of damage recognised by the Code of Obligations, as the right to trial within a reasonable time could not be interpreted as a personality right.

2. Protection of the Right to a Hearing without Undue Delay Act of 2006 ("the 2006 Act")

68. Under section 1 of the 2006 Act, any party to court proceedings – including a victim of a criminal offence – is guaranteed the right to have his or her rights decided upon by the court without undue delay.

C. Relevant international law

69. The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by United Nations General Assembly Resolution 40/34 of 29 November 1985 provides that victims of crime should be treated with compassion and respect for their dignity (Annex, paragraph 4). Moreover, the responsiveness of judicial and administrative processes to the needs of victims should be facilitated by, *inter alia*, taking measures to minimise inconvenience to victims, protect their privacy when necessary, and ensure that they and their families and witnesses on their behalf are protected from intimidation and retaliation (Annex, paragraph 6 (d)).

70. Victims of criminal offences further enjoy protection under European Union legislation. On 15 March 2001 a Council Framework Decision on the standing of victims in criminal proceedings (2001/220 JHA) was

adopted with a view to introducing minimum standards on the rights and protection of victims of crime. Article 2 of the Framework Decision requires each member State to ensure that victims have a real and appropriate role in its criminal legal system and that they are treated with due respect for the dignity of the individual during proceedings. Moreover, Article 3 provides that victims must be afforded the possibility to be heard during proceedings and to supply evidence; however, appropriate measures must be taken to ensure that they are questioned by the authorities only in so far as necessary for the purpose of criminal proceedings. Article 8 requires each member State to provide a number of measures aimed at protecting the victims' safety and privacy in the criminal proceedings. Among others, measures must be taken to ensure that contact between victims and offenders within court premises may be avoided, unless such contact is required in the interests of the criminal proceedings. Also, the member States must ensure that, where there is a need to protect victims – particularly those most vulnerable – from the effects of giving evidence in open court, they may be entitled to testify in a manner which enables this objective to be achieved, by any appropriate means compatible with its basic legal principles.

71. Moreover, the EU member States' ambition to reinforce the rights of the victims of crime led to the adoption, on 25 October 2012, of Directive 2012/29/EU of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA. The relevant part of the Directive, which is to be implemented into the national laws of the EU member States by 16 November 2015, provides as follows.

Recital 19

"A person should be considered to be a victim regardless of whether an offender is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between them ..."

Article 20
Right to protection of victims during criminal investigations

"Without prejudice to the rights of the defence and in accordance with rules of judicial discretion, Member States shall ensure that during criminal investigations:

(a) interviews of victims are conducted without unjustified delay after the complaint with regard to a criminal offence has been made to the competent authority;

(b) the number of interviews of victims is kept to a minimum and interviews are carried out only where strictly necessary for the purposes of the criminal investigation;

...

(d) medical examinations are kept to a minimum and are carried out only where strictly necessary for the purposes of the criminal proceedings."

Article 22
Individual assessment of victims to identify specific protection needs

"1. Member States shall ensure that victims receive a timely and individual assessment, in accordance with national procedures, to identify specific protection needs and to determine whether and to what extent they would benefit from special measures in the course of criminal proceedings, as provided for under Articles 23 and 24, due to their particular vulnerability to secondary and repeat victimisation, to intimidation and to retaliation.

2. The individual assessment shall, in particular, take into account:

(a) the personal characteristics of the victim;

(b) the type or nature of the crime; and

(c) the circumstances of the crime.

3. In the context of the individual assessment, particular attention shall be paid to victims who have suffered considerable harm due to the severity of the crime; victims who have suffered a crime committed with a bias or discriminatory motive which could, in particular, be related to their personal characteristics; victims whose relationship to and dependence on the offender make them particularly vulnerable. In this regard, victims of terrorism, organised crime, human trafficking, gender-based violence, violence in a close relationship, sexual violence, exploitation or hate crime, and victims with disabilities shall be duly considered.

..."

Article 23
Right to protection of victims with specific protection needs during criminal proceedings

"1. Without prejudice to the rights of the defence and in accordance with rules of judicial discretion, Member States shall ensure that victims with specific protection needs who benefit from special measures identified as a result of an individual assessment provided for in Article 22(1), may benefit from the measures provided for in paragraphs 2 and 3 of this Article. A special measure envisaged following the individual assessment shall not be made available if operational or practical constraints make this impossible, or where there is a an urgent need to interview the victim and failure to do so could harm the victim or another person or could prejudice the course of the proceedings.

2. The following measures shall be available during criminal investigations to victims with specific protection needs identified in accordance with Article 22(1):

...

(b) interviews with the victim being carried out by or through professionals trained for that purpose;

...

3. The following measures shall be available for victims with specific protection needs identified in accordance with Article 22(1) during court proceedings:

(a) measures to avoid visual contact between victims and offenders including during the giving of evidence, by appropriate means including the use of communication technology;

(b) measures to ensure that the victim may be heard in the courtroom without being present, in particular through the use of appropriate communication technology;

(c) measures to avoid unnecessary questioning concerning the victim's private life not related to the criminal offence; and

(d) measures allowing a hearing to take place without the presence of the public."

72. On 11 May 2011 the Council of Europe adopted the Convention on preventing and combating violence against women and domestic violence, which came into force on 1 August 2014. The Convention was signed by Slovenia on 8 September 2011, but has not yet been ratified. The relevant part of the Convention provides as follows.

Article 49
General obligations

"1. Parties shall take the necessary legislative or other measures to ensure that investigations and judicial proceedings in relation to all forms of violence covered by the scope of this Convention are carried out without undue delay while taking into consideration the rights of the victim during all stages of the criminal proceedings.

2. Parties shall take the necessary legislative or other measures, in conformity with the fundamental principles of human rights and having regard to the gendered understanding of violence, to ensure the effective investigation and prosecution of offences established in accordance with this Convention."

Article 54
Investigations and evidence

"Parties shall take the necessary legislative or other measures to ensure that, in any civil or criminal proceedings, evidence relating to the sexual history and conduct of the victim shall be permitted only when it is relevant and necessary."

Article 56
Measures of protection

"1. Parties shall take the necessary legislative or other measures to protect the rights and interests of victims, including their special needs as witnesses, at all stages of investigations and judicial proceedings, in particular by:

(a) providing for their protection, as well as that of their families and witnesses, from intimidation, retaliation and repeat victimisation;

(b) ensuring that victims are informed, at least in cases where the victims and the family might be in danger, when the perpetrator escapes or is released temporarily or definitively;

(c) informing them, under the conditions provided for by internal law, of their rights and the services at their disposal and the follow-up given to their complaint, the charges, the general progress of the investigation or proceedings, and their role therein, as well as the outcome of their case;

(d) enabling victims, in a manner consistent with the procedural rules of internal law, to be heard, to supply evidence and have their views, needs and concerns presented, directly or through an intermediary, and considered;

(e) providing victims with appropriate support services so that their rights and interests are duly presented and taken into account;

(f) ensuring that measures may be adopted to protect the privacy and the image of the victim;

(g) ensuring that contact between victims and perpetrators within court and law enforcement agency premises is avoided where possible;

(h) providing victims with independent and competent interpreters when victims are parties to proceedings or when they are supplying evidence;

(i) enabling victims to testify, according to the rules provided by their internal law, in the courtroom without being present or at least without the presence of the alleged perpetrator, notably through the use of appropriate communication technologies, where available.

2. A child victim and child witness of violence against women and domestic violence shall be afforded, where appropriate, special protection measures taking into account the best interests of the child."

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 3 AND 8 OF THE CONVENTION

73. The applicant complained under Articles 3 and 8 of the Convention that the criminal proceedings concerning the sexual assaults against her had been at variance with the respondent State's positive obligation to provide effective legal protection against sexual abuse, as they had been unreasonably delayed, lacked impartiality, and had exposed her to several traumatic experiences by violating her personal integrity. Moreover, the applicant claimed not to have had an effective remedy in respect of her complaints, as required by Article 13 of the Convention.

74. Having regard to the nature and the substance of the above complaints, the Court considers that the alleged delays and bias of the domestic courts fall to be examined solely under Article 3 of the Convention (see *P.M. v. Bulgaria*, no. 49669/07, § 58, 24 January 2012), which reads as follows:

Article 3

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

75. The applicant's remaining complaints regarding the lack of protective measures afforded to her in the criminal proceedings raise certain questions about the scope of the State's obligation to protect victims of crime appearing as witnesses in criminal proceedings. In the specific circumstances of the present case, the Court takes the view that these issues should be considered under Article 8 of the Convention, which reads as follows:

Article 8

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

...

B. Merits

1. The parties' submissions

(a) The applicant

85. The applicant alleged that the investigation of the sexual assaults on her and the ensuing judicial proceedings had been unreasonably delayed and ineffective, the authorities having been biased against her due to her Ukrainian origin. Firstly, she contended that the Maribor police had left the investigation of her complaints dormant for a year, and had only sent a report to the Maribor District State Prosecutor's Office when urged to do so by the Prosecutor's Office. Moreover, the Maribor District Court had not conducted the trial in compliance with the time-limits set out in the domestic legislation. In this connection, the applicant also maintained that it had not been her responsibility to attempt to accelerate the course of judicial proceedings.

86. Secondly, the Maribor District Court had refused to call important witnesses or to appoint a new orthopaedics expert in order to clarify

whether X's disability had in fact prevented him from performing the acts of force alleged by the applicant. Also, the court had lacked impartiality, relying predominantly on the orthopaedics report, which was based on the assumption that the applicant had been capable of actively defending herself. Moreover, that report was at variance with certain other evidence showing that X may not have been completely without the use of his left arm.

87. Furthermore, the applicant complained that the State had failed to protect her personal integrity during the proceedings. In this connection, she asserted that the expert in gynaecology, B., had exceeded the scope of his duty and, instead of answering the investigating judge's question regarding the probability of sexual intercourse, had set out to discover whether a criminal offence had been committed, asking the applicant a number of questions which had put her in the position of having to defend herself against him (see paragraph 22 above).

88. Moreover, although the applicant had been questioned during the investigation, she had subsequently had to testify at four hearings before the Maribor District Court at which the defendant had been allowed personally to torment her with numerous provocative and repetitive questions, despite the fact that he was legally represented and those questions could have been asked by his counsel. This questioning had caused her intense psychological suffering; she had felt frustrated, humiliated and helpless. Moreover, the applicant had been represented by a lawyer to whom she had previously spoken about the events in issue and who was therefore in a position to misuse or even abuse the information received. In this connection, the applicant, relying on the Court's case-law, and in particular the judgments in *Doorson v. the Netherlands* (26 March 1996, *Reports of Judgments and Decisions* 1996-II); *Van Mechelen and Others v. the Netherlands* (23 April 1997, *Reports* 1997-III); and *S.N. v. Sweden* (no. 34209/96, ECHR 2002-V), maintained that the domestic legislation did not provide for the accused's rights of defence under Article 6 of the Convention to be weighed against the personal integrity and privacy of the victims protected by Articles 3 and 8. According to the applicant, her trauma had caused her severe and permanent psychological difficulties which had also led to her immune system being compromised. Lastly, the applicant complained that the domestic legislation had not afforded her an effective remedy in respect of her complaints.

(b) The Government

89. The Government argued that the investigation of the alleged sexual assaults on the applicant and the ensuing trial had been effective. The police had questioned the applicant and X, as well as all the relevant witnesses,

and, according to the Government, there was no proof that the criminal complaint would not have been forwarded to the Prosecutor's Office had it not been for the latter's intervention. The judicial investigation had been duly conducted and followed by an indictment against X.

90. The Government also maintained that the trial had been conducted without bias. With regard to the orthopaedics report allegedly contradicted by other evidence, they pointed out that the report had been based on medical documentation and a clinical examination of X, and had contained no contradictions or deficiencies capable of raising doubts as to its accuracy. Since the alleged acts of sexual abuse had not been seen by any witnesses, nor had they been supported by the results of gynaecological examinations, the Maribor District Court had acquitted X. While it was true that the applicant had shown symptoms of sexual abuse, the court could not disregard the fact that another set of criminal proceedings had been pending at the time against another person suspected of having sexually abused the applicant, which had not been taken into account in the preparation of the opinion by the expert in clinical psychology. Moreover, the Government argued that the expert in gynaecology had not "questioned" the applicant, but had had a conversation with her outside the court hearing. In the Government's opinion, the applicant could have asked for the expert to be sanctioned if she had believed that he was not performing his work in an appropriate manner.

91. Furthermore, as regards X's court-appointed counsel, M., the Government argued that, X having been entitled to mandatory representation, the Maribor District Court had followed the statutory provisions regulating court-ordered appointments. Moreover, in her application to have M. disqualified from representing X, the applicant had failed to adduce any grounds which, under the domestic law, would justify a decision in her favour; thus, the court had had no duty to hear the parties on the matter. The Government added that the fact that M. had once worked for a law firm representing the applicant's mother's husband in divorce proceedings did not give rise to the conclusion that M. should not have defended X.

92. Moreover, the Government asserted that a number of measures had been adopted, both during the investigation and at the trial, in order to prevent aggravation of the applicant's trauma. During the investigation, the applicant had been questioned in the absence of X and his counsel. Thus, the trial hearing had been the first opportunity for the defendant to put questions to the applicant, and consideration had to be given to the fact that she had been the only witness to X's alleged criminal acts. In this connection, the Government were of the view that the applicant's

case had not warranted a limitation of the defendant's rights of defence to the extent that would prevent him from cross-examining her. They pointed out that the present case differed from *Doorson*, *Van Mechelen and Others* and *S.N. v. Sweden* (cited above), as the applicant's safety had not been at stake, nor had she been a minor. However, the Government emphasised that the Maribor District Court had excluded the public from the hearing and removed X from the courtroom during the applicant's testimony. After the applicant had given her testimony, the court had granted her request for the defendant to cross-examine her at the next hearing.

93. In this connection, the Government pointed out that X had not been allowed to ask the applicant certain questions that were not related to the case or were otherwise prohibited. Moreover, the court had on several occasions ordered breaks to be taken during the applicant's cross-examination; the Government asserted that the applicant could have requested further breaks if she had considered that necessary. Also, the applicant had been represented by a lawyer throughout the proceedings.

94. Lastly, as regards the delays in the proceedings the Government pointed out that during the investigation stage of the proceedings the applicant could have complained of the delays to the president of the competent court (see paragraph 61 above), but had not done so. The Government did, however, acknowledge that the applicant had lodged two supervisory appeals under the 2006 Act (see paragraphs 33 and 52 above). The Maribor District Court had responded appropriately on both occasions: the first time a hearing had been scheduled within a month, while the second time the reasoning of the judgment had been prepared and sent to the applicant within a few days of the appeal. It was true that the trial hearing had been adjourned nine times for various reasons; however, only the first time had the hearing been adjourned for a longer period, and this had been on account of X's illness. The Government further maintained that the large quantity of evidence that needed to be taken had also contributed to the overall duration of the trial.

2. The Court's assessment

...

(b) The protection of the applicant's personal integrity in the criminal proceedings concerning sexual abuse against her

101. The Court is called upon to examine whether in the criminal proceedings concerning alleged sexual assaults on the applicant the State afforded sufficient protection to her right to respect for private life, and especially for her personal integrity. Thus, what is in issue is not an act by

the State, but the alleged lack or inadequacy of measures aimed at protecting the victim's rights in the criminal proceedings. In this connection, the Court reiterates that, while the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this negative undertaking there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves (see *X and Y v. the Netherlands*, 26 March 1985, § 23, Series A no. 91).

102. The boundary between the State's positive and negative obligations under Article 8 does not lend itself to precise definition; the applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the relevant competing interests (see *White v. Sweden*, no. 42435/02, § 20, 19 September 2006).

103. As regards the conflicts between the interests of the defence and those of witnesses in criminal proceedings, the Court has already held on several occasions that criminal proceedings should be organised in such a way as not to unjustifiably imperil the life, liberty or security of witnesses, and in particular those of victims called upon to testify, or their interests coming generally within the ambit of Article 8 of the Convention. Thus, the interests of the defence are to be balanced against those of witnesses or victims called upon to testify (see *Doorson*, cited above, § 70). Notably, criminal proceedings concerning sexual offences are often conceived of as an ordeal by the victim, in particular when the latter is unwillingly confronted with the defendant. These features are even more prominent in a case involving a minor. Therefore, in such proceedings certain measures may be taken for the purpose of protecting the victim, provided that they can be reconciled with an adequate and effective exercise of the rights of the defence (see *S.N. v. Sweden*, cited above, § 47, and *Aigner v. Austria*, no. 28328/03, § 37, 10 May 2012).

104. In the cases hitherto before the Court, the question of whether the domestic authorities succeeded in striking a fair balance between the competing interests of the defence, especially the right of the accused set out in Article 6 § 3 (d) to call and cross-examine witnesses, and the rights of the victims under Article 8 was raised by the accused. Conversely, in the present case, the Court is called upon to examine this issue from the perspective of the alleged victim. In addressing the question, the Court will take into account the criteria laid down in the relevant international instruments (see paragraphs 69-72 above). In this connection, the Court notes that the Council of Europe Convention on preventing and combating

violence against women and domestic violence requires the Contracting Parties to take the necessary legislative and other measures to protect the rights and interests of victims. Such measures involve, *inter alia*, protection from intimidation and repeat victimisation, enabling victims to be heard and to have their views, needs and concerns presented and duly considered, and enabling them, if permitted by applicable domestic law, to testify in the absence of the alleged perpetrator. In addition, Directive 2012/29/EU of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime provides, *inter alia*, that interviews with victims are to be conducted without unjustified delay and that medical examinations are to be kept to a minimum.

105. As regards the manner in which the applicant's rights were protected in the criminal proceedings in issue, the Court observes, firstly, that her testimony at the trial provided the only direct evidence in the case. In addition, other evidence presented was conflicting, the psychologist's report confirming sexual abuse being countervailed by the orthopaedics report. In this light, it must be reiterated that the interests of a fair trial required the defence to be given the opportunity to cross-examine the applicant, who by that time was no longer a minor. Nevertheless, it needs to be determined whether the manner in which the applicant was questioned struck a fair balance between her personal integrity and X's defence rights.

106. In this connection, the Court reiterates that, as a rule, the defendant's rights under Article 6 §§ 1 and 3 (d) require that he be given an adequate and proper opportunity to challenge and question a witness against him either when he makes his statements or at a later stage of the proceedings (see *Saïdi v. France*, 20 September 1993, § 43, Series A no. 261-C, and *A.M. v. Italy*, no. 37019/97, § 25, ECHR 1999-IX). Furthermore, the Court must be cautious in making its own assessment of a specific line of questioning, considering that it is primarily the role of the competent national authorities to decide upon the admissibility and relevance of evidence (see *Schenk v. Switzerland*, 12 July 1988, § 46, Series A no. 140, and *Engel and Others v. the Netherlands*, 8 June 1976, § 91, Series A no. 22). This being said, the Court has also already held that a person's right to defend himself or herself does not provide for an unlimited right to use any defence arguments (see, *mutatis mutandis*, *Brandstetter v. Austria*, 28 August 1991, § 52, Series A no. 211). Thus, since a direct confrontation between defendants charged with criminal offences of sexual violence and their alleged victims involves a risk of further traumatisation on the latter's part, in the Court's opinion, personal cross-examination by defendants should be subject to most careful assessment by the national courts, this being even more the case the more intimate the questions are.

107. The applicant's questioning stretched over four hearings (see paragraphs 31, 32, 34-38 and 40 above) held over seven months, a lengthy period, which, in the Court's opinion, in itself raises concerns, especially given the absence of any apparent reason for the long intervals between the hearings. Moreover, at two of those hearings, X, the defendant, who was otherwise represented by counsel throughout the proceedings, personally cross-examined the applicant. In addition to claiming that he was physically incapable of assaulting her, X based his cross-examination on the premise that the applicant had considered him a person of trust and had sought his company, rather than the other way round, and that her accusations against him were prompted by her mother's wish to extort money from him. Accordingly, most of X's questions were of a distinctly personal nature.

108. The Court notes that some of the questions asked by X were phrased in such a manner as to suggest the answers, and a number of others were asked more than once (see paragraphs 34 and 36 above). X also continually contested the veracity of the applicant's answers, advancing his own version of events. Of course, the defence had to be allowed a certain leeway to challenge the reliability and credibility of the applicant and to reveal possible inconsistencies in her statement. However, the Court considers that cross-examination should not be used as a means of intimidating or humiliating witnesses. In this connection, the Court is of the view that some of X's questions and remarks suggesting, without any evidentiary basis, that the applicant could cry on cue in order to manipulate people, that her distress might be eased by having dinner with him, or that she had confided in him her desire to dominate men, were not aimed only at attacking the applicant's credibility, but were also meant to denigrate her character.

109. The Court considers that it was first and foremost the responsibility of the presiding judge to ensure that respect for the applicant's personal integrity was adequately protected at the trial. In its opinion, the sensitivity of the situation in which the applicant was questioned directly, in detail and at length by the man she accused of sexually assaulting her, required the presiding judge to oversee the form and content of X's questions and comments and, if necessary, to intervene. Indeed, the record of the hearing indicates that the presiding judge prohibited X from asking certain questions which were of no relevance to the case. However, the Court takes the view that X's offensive insinuations about the applicant also exceeded the limits of what could be tolerated for the purpose of enabling him to mount an effective defence, and called for a similar reaction. Considering the otherwise wide scope of cross-examination afforded to X, in the Court's opinion, curtailing his personal remarks would not have unduly restricted his defence rights. Yet, such an intervention would have mitigated what

was clearly a distressing experience for the applicant (see paragraphs 37-38 above).

110. Furthermore, as regards the applicant's assertion that X's counsel, M., should have been disqualified from representing X in the proceedings, having been consulted by her regarding the sexual assaults even before the police were informed of the matter, it is not the Court's task to speculate on whether, and if so in what capacity, the applicant and M. might have known each other prior to the trial, that being the task of the domestic authorities. However, it appears that under domestic law the possibility of prior informal consultation between the applicant and M. did not raise an issue of a conflict of interests which could lead to the latter's disqualification (see paragraphs 29, 31 and 40-42 above). Hence, finding that no statutory ground had been adduced by the applicant in support of her application to have M. disqualified, the Maribor District Court dismissed it.

111. Nevertheless, assuming that the applicant's allegation was true, the Court cannot but consider that the negative psychological effect of being cross-examined by M. considerably exceeded the apprehension that the applicant would have experienced if she had been questioned by another lawyer. Accordingly, this was a consideration which should not have been entirely disregarded in deciding whether M. should be disqualified as X's counsel. Moreover, on a more general note, the Court would add that any information that M. might have received from the applicant in his capacity as a lawyer, even without a retainer agreement, should have been treated as confidential and should not have been used to benefit a person with adverse interests in the same matter. Thus, the Court finds that the domestic law on disqualification of counsel, or the manner in which it was applied in the present case, did not take sufficient account of the applicant's interests.

112. Lastly, the applicant complained that B., the expert in gynaecology who was called upon to establish whether she had engaged in sexual intercourse at the material time, had made her answer a number of accusatory questions unrelated to his task. In this connection, the Court considers, firstly, that the personal integrity of the victims of crime in criminal proceedings must, by the very nature of the situation, be primarily protected by the public authorities conducting the proceedings. In this regard, the Court is of the view that the authorities are also required to ensure that other participants in the proceedings called upon to assist them in the investigation or the decision-making process treat victims and other witnesses with dignity, and do not cause them unnecessary inconvenience. As regards the present case, it is noted that, irrespective of B.'s status in the proceedings, the Government did not dispute that the State could be held responsible for his conduct. The Court sees no reason to hold otherwise, observing that the expert was

appointed by, and the disputed examination ordered by, the investigating judge in the exercise of his judicial powers.

113. Furthermore, regarding B.'s examination of the applicant, the Court notes that he confronted the applicant with the findings of the police and orthopaedics reports, and questioned her on why she had not defended herself more vigorously (see paragraph 22 above), thus addressing issues that were indeed not related to the question he was requested to examine. In the Court's opinion, B.'s questions and remarks, as well as the legal findings he made in his expert opinion, exceeded the scope of his task, as well as of his medical expertise. Moreover, it does not appear that B. was trained in conducting interviews with victims of sexual abuse; hence, it is difficult to see what purpose was to be served by his intervention in matters within the jurisdiction of the prosecuting and judicial authorities. More importantly, as argued by the applicant, she was put in a defensive position which, in the Court's opinion, unnecessarily added to the stress of the criminal proceedings.

114. The Court is mindful of the fact that the domestic authorities, and in particular the judge presiding over the trial in issue, had the delicate task of balancing the competing interests, and of ensuring the effective exercise of the defendant's rights to legal assistance and to examine witnesses testifying against him. It is also true that a number of measures were taken to prevent further traumatisation of the applicant. Her statement before the investigating judge was taken in the absence of the defendant and his counsel, the public was excluded from the trial, and the defendant was removed from the courtroom when she gave her testimony (see paragraphs 18, 29, 31 and 34 above). Owing to the applicant's stress during her testimony and cross-examination, the trial hearings were on several occasions adjourned for a few minutes or rescheduled to another date (see paragraphs 31, 37 and 38 above). Furthermore, the presiding judge warned the defendant against repeating questions in cross-examination and prohibited a number of them (see paragraph 36 above). Nevertheless, in the Court's opinion, the pre-existing relationship between the applicant and the defendant and the intimate nature of the subject matter, as well as the applicant's young age – she was a minor when the alleged sexual assaults took place – were points of particular sensitivity which called for a correspondingly sensitive approach on the part of the authorities to the conduct of the criminal proceedings in issue. Taking into account the cumulative effect of the factors analysed above, which adversely affected the applicant's personal integrity (see paragraphs 107-13 above), the Court considers that they substantially exceeded the level of discomfort inherent in giving evidence as

a victim of alleged sexual assaults, and accordingly cannot be justified by the requirements of a fair trial.

115. Therefore, the Court is of the view that the manner in which the criminal proceedings were conducted in the present case failed to afford the applicant the necessary protection so as to strike an appropriate balance between her rights and interests protected by Article 8 and X's defence rights protected by Article 6 of the Convention.

116. It follows that there has been a violation of Article 8 of the Convention.

...

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the application admissible;
2. *Holds*, unanimously, that there has been a violation of Article 3 of the Convention on account of the failure of the authorities of the respondent State to ensure a prompt investigation and prosecution of the applicant's complaint of sexual abuse;
3. *Holds*, by six votes to one, that there has been a violation of Article 8 of the Convention in respect of the failure of the authorities of the respondent State to protect the applicant's personal integrity in the criminal proceedings concerning sexual abuse against her;

...

Done in English, and notified in writing on 28 May 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Mark Villiger
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Yudkivska is annexed to this judgment.

M.V.
C.W.

PARTLY DISSENTING OPINION OF JUDGE YUDKIVSKA

Whilst I fully share the position of the majority to the effect that the investigation into the applicant's complaint of sexual abuse lasted too long, in breach of Article 3, I cannot agree that Article 8 was also violated in the present case.

The case concerns the fair balance which is to be struck between the interests of the defence in a criminal trial and those of a victim who is called upon to testify. Having carefully studied the available case materials, I find it is difficult for the Court, an international court, to suggest what additional steps could have been taken by the presiding judge to protect the applicant's interests to an extent which would not have amounted to a violation of the fair-trial rights of the defendant.

This Court has examined under Article 8 a number of cases introduced by rape victims, in which the authorities failed to meet their positive obligations to conduct an effective investigation into the allegations of sexual abuse (see, among the most recent examples, *C.A.S. and C.S. v. Romania*[1] and *D.J. v. Croatia*[2], with further references); however, it had not previously examined in such detail the issue of questioning during the trial proceedings.

Moreover, in its innovatory judgment in *M.C. v Bulgaria*[3], the Court stated that in the circumstances of that case its task was limited

> "to examin[ing] whether or not the impugned legislation and practice and their application in the case at hand, combined with the alleged shortcomings in the investigation, had such significant flaws as to amount to a breach of the respondent State's positive obligations under Articles 3 and 8 of the Convention ... The Court [was] not concerned with allegations of errors or isolated omissions in the investigation ..."

Nonetheless, in that case the Court criticised the authorities for their failure to "explore all the facts and decide on the basis of an assessment of all the surrounding circumstances" (ibid., § 181). In the present case, in contrast, it appears that the domestic judicial authorities are being criticised for a failure to disallow questions which might potentially have shed additional light on the circumstances of the case.

Practising lawyers know only too well how difficult it is to prosecute rape cases successfully, for a number of reasons – these crimes are rarely witnessed by others, corroborating physical evidence is lacking, there is an obvious difficulty in proving the accusation, and so on.

1. *C.A.S. and C.S. v. Romania,* no. 26692/05, 20 March 2012.
2. *D.J. v. Croatia*, no. 42418/10, 24 July 2012.
3. *M.C. v Bulgaria*, no. 39272/98, §§ 167-68, ECHR 2003-XII.

The prosecution thus tends to rely heavily on victim testimony, which quite often serves as the main ground for conviction. The only defence tactic for a defendant in such cases is to disprove the veracity of the victim's statements and to challenge his or her credibility. It is therefore unsurprising that the questions put by a defendant can be too intimate and intrusive – precisely in order to allow the judge to observe the victim's demeanour under cross-examination. This is the very core of a defendant's right to examine witnesses testifying against him or her.

Some 120 years ago the US Supreme Court defined the "primary object" of the confrontation clause as being

> "to prevent depositions or *ex parte* affidavits ... being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanour upon the stand and the manner in which he gives his testimony whether he is worthy of belief"[4].

The right to confrontation has a long and rich history dating back to Roman law and has become widely developed in common-law systems, where its crux lies in a belief that "[i]t is always more difficult to tell a lie about a person 'to his face' than 'behind his back'", and "even if the lie is told it will often be told less convincingly". This was explained by Justice Antonin Scalia in the US Supreme Court's landmark judgment in this respect, *Coy v. Iowa*[5]. In that judgment Justice Scalia traced the history of the right to confront as a "face-to-face encounter", illustrated in Shakespeare's Richard II:

> "Shakespeare was thus describing the root meaning of confrontation when he had Richard the Second say:
>
> 'Then call them to our presence – face to face, and
>
> frowning brow to brow, ourselves will hear the accuser
>
> and the accused freely speak.'[6]"

He concluded that "there is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution'". In *California v. Green*[7] the right to confrontation was described as the "greatest legal engine ever invented for the discovery of the truth".

4. *Mattox v. the United States*, 156 US 237, 242-43 (1895).
5. *Coy v. Iowa*, 487 US 1,012, 1,019 (1988).
6. *Richard II*, Act I, scene I.
7. *California v. Green*, 399 US 149 (1970).

Contrary to the US Constitution, the Convention does not guarantee as such a right to face-to-face confrontation between the accused and the victim. Still, in many cases, also related to the sexual abuse of minors, the Court has found that the guarantees of a fair trial were not respected if at no stage of the proceedings the defendant was able to put questions to an alleged victim (see, as one of the recent examples, *Vronchenko v. Estonia*[8]). The aim of the guarantee in Article 6 § 3 (d) of the Convention is the same – to assist the court in observing the demeanour of a witness under direct examination. This provision not only operates to protect the interests of the defence; it also serves justice in a more general way – it assists in establishing the truth, since questions put by the defence not only allow the witness's credibility to be tested, they also bring to light further elements of fact which may be important for the court's conclusions[9]. In my opinion, in the present case, the majority disregarded this essential element of the defendant's right to examine the key witness testifying against him.

In the case at hand, the applicant was an alleged victim of sexual assault, which is one of the gravest crimes against one's physical integrity, and one which causes deep trauma to a victim. It has been argued that "[e]xcept for murder, the crime of rape is the ultimate invasion, the one with the most severe physical and psychological consequences for its victim"[10]. It goes without saying that the court proceedings represent additional trauma for a rape victim, especially for one who is a minor. Thus, it is obvious that considerations of ensuring sufficient psychological comfort of the victim are important and may, in certain cases, outweigh the accused's right to confrontation.

Directive 2012/29/EU of 25 October 2012 of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime, indicates that measures are to be available for the most vulnerable victims, including "measures to avoid unnecessary questioning concerning the victim's private life not related to the criminal offence", and "measures allowing a hearing to take place without the presence of the public" (Article 23 § 3 (c) and (d)).

Other international documents on the protection of victims, including those cited in the judgment, while concentrating on victims' rights in the course of criminal proceedings, also stress the importance of the rights of the defence. It appears uncontested that completely sacrificing the right of the accused in order to ensure the victim's psychological comfort is a step towards obtaining the wrong decision.

8. *Vronchenko v. Estonia*, no. 59632/09, 18 July 2013.
9. Stefan Trechsel, *Human Rights in Criminal Proceedings*, Oxford University Press, 2005, p. 293.
10. Janet L. Barkas, *Victims*, New York, Scribner, 1978.

In the present case, it is worth mentioning that, although the alleged events occurred when the applicant was between 14 and 15 years old, the court proceedings took place five or six years later, when, firstly, her trauma cannot be said to have still been rankling to the same extent as immediately after the event, and, secondly, she was already an adult. It is therefore difficult to argue that she was particularly vulnerable at the time of the court examination.

Furthermore, it is of utmost importance that the applicant's questioning took place in the absence of the public (see the above-mentioned Directive). Moreover, the court granted her requests to have X removed from the courtroom while she was questioned. Besides, as also noted by the majority, some of X's questions were prohibited by the presiding judge where the latter considered them to be irrelevant to the case. What more could have been done by the judge in order to protect the applicant's rights while still having an opportunity to assess the victim's credibility?

The majority consider that "most of X's questions were of a distinctly personal nature" (see paragraph 107 of the present judgment). I absolutely agree with that finding, and I can hardly imagine any question of a non-personal nature that an accused who considers himself innocent could put to a victim defaming him, as he believes. Some of X's remarks were in reality aimed at presenting the negative aspects of the applicant's character, yet the majority define them as "offensive insinuations" exceeding "the limits of what could be tolerated for the purpose of enabling him to mount an effective defence" (see paragraph 109). It is obvious that the aim of those remarks was to challenge the applicant's credibility and to enable the judge to observe her demeanour under this provocative questioning – which is, again, the crux of any confrontation in the courtroom.

Certainly, the manner in which X built his line of defence brought additional stress to the applicant, who had already been deeply traumatised. Still, the present situation is significantly different from that in *Brandstetter v. Austria*[11] referred to by the majority, since in that case the applicant, in the course of proceedings against him for adulterating wine (an offence for which he could only be fined, and which, in principle, is incomparable with a rape accusation), deliberately and falsely accused an official of an offence in order to manipulate evidence, thus exposing the latter to the risk of disciplinary sanctions. In the present case, "offensive insinuations" such as the comments that "the applicant could cry on cue in order to manipulate people, that her distress might be eased by having dinner with him, or that she had confided in him her desire to dominate men" are mostly value

11. *Brandstetter v. Austria*, 28 August 1991, Series A no. 211.

judgments and cannot be compared to a false, as X believed, accusation of sexual abuse. The degree of interference in one's private life represented by those quoted remarks and by the accusation of having committed a grave crime is incommensurable. Thus, I cannot agree that X's questions overstepped the admissible limits of defence, given that what was at stake for him was his honour and liberty.

In addition to criticising the way in which the confrontation between the applicant and X was conducted, the majority reproaches the domestic judicial authorities for not having disqualified X's counsel, M., who allegedly had some prior informal consultations with the applicant. This was not proved; however, "assuming that the applicant's allegation was true", the majority have decided that the applicant would have felt better psychologically being cross-examined by another lawyer. Once more, had that been the case, then the applicant's greater comfort would have been at the expense of X's right to defend himself through legal assistance of his own choosing. The majority also stated, quite *in abstracto*, "that any information that M. might have received from the applicant in his capacity as a lawyer ... should have been treated as confidential and should not have been used to benefit a person with adverse interests in the same matter" (see paragraph 110 of the present judgment). There is no evidence in the case file to the contrary.

Lastly, the majority criticise the questioning of the applicant by the expert in gynaecology, B., namely the fact that the latter "confronted the applicant with the findings of the police and orthopaedics reports, and questioned her on why she had not defended herself more vigorously ..., thus addressing issues that were indeed not related to the question he was requested to examine" (see paragraph 113 of the present judgment). It is to be noted, however, that B. was entrusted with the task of "establish[ing] the probability that the applicant had engaged in sexual intercourse" (see paragraph 22), and thus had to assess whether her testimony was reliable from a medical standpoint. Given that the applicant's hymen was intact and that X could not have used his left arm to crush the applicant's resistance, it cannot be said that B.'s questions were completely irrelevant to the report he had to present.

In view of the above considerations, and bearing in mind that, in cases such as the present one, the absence of a complete picture of the trial calls for self-restraint on the part of the international judge, I have voted for the finding that there was no violation of Article 8 of the Convention.

Y. c. SLOVÉNIE
(Requête n° 41107/10)

CINQUIÈME SECTION

ARRÊT DU 28 MAI 2015[1]

1. Traduction ; original anglais. Extraits.

SOMMAIRE[1]

Défaut de protection de l'intégrité personnelle de la victime dans le cadre d'une procédure pénale relative à des abus sexuels

Eu égard à la nature même de la situation, c'est en premier lieu aux autorités publiques chargées de la procédure qu'il appartient de protéger l'intégrité personnelle des victimes d'infractions parties à une procédure pénale. De ce point de vue, les autorités sont également tenues de s'assurer que les autres intervenants qui leur apportent leur concours pour conduire l'instruction ou statuer sur l'affaire traitent les victimes et les autres témoins avec dignité et ne les perturbent pas inutilement (paragraphe 112 de l'arrêt).

Article 8

Respect de la vie privée – Défaut de protection de l'intégrité personnelle de la victime dans le cadre d'une procédure pénale relative à des abus sexuels – Juste équilibre entre les droits des victimes d'infractions pénales et les droits de la défense – Droits des victimes d'abus sexuels, notamment à une protection contre les risques d'intimidation et de nouvelle victimisation pendant qu'elles livrent leur témoignage

*

* *

En fait
En 2001, à l'âge de quatorze ans, la requérante fut, selon ses allégations, victime d'agressions sexuelles répétées de la part d'un ami de la famille, X. À la suite d'une plainte pénale déposée par la mère de la requérante, une enquête fut ouverte en 2003 et une procédure pénale fut engagée à l'encontre de X en 2007. En 2009, après douze audiences au total, les juridictions nationales acquittèrent X de tous les chefs d'accusation au motif qu'un expert avait contredit certaines des allégations de la requérante relatives à l'état physique de son agresseur présumé, dont la culpabilité était dès lors, selon les juges internes, impossible à prouver au-delà de tout doute raisonnable. L'appel du parquet contre ce jugement fut rejeté en 2010. Quelques mois plus tard, la requérante se vit refuser l'autorisation de former un pourvoi dans l'intérêt de la loi auprès de la Cour suprême.

En droit
Article 8 : la Cour doit examiner si l'État défendeur a suffisamment protégé le droit de la requérante au respect de sa vie privée, en particulier son intégrité personnelle,

1. Rédigé par le greffe, il ne lie pas la Cour.

s'agissant de la manière dont elle a été interrogée dans le cadre de la procédure pénale engagée contre son agresseur sexuel présumé. À cette fin, elle doit ménager un juste équilibre entre les droits que l'article 8 garantit à la requérante en tant que victime appelée à témoigner dans une procédure pénale et ceux de la défense, en particulier le droit de l'accusé de faire citer et contre-interroger des témoins, conformément aux dispositions de l'article 6 § 3 d) de la Convention. Alors que dans les affaires similaires dont la Cour a eu à connaître jusqu'à présent, la requête avait été formée par les accusés, en l'espèce la question soulevée doit être examinée du point de vue de la victime présumée.

Dans le cas présent, l'exigence d'équité du procès commandait de donner à X la possibilité de contre-interroger la requérante, d'autant plus que les seules preuves directes disponibles dans cette affaire résidaient dans la déposition faite par l'intéressée au procès et que les autres éléments de preuve étaient contradictoires. Toutefois, étant donné que les procédures pénales relatives aux délits sexuels sont souvent perçues par les victimes comme extrêmement pénibles et comme très longues et qu'une confrontation directe entre les auteurs présumés d'infractions à caractère sexuel et leurs victimes présumées risque de traumatiser celles-ci encore davantage, la conduite d'un contre-interrogatoire par l'accusé en personne doit faire l'objet d'une évaluation particulièrement rigoureuse de la part des juridictions internes. De fait, plusieurs instruments internationaux, dont certains adoptés par l'Union européenne, disposent que certains droits doivent être garantis aux victimes d'actes tels que, entre autres, les abus sexuels, imposant notamment à l'État l'obligation de protéger lesdites victimes du risque d'intimidation et de victimisation répétée lorsqu'elles livrent leur témoignage sur les abus sexuels allégués.

À cet égard, la Cour relève que l'interrogatoire de la requérante s'est prolongé pendant quatre audiences, qui se sont tenues en l'espace de sept mois. La procédure a donc connu une durée longue, en elle-même problématique, d'autant plus que rien ne semble expliquer les longs intervalles qui se sont écoulés entre les audiences. En outre, lors de deux de ces audiences, X interrogea personnellement la requérante, contestant systématiquement la véracité des réponses apportées par celle-ci et lui posant des questions à caractère personnel. Selon la Cour, ces questions avaient pour but de remettre en cause la crédibilité de la requérante mais aussi de salir sa réputation. Or, alors que les autorités judiciaires avaient l'obligation de contrôler la forme et le contenu des questions et commentaires de X et d'intervenir en cas de besoin, la présidente du tribunal n'est pas suffisamment intervenue pour alléger ce qui constituait manifestement une dure épreuve pour la requérante.

S'agissant de l'affirmation de la requérante selon laquelle l'avocat de X aurait dû être déchargé de l'affaire parce qu'elle l'avait consulté au sujet de ses agressions sexuelles peu après les événements allégués, la Cour estime que le droit interne applicable ou l'application qui en a été faite en l'espèce n'étaient pas suffisamment protecteurs des intérêts de la requérante. En effet, le contre-interrogatoire mené par l'avocat de X a eu sur la requérante des répercussions psychologiques négatives très supérieures à

l'appréhension qu'elle aurait éprouvée si elle avait été interrogée par un autre avocat. En outre, toute information que le défenseur de X a pu, en qualité d'avocat, recevoir de la victime aurait dû être considérée comme confidentielle et n'aurait pas dû être utilisée au profit de la partie adverse.

La Cour relève également le caractère déplacé des questions posées à la requérante par le gynécologue que le tribunal de première instance avait chargé d'établir si la requérante avait eu un rapport sexuel à l'époque des faits allégués. À cet égard, les autorités étaient tenues de veiller à ce que tous les autres intervenants appelés à apporter leur concours à l'instruction ou à la décision respectent la dignité des victimes et des autres témoins éventuels et ne les perturbent pas inutilement. Or, en plus d'être dépourvu de la formation nécessaire à la conduite d'entretiens avec des victimes d'abus sexuels, le gynécologue désigné comme expert par le tribunal a posé à la requérante des questions accusatrices et lui a adressé des commentaires sortant du cadre de sa mission et dépassant son expertise médicale. La requérante a ainsi été amenée à adopter une attitude défensive, ce qui a inutilement accru la tension due à la procédure pénale.

Les autorités internes ont certes pris un certain nombre de mesures pour éviter de causer un traumatisme supplémentaire à la requérante, mais ces mesures se sont finalement révélées insuffisantes pour offrir à l'intéressée la protection qui eût permis de ménager un juste équilibre entre les droits et intérêts que lui garantissait l'article 8 et les droits de la défense conférés à X par l'article 6.

Conclusion: violation (six voix contre une).

Jurisprudence citée par la Cour

A.M. c. Italie, n° 37019/97, CEDH 1999-IX
Aigner c. Autriche, n° 28328/03, 10 mai 2012
Brandstetter c. Autriche, 28 août 1991, série A n° 211
Doorson c. Pays-Bas, 26 mars 1996, *Recueil des arrêts et décisions* 1996-II
Engel et autres c. Pays-Bas, 8 juin 1976, série A n° 22
S.N. c. Suède, n° 34209/96, CEDH 2002-V
Saïdi c. France, 20 septembre 1993, série A n° 261-C
Schenk c. Suisse, 12 juillet 1988, série A n° 140
White c. Suède, n° 42435/02, 19 septembre 2006
X et Y c. Pays-Bas, 26 mars 1985, série A n° 91

En l'affaire Y. c. Slovénie,

La Cour européenne des droits de l'homme (cinquième section), siégeant en une chambre composée de :

Mark Villiger, *président*,
Angelika Nußberger,
Boštjan M. Zupančič,
Ganna Yudkivska,
André Potocki,
Helena Jäderblom,
Aleš Pejchal, *juges*,

et de Claudia Westerdiek, *greffière de section*,

Après en avoir délibéré en chambre du conseil le 31 mars 2015,

Rend l'arrêt que voici, adopté à cette date :

PROCÉDURE

1. À l'origine de l'affaire se trouve une requête (nº 41107/10) dirigée contre la République de Slovénie et dont une ressortissante de cet État, Y. (« la requérante »), a saisi la Cour le 17 juillet 2010 en vertu de l'article 34 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales (« la Convention »). Le président de la section a accédé à la demande de non-divulgation de son identité formulée par la requérante (article 47 § 4 du règlement).

2. La requérante a été représentée par Me J. Ahlin, avocat à Ljubljana. Le gouvernement slovène (« le Gouvernement ») a été représenté par son agent, Mme B. Jovin Hrastnik, procureur général.

3. La requérante alléguait que la procédure pénale relative aux abus sexuels perpétrés contre elle avait eu une durée excessive, qu'elle avait manqué d'impartialité et qu'elle lui avait fait vivre plusieurs expériences traumatisantes contraires au respect de son intégrité personnelle.

4. Le 20 février 2012, la requête a été communiquée au Gouvernement.

EN FAIT

I. LES CIRCONSTANCES DE L'ESPÈCE

A. Contexte

5. Née en Ukraine en 1987, la requérante arriva en Slovénie en 2000 avec sa sœur et sa mère, qui avait épousé un Slovène.

6. Entre juillet et décembre 2001, la requérante, alors âgée de quatorze ans, aurait été agressée sexuellement à plusieurs reprises par un ami de la famille, X, âgé de cinquante-cinq ans à l'époque des faits, qui, avec sa femme, s'occupait souvent d'elle et l'aidait à se préparer à participer à des concours de beauté.

7. En juillet 2002, elle informa sa mère des abus sexuels selon elle commis par X, mais refusa d'en parler avec qui que ce fût d'autre.

8. Le 15 juillet 2002, un prêtre fit une déposition au poste de police de Maribor, dans laquelle il déclarait que la mère de la requérante lui avait dit craindre que sa fille eût été violée par X.

B. L'enquête de police

9. Le 16 juillet 2002, la mère de la requérante déposa une plainte contre X, dans laquelle elle accusait celui-ci d'avoir forcé à plusieurs reprises la requérante à avoir des rapports sexuels avec lui.

10. Le 17 juillet 2002, interrogée par la police de Maribor, la requérante expliqua que X l'avait contrainte à diverses activités sexuelles. S'agissant de la période durant laquelle ces faits étaient supposés s'être déroulés, elle indiqua que X avait tenté de l'embrasser pour la première fois avant juillet 2001, alors qu'elle commençait à travailler comme mannequin pour des défilés de mode. Elle fit un récit des différentes occasions auxquelles X l'aurait agressée sexuellement. à l'une de ces occasions, X se serait allongé sur elle pendant qu'elle dormait chez lui et aurait tenté d'avoir des rapports sexuels avec elle, lui écartant les jambes d'une main tandis qu'il posait l'autre sur sa bouche pour l'empêcher de crier. Il aurait cependant été interrompu par l'arrivée de son jeune fils dans l'escalier. Une autre fois, alors qu'ils étaient dans une piscine, il l'aurait caressée dans l'eau. Une autre fois encore, il l'aurait conduite dans un atelier désaffecté appartenant à sa famille et lui aurait fait subir un cunnilingus. De plus, toujours selon les dires de la requérante, X l'aurait obligée à pratiquer une fellation à trois reprises au moins, une fois chez lui, une fois dans le garage de son entreprise et la troisième fois dans sa camionnette, qu'il avait garée dans les bois situés à proximité de la ville. à cette troisième occasion, elle aurait tenté de s'échapper, mais, ne connaissant pas les lieux, elle n'aurait eu d'autre choix que de revenir vers la camionnette. La requérante déclara que X avait tenté d'avoir un rapport sexuel avec elle à plusieurs reprises, mais qu'elle ne savait pas avec certitude s'il y avait eu pénétration ou non. Elle ajouta avoir tenté en vain de se défendre en criant et en le repoussant.

11. La requérante fut également examinée par un expert en gynécologie, qui constata que son hymen était intact. Par ailleurs, durant les mois de

juillet et août 2002, la police interrogea X, qui nia avoir eu des relations sexuelles avec la requérante, ainsi que trois autres personnes.

12. Après avoir à plusieurs reprises tenté en vain d'obtenir de la police des informations précises sur l'avancement de l'enquête, la mère de la requérante déposa une plainte auprès du parquet du district de Maribor (« le parquet »).

13. Le 27 juin 2003, le parquet envoya à la police de Maribor une lettre dans laquelle il demandait qu'une copie de la plainte pénale déposée contre X lui fût transmise d'urgence.

14. Le 18 août 2003, la police adressa au parquet un rapport dans lequel il était écrit que la requérante n'avait pas fourni de description détaillée des faits qu'elle invoquait et qu'elle n'avait pas indiqué les lieux où les viols allégués étaient censés s'être produits. La police disait que la requérante avait donné l'impression d'être soumise à une forte pression psychologique et de craindre la réaction de sa mère. Elle concluait qu'il était impossible de confirmer l'allégation de viol et tout aussi impossible de déterminer les causes du profond désarroi de la requérante.

C. L'enquête judiciaire

15. Le 28 août 2003, le parquet requit l'ouverture d'une information judiciaire contre X du chef d'agression sexuelle sur mineur de moins de quinze ans. Dans son réquisitoire introductif, il affirmait que X avait forcé la requérante à des pratiques sexuelles orales et avait eu des rapports sexuels avec elle à trois reprises au moins malgré son refus et les tentatives faites par elle pour lui résister.

16. Le 7 janvier 2005, X fut cité à comparaître devant le juge d'instruction du tribunal de district de Maribor. Il refusa de s'exprimer. Le 10 mars 2005, X, représenté par un avocat, déposa une déclaration écrite dans laquelle il niait les faits qui lui étaient reprochés. Il produisit également un rapport médical indiquant qu'il souffrait d'un handicap congénital au bras gauche.

17. Le 26 mai 2005, le juge d'instruction ordonna l'ouverture d'une information judiciaire à l'encontre de X. Celui-ci attaqua cette décision, mais fut débouté par la formation collégiale du tribunal de district de Maribor chargée de contrôler les actes d'instruction.

18. Le 17 octobre 2005, la requérante fut auditionnée en qualité de témoin par le tribunal de district de Ljubljana, auquel il avait été demandé de l'entendre parce qu'elle résidait dans son ressort. L'audition reprit le 8 novembre 2005. X et son conseil ne furent pas informés de cette audition. La requérante fit un récit détaillé des dates, des lieux et du déroulement des infractions alléguées. Elle commença par décrire l'agression censée avoir eu

lieu chez X, alors qu'elle y dormait, répétant que X avait été interrompu par l'arrivée de son fils. D'après son récit, la deuxième agression aurait eu lieu un jour où X, au lieu de la raccompagner chez elle en voiture, se serait garé dans les bois et aurait commencé à l'embrasser de force. Il l'aurait ensuite déshabillée, lui aurait écarté les jambes avec une main pendant que de l'autre, il lui tenait les poignets ; il aurait de nouveau essayé d'avoir un rapport sexuel avec elle, mais ne serait pas parvenu à la pénétrer. La requérante expliqua également qu'à une autre occasion le requérant l'avait emmenée dans l'atelier désaffecté appartenant à sa famille et aurait pratiqué sur elle un cunnilingus. Elle aurait tenté de se libérer de son emprise, mais il lui aurait immobilisé les poignets et l'aurait giflée. Il aurait de nouveau essayé de la pénétrer, mais sans succès. X aurait ordonné à la requérante de ne raconter à personne ce qui s'était passé et l'aurait menacée de la faire expulser de Slovénie avec sa famille si elle parlait. La requérante précisa qu'elle se souvenait bien de ces trois incidents et qu'ils s'étaient déroulés exactement selon sa description, ajoutant que plusieurs autres événements similaires s'étaient produits entre juillet et décembre 2001.

19. Les 13 et 20 décembre 2005, l'épouse de X et un autre témoin furent entendus par le juge d'instruction du tribunal de district de Maribor.

20. Le 13 janvier 2006, sur demande du tribunal de Maribor, le tribunal de district de Koper auditionna un témoin, D. Celle-ci déclara que la requérante lui avait parlé du viol qu'elle disait avoir subi.

21. Le 14 avril 2006, le juge d'instruction auditionna H., salariée de l'entreprise appartenant à X et à son épouse. Elle déclara n'avoir jamais vu X se comporter de manière déplacée vis-à-vis de la requérante dans l'enceinte de l'entreprise.

22. Le 16 mai 2006, le juge d'instruction désigna un expert en gynécologie, B., qu'il chargea d'apprécier la probabilité que la requérante eût eu des rapports sexuels entre juillet et décembre 2001. Le gynécologue eut un entretien avec la requérante, qui refusa de se soumettre à un examen clinique. Elle expliqua entre autres à B. que malgré les tentatives de X, il n'y avait jamais réellement eu pénétration. Durant l'entretien, B. confronta la requérante à un rapport établi par un orthopédiste attestant que X n'avait pas pu utiliser son bras gauche de la manière décrite par elle. La requérante répondit qu'elle avait vu X utiliser ce bras pour soulever des objets lourds. B. lui présenta également le rapport de la police dans lequel il était dit qu'elle n'avait pas pu faire un récit détaillé des agressions sexuelles et des lieux précis où elles étaient censées avoir été perpétrées et lui demanda pourquoi elle ne s'était pas défendue, par exemple en griffant ou en mordant X. Elle répondit ne pas s'être défendue parce qu'elle était dans l'impossibilité de le faire. Le 19 juin 2006, l'expert établit son rapport à l'appui des pièces versées au

dossier, dont un rapport gynécologique de 2002 indiquant que l'hymen de la requérante était à l'époque intact, et de son entretien avec l'intéressée. Il indiqua que rien ne permettait d'affirmer avec certitude que la requérante avait eu des rapports sexuels avec X à l'époque en cause. Outre son opinion médicale, il nota que le récit que la requérante avait fait des événements contenait certaines incohérences. à la lecture du rapport, il apparaît qu'aucune des incohérences alléguées ne fut mise en relation avec un problème médical.

23. Le 20 juin 2006, le juge d'instruction nomma un expert en psychologie clinique, R., qui reçut la requérante en consultation et soumit son rapport le 4 juillet. Elle parvint à la conclusion suivante :

> « Depuis 2001, Y. présente tous les symptômes dont souffre typiquement une victime d'abus sexuels ou d'autres formes de violence (symptômes émotionnels, comportementaux et physiques) (...)
>
> En plus d'avoir des séquelles émotionnelles, elle adopte des comportements très caractéristiques, liés aux violences qu'elle a subies, et présente quelques symptômes physiques (troubles du sommeil, cauchemars, malaises). Les symptômes sont cités dans le rapport (...)
>
> La gravité des séquelles – en particulier physiques et sexuelles – est pour l'heure difficile à évaluer. Cependant, tout comme il y a des conséquences immédiates, des séquelles à long terme sont à prévoir. Leur ampleur réelle apparaîtra aux grandes étapes de la vie de cette adolescente et dans les situations de tension (...)
>
> étant donné ces conséquences, particulièrement graves sur le plan psychologique (...), la question de savoir si le comportement violent de l'auteur des abus a entraîné ou non une rupture de l'hymen de la victime est tout à fait accessoire (...)
>
> Seul un psychologue clinicien peut évaluer correctement les schémas de comportement sexuel (...) »

24. Le 15 septembre 2006, le parquet inculpa X du chef d'agression sexuelle sur mineur de moins de quinze ans sur le fondement de l'article 183 §§ 1 et 2 du code pénal slovène. Le 20 octobre 2006, le recours introduit par X contre l'acte d'inculpation fut rejeté par la formation collégiale du tribunal de district de Maribor chargée de contrôler les actes d'instruction.

D. Le procès

25. Le tribunal de district de Maribor fixa une audience au 27 juin 2007. Celle-ci fut cependant renvoyée à la demande de X sur le fondement d'un document prouvant qu'il était alors en arrêt maladie pour plusieurs semaines.

26. Une nouvelle audience fut fixée au 3 octobre 2007, mais fut reportée à la demande du conseil de X. Prévue pour le 12 novembre 2007, elle fut

ajournée en raison de l'absence d'un membre du jury. X informa ensuite le tribunal qu'il s'apprêtait à partir en voyage d'affaires, si bien que l'audience fut renvoyée au 16 janvier 2008.

27. Le 16 janvier 2008, X ne comparut pas. Il présenta un certificat médical le 17 janvier 2008.

28. Le 25 janvier 2008, le conseil de X informa le tribunal que son client avait révoqué son mandat et serait dès lors représenté par un autre avocat, M. Le tribunal ne reçut cependant pas de nouveau mandat autorisant M. à agir en qualité de conseil de X. X étant prévenu d'une infraction pénale pour laquelle la représentation était obligatoire, le 28 janvier 2008, le tribunal commit M. en qualité d'avocat de X.

29. Le 14 mars 2008, le tribunal tint une audience qui se déroula à huis clos pour des raisons tenant à la protection de la vie privée et de la morale publique. La Cour entendit X. à l'audience, l'avocat de la requérante demanda que M., le conseil de X, fût dessaisi au motif que la requérante et sa mère l'avaient consulté en 2001 au sujet des questions au cœur de l'espèce. Il fit également valoir que la mère de la requérante avait eu une liaison avec M. Celui-ci affirma qu'il n'avait jamais vu la requérante ni sa mère et qu'il savait simplement qu'un avocat du cabinet dans lequel il travaillait à l'époque avait représenté l'ex-conjoint de la mère de la requérante dans le cadre de sa procédure de divorce. Le tribunal réuni en formation collégiale rejeta la demande, estimant qu'aucun motif légal ne justifiait le dessaisissement de M.

30. Le 14 mars 2008, X déposa un mémoire dans lequel il affirmait qu'il souffrait d'un handicap congénital au bras gauche, plus court de 15 cm que son bras droit, et qu'il ne pouvait donc avoir fait usage de la force physique envers la requérante. Il faisait valoir qu'il n'avait pratiquement pas l'usage de ce bras gauche. Il avançait également que lui-même et sa famille avaient aidé la requérante et sa sœur à s'intégrer dans leur nouvel environnement et à apprendre le slovène alors que leur mère s'occupait de ses affaires privées. Il soutenait que la mère était à l'origine des accusations d'abus sexuels portées contre lui parce qu'elle voulait lui extorquer de l'argent.

31. Le 14 avril 2008, la Cour tint une deuxième audience. X fut interrogé par la procureur, principalement sur l'usage qu'il pouvait faire de son bras gauche. à ce propos, il admit que même s'il conduisait le plus souvent des véhicules automatiques, il lui arrivait occasionnellement de conduire une voiture plus petite à transmission manuelle. Toutefois, lorsqu'il lui fut demandé s'il avait déjà conduit un camion, il objecta que cette question était sans lien avec l'affaire tout en reconnaissant être titulaire d'un permis l'autorisant à conduire toutes les catégories de véhicules. La requérante fut ensuite appelée à la barre après que le tribunal eut accueilli la demande

qu'elle avait formulée pour que X fût absent du prétoire. Elle pleura à plusieurs reprises en relatant les agressions sexuelles perpétrées par X, si bien que l'audience fut suspendue pendant quelques minutes. Elle fut ensuite interrogée par M., le conseil de X, qui lui posa des questions sur sa taille et son poids au moment des faits allégués. Elle fut alors prise d'une grande nervosité et demanda à M. pourquoi il se comportait ainsi et défendait maintenant X alors qu'il avait été le premier à entendre son histoire, ce que M. qualifia de manœuvre. L'audience fut ensuite suspendue en raison de la nervosité de la requérante.

32. Le 9 mai 2008, le tribunal tint une troisième audience. L'interrogatoire de la requérante reprit, en l'absence de X. Invitée à exprimer ce qu'elle ressentait avec le recul, elle se mit à pleurer et répondit que personne ne l'avait aidée et que la procédure durait depuis des années, pendant lesquelles elle avait dû revivre en permanence le traumatisme qu'elle avait subi.

33. Le 27 août 2008, elle introduisit un recours hiérarchique en application de la loi de 2006 sur la protection du droit à un procès sans retard injustifié (« la loi de 2006 ») afin d'obtenir une accélération de la procédure.

34. Le 26 septembre 2008, le tribunal tint une quatrième audience, qui se déroula à huis clos et au cours de laquelle X lui-même posa à la requérante plus d'une centaine de questions, en commençant par un commentaire sous la forme d'une question : « Est-il vrai que tu m'aies dit et montré que tu étais capable de pleurer sur commande pour que tout le monde te croie ? » D'après le procès-verbal d'audience, il semble que la requérante n'ait pas répondu. X lui posa ensuite une série de questions visant à prouver qu'ils s'étaient essentiellement vus lors de réunions de famille ou lorsque la requérante, ayant besoin d'un moyen de transport ou d'une aide quelconque, avait volontairement cherché à le voir. Il posa notamment les questions suivantes : « Est-il vrai que je ne pouvais pas abuser de toi le soir de l'événement comme tu l'as affirmé le 14 avril ? » ; « Est-il vrai que si j'avais voulu satisfaire mes besoins sexuels, je t'aurais appelée au moins une fois ? » ; « Pourquoi m'as-tu appelé en septembre pour me demander de t'emmener en dehors de la ville si je t'avais déjà violée cinq fois avant cette date ? » ; « Pourquoi m'appelais-tu, parce que moi, je ne t'ai certainement jamais appelée ? » ou « Est-il vrai que tu m'as demandé précisément de t'emmener en dehors de la ville seule, parce que tu voulais m'informer de ta victoire à un concours de beauté et la célébrer avec moi ? ». La requérante répliqua qu'elle ne l'avait pas appelé, n'avait pas été à l'initiative de sorties avec lui et ajouta que c'était lui qui l'avait appelée. X lui demanda s'il était vrai qu'elle lui avait dit que lorsqu'elle aurait un petit ami, elle serait toujours dessus (pendant l'acte sexuel) parce qu'elle voulait dominer.

35. X ajouta que les accusations de viol avaient été inventées par la mère de la requérante et lui posa donc de nombreuses questions sur sa mère, notamment sur sa maîtrise du slovène, sur son travail et sur ses relations personnelles. Il parla également à la requérante du rapport médical prouvant qu'il souffrait d'un handicap important au bras gauche. La requérante redit qu'elle l'avait vu utiliser son bras gauche dans le cadre de ses activités courantes, par exemple pour conduire et pour soulever et porter ses enfants et leur cartable, ou encore transporter des cartons et des bouteilles. Pendant toute la durée de l'interrogatoire, X contesta la véracité et la crédibilité des réponses de la requérante, faisant de longs commentaires sur les situations décrites par elle et réfutant sa version des faits. Il continua de se comporter ainsi même après que la juge qui présidait l'audience lui eut expliqué qu'il aurait la possibilité de faire des observations après l'interrogatoire de la requérante.

36. Durant le contre-interrogatoire, X répéta certaines questions. La présidente finit par le mettre en garde contre ce comportement et refusa d'admettre sept questions qui, selon elle, étaient sans lien avec l'affaire en cause.

37. Le tribunal ordonna à trois reprises une courte suspension d'audience en raison de la nervosité et des larmes de la requérante. Après l'une de ces suspensions, X demanda à la requérante si elle se sentirait mieux s'ils allaient dîner ensemble comme ils avaient l'habitude de le faire, ajoutant qu'elle pleurerait peut-être alors moins.

38. à un moment donné, la requérante demanda au tribunal d'ajourner l'audience, les questions lui étant trop pénibles. Toutefois, après que X eut déclaré que l'audience ne pourrait se tenir qu'après le 19 novembre 2008, date à laquelle il serait de retour d'un voyage d'affaires, elle demanda, en pleurant, que l'interrogatoire se poursuivît parce qu'elle voulait en finir avec ses questions. Finalement, après quatre heures de contre-interrogatoire de la requérante, la présidente renvoya l'audience au 13 octobre 2008.

39. Au cours de l'audience suivante, l'épouse et la belle-mère de X et une salariée de son entreprise furent entendues. Toutes trois affirmèrent que X utilisait très peu son bras gauche et ne pouvait certainement soulever aucune charge.

40. Le 24 novembre 2008 se tint une sixième audience. L'interrogatoire de la requérante par X dura une heure et demie. Interrogée par M., le conseil de X, la requérante répéta qu'elle lui avait relaté l'intégralité des faits longtemps auparavant, ce que M. démentit, ajoutant que s'il avait été informé des faits, il lui aurait conseillé de se rendre à l'hôpital et au poste de police. Une fois l'interrogatoire de la requérante terminé, sa mère fut interrogée, essentiellement sur ses relations privées.

41. à l'issue de l'audience, M., le conseil de X, répéta avoir rencontré la mère de la requérante alors qu'il travaillait dans le même cabinet qu'un avocat qui l'avait représentée dans le cadre de certaines procédures judiciaires. Il ajouta qu'il ferait savoir au tribunal sous trois jours s'il demandait ou non l'autorisation de renoncer à représenter X dans le cadre de la procédure en cause. Le 25 novembre 2008, il demanda à être dessaisi de l'affaire au motif qu'il avait été personnellement affecté par certains propos tenus par la mère de la requérante.

42. à l'audience du 15 décembre 2008, le tribunal rejeta la demande de M., estimant qu'il n'existait aucun motif légal de le dessaisir de sa mission de représentation. L'expert en gynécologie, B., fut entendu en qualité de témoin. Il reconnut que pour éclaircir les circonstances des événements, il avait également abordé dans son rapport des aspects ne figurant pas dans l'ordonnance de mission du juge d'instruction. Il répéta que l'hymen de la requérante était intact à l'époque des faits allégués.

43. Le 22 janvier 2009, le tribunal tint une huitième audience, au cours de laquelle il entendit la psychologue clinicienne R., qui répéta qu'il n'était pas possible d'établir au moyen de preuves matérielles la réalité d'abus sexuels anciens et que seules les séquelles psychologiques pouvaient être évaluées. Elle répéta en outre que la requérante présentait des symptômes évidents d'abus sexuels.

44. Le 20 février 2009, le tribunal désigna un autre expert en gynécologie, T., qu'il invita à donner son opinion sur le point de savoir s'il était possible que la requérante eût eu des rapports sexuels à l'époque en cause étant donné les résultats de l'examen médical pratiqué (paragraphe 11 ci-dessus). Le 10 mars 2009, l'expert rendit son rapport, selon lequel les résultats de cet examen étaient incompatibles avec le récit fait par la requérante des événements en question.

45. Le 16 mars 2009, le tribunal tint une audience au cours de laquelle il désigna un expert en orthopédie, N., qu'il chargea d'exprimer un avis sur le point de savoir si, compte tenu de son handicap au bras gauche, X avait pu commettre les actes décrits par la requérante.

46. Le 5 mai 2009, N. rendit son rapport. Il y indiquait que X avait un handicap important au bras gauche et que certains des événements en cause n'avaient de ce fait pas pu se dérouler selon la description de la requérante.

47. Le 8 juin 2009, le tribunal tint une audience au cours de laquelle N. fut interrogé. Répondant à des questions du conseil de la requérante, il expliqua s'être forgé une opinion à l'appui du dossier médical de X, de radiographies fournies par celui-ci et d'un examen de l'intéressé.

48. Une audience se tint le 9 juillet 2009. La requérante demanda que N. fût de nouveau interrogé.

49. Le 29 septembre 2009 eut lieu la douzième et dernière audience dans cette affaire. La requérante et la procureur interrogèrent N., qui déclara, entre autres, que X ne pouvait utiliser son bras gauche qu'en soutien du bras droit pour exécuter certaines tâches et qu'il n'avait pratiquement pas de force dans ce bras. Il ajouta que selon lui, X n'avait pas pu utiliser son bras gauche pour maintenir écartées les jambes de la requérante, ni pour enlever son propre pantalon comme celle-ci le soutenait. Invité par la procureur à préciser s'il avait supposé, pour faire son évaluation, que la requérante avait résisté à X de toutes ses forces, il répondit ne pas s'être fondé sur cette hypothèse parce qu'il ne savait pas si l'intéressée avait résisté ou si elle était consentante. Invité à indiquer s'il pensait que la requérante, alors âgée de quatorze ans, aurait pu résister à X qui était prétendument allongé sur elle, N. répondit par l'affirmative. Il indiqua également que même si X possédait une force supérieure à la moyenne dans le bras droit, il ne pouvait pas avoir agressé la requérante comme elle l'alléguait.

50. Après l'interrogatoire de N., la requérante, qui avait demandé et obtenu, hors du cadre de la procédure judiciaire, l'avis d'un autre orthopédiste, lequel avait conclu que X pouvait peut-être faire une utilisation limitée de son bras gauche, demanda qu'un autre expert en orthopédie fût nommé au motif que les conclusions de N. suscitaient des doutes. Le tribunal, jugeant une contre-expertise inutile, rejeta sa demande. Il rejeta également sa demande de faire citer en qualité de témoins sa sœur et l'ex-conjoint de sa mère, qui, selon la requérante, auraient vu X ramer en utilisant ses deux bras. Il refusa également que la requérante fût soumise à un nouvel examen médical comme l'avait requis la procureur.

51. à l'issue de l'audience, le tribunal prononça son jugement, relaxant X de tous les chefs dont il était prévenu. Compte tenu de cette décision, le tribunal recommanda à la requérante de porter devant la juridiction civile compétente la demande de dommages-intérêts qu'elle avait formée au cours de la procédure.

52. Le 15 décembre 2009, la requérante introduisit un nouveau recours hiérarchique en application de la loi de 2006. Le 22 décembre 2009, elle reçut une réponse du tribunal l'informant que les motifs du jugement lui avait été envoyés le jour-même.

53. Dans ces motifs, le tribunal expliquait que le rapport de l'expert en orthopédie démontrait que X n'était pas capable d'accomplir certains actes décrits par la requérante, qui auraient nécessité l'usage de ses deux bras. Il indiquait que d'après l'expert X ne pouvait même pas mettre sa main gauche dans une position lui permettant d'enlever son pantalon ou d'écarter les jambes de la requérante. Le tribunal indiquait que la remise en cause par l'expert de certaines des allégations de la requérante fragilisait l'intégralité de

sa version des faits. Se fondant sur le principe voulant que l'existence d'un doute raisonnable profite au prévenu (*in dubio pro reo*), il relaxa X. S'agissant du rapport de l'expert en psychologie, R., concluant que la requérante avait été abusée sexuellement, le tribunal disait ne pouvoir faire abstraction de la décision rendue dans une autre procédure, relative à l'ex-conjoint de la mère de la requérante, dans laquelle le tribunal compétent avait estimé que celui-ci avait eu des relations sexuelles devant la requérante et sa sœur et s'était comporté de manière déplacée vis-à-vis de la requérante.

54. Le 30 décembre 2009, la procureur forma un recours dans lequel elle reprochait au tribunal de n'avoir pas tenu compte de ce qu'eu égard à son âge, à son sexe et à sa corpulence, X était beaucoup plus fort que la requérante, ajoutant qu'il se trouvait de surcroît dans une position de pouvoir du fait de sa situation économique et de son statut social. Elle soulignait également que X avait conduit des véhicules à transmission manuelle, exigeant l'utilisation des deux bras. Elle faisait en outre valoir que pour que l'infraction pénale en cause fût constituée, il n'était pas nécessaire que l'acte sexuel eût été commis par la force ; le refus de la victime suffisait. Elle soulignait également que la procédure était pendante depuis déjà huit ans, ce qui avait accentué le traumatisme subi par la requérante.

55. Le 26 mai 2010, la cour d'appel de Maribor rejeta l'appel, considérant que la motivation du jugement rendu en première instance était claire et précise quant au fait qu'il n'était pas certain que X eût commis l'infraction alléguée.

56. La requérante pria par la suite le procureur près la Cour suprême d'introduire un pourvoi dans l'intérêt de la loi (recours extraordinaire). Le 28 juillet 2010, ledit procureur l'informa que ce pourvoi ne pouvait porter que sur des points de droit et non sur les faits, contestés par la requérante.

E. Indemnisation au titre de la durée excessive de la procédure judiciaire

57. Le 11 février 2011, la requérante et le Gouvernement conclurent en vertu de la loi de 2006 un règlement amiable prévoyant l'attribution de 1 080 euros (EUR) au titre de l'intégralité du préjudice matériel et moral subi par la requérante à raison de la violation de son droit à être jugée sans retard injustifié dans le cadre de la procédure pénale en cause. La requérante reçut également 129,60 EUR au titre des frais exposés.

II. LE DROIT ET LA PRATIQUE PERTINENTS

A. Le droit pénal interne pertinent

58. L'infraction pénale d'agression sexuelle sur mineur de moins de quinze ans est prévue à l'article 183 §§ 1 et 2 du code pénal, ainsi libellé dans sa version en vigueur à l'époque des faits allégués :

> « 1. Quiconque a des rapports sexuels ou se livre à toute autre activité sexuelle avec un mineur de moins de quinze ans du sexe opposé ou de même sexe, et lorsqu'il existe un écart de maturité flagrant entre l'auteur et sa victime, est passible d'une peine d'emprisonnement d'une durée comprise entre un et huit ans.
>
> 2. Quiconque commet l'acte visé ci-dessus à l'encontre d'un mineur de moins de dix ans ou d'une personne vulnérable de moins de quinze ans ou encore en faisant usage de la force ou en menaçant la vie ou l'intégrité physique de sa victime est passible d'une peine d'emprisonnement de trois ans au minimum (...) »

59. Selon l'article 148 de la loi de 1994 sur la procédure pénale dans sa version en vigueur à l'époque des faits allégués, à l'issue de l'enquête préliminaire sur une infraction présumée la police doit établir un procès-verbal de plainte à partir des informations recueillies et le transmettre au parquet. En tout état de cause, même dans les cas où les éléments recueillis ne suffisent pas à justifier une plainte, la police est tenue de transmettre un procès-verbal d'enquête au parquet.

60. La loi sur la procédure pénale contient diverses dispositions visant à assurer pendant la procédure judiciaire la protection des mineurs victimes d'infractions à caractère sexuel, ainsi que de ceux qui ont la qualité de témoins. Dès l'ouverture d'une procédure relative à une atteinte à leur intégrité sexuelle, les mineurs doivent bénéficier de l'assistance d'un conseil chargé de protéger leurs droits. Lorsqu'un mineur n'a pas d'avocat, le tribunal lui en commet un d'office. De surcroît, le prévenu ne peut pas être présent pendant l'audition de témoins de moins de quinze ans qui allèguent avoir été victimes d'atteintes à leur intégrité sexuelle. à ce propos, l'article 240 de la loi dispose que lorsque des mineurs, en particulier ceux concernés par l'infraction, sont entendus, il y a lieu d'avoir égard à leur âge afin d'éviter toute répercussion négative de l'audition sur leur état mental.

61. Pour garantir le bon déroulement d'une instruction, les parties et la victime peuvent, en vertu de l'article 191 de la loi sur la procédure pénale, se plaindre au président du tribunal chargé de l'instruction de tout retard ou de toute autre irrégularité. Le président est tenu d'examiner la plainte, puis d'informer son auteur des mesures prises à cet égard, le cas échéant.

62. En ce qui concerne le délai d'enrôlement d'une affaire pénale, l'article 286 § 2 de la loi sur la procédure pénale dispose que le juge qui préside la formation de jugement est tenu de fixer une première audience dans un

délai de deux mois à compter de la réception d'un acte d'inculpation. S'il ne le fait pas, il doit en informer le président du tribunal, à charge pour celui-ci de prendre les mesures nécessaires pour qu'une audience soit prévue.

63. L'article 295 de la loi sur la procédure pénale dispose que, le cas échéant, par exemple aux fins de la protection de la vie privée ou familiale de l'accusé ou de la victime, l'audience peut se dérouler à huis clos. Selon l'article 299 de la loi, il appartient au juge qui préside la formation de jugement de conduire l'audience, de donner la parole aux parties et d'interroger l'accusé, les témoins et les experts. Il lui incombe de surcroît de veiller à ce que l'affaire soit présentée de manière claire et exhaustive, à ce que la vérité soit établie et à ce que tout obstacle susceptible de retarder la procédure soit levé.

64. Il est possible de faire sortir temporairement le prévenu du prétoire si un témoin refuse de s'exprimer en sa présence. En pareil cas, la déposition du témoin lui est lue et il peut lui poser des questions. Néanmoins, selon l'article 334 § 2 de la loi, le président de la formation de jugement doit interdire toute question qui a déjà été posée, qui est sans rapport avec l'affaire ou qui est formulée de manière à induire la réponse.

B. Le droit et la pratique internes pertinents en matière civile

1. Action civile en indemnisation

65. L'article 148 du code des obligations, qui vise la responsabilité des personnes morales à raison des préjudices causés par leurs organes et s'applique également à la détermination de la responsabilité de l'État, dispose qu'une personne morale est responsable des dommages causés à un tiers par l'un de ses organes dans l'exercice de ses fonctions ou du fait de l'exercice de ses fonctions. Quiconque s'estime victime d'un préjudice causé par l'État doit, pour obtenir une indemnisation, prouver que les quatre éléments constitutifs de la responsabilité de l'État sont réunis, à savoir l'illégalité de l'action de l'État, l'existence du dommage, l'existence d'un lien de causalité et la commission d'une négligence ou d'une faute par l'État.

66. En vertu de l'article 179 du code des obligations, qui régit l'indemnisation pour préjudice moral, pareille indemnisation peut être accordée en cas d'atteinte aux droits de la personnalité, ainsi qu'au titre des souffrances physiques, des souffrances morales endurées en raison d'une diminution d'activité, d'une défiguration, d'une atteinte à la réputation, du décès d'un proche ou de la peur, à condition toutefois que les circonstances de l'espèce, et notamment la durée et l'intensité des souffrances ou de la peur, le justifient.

67. Dans son arrêt nº II Ips 305/2009, la Cour suprême a strictement limité l'attribution d'une indemnité pour préjudice moral aux catégories de préjudices énumérées dans le code des obligations, adhérant ainsi au principe du *numerus clausus*. Elle a donc estimé que le préjudice moral causé par la durée excessive d'une procédure ne faisait pas partie des catégories de préjudices énumérées par le code des obligations, le droit à être jugé dans un délai raisonnable ne pouvant s'analyser en un droit de la personnalité.

2. Loi de 2006 sur la protection du droit à un procès sans retard injustifié (« loi de 2006 »)

68. L'article 1 de la loi de 2006 garantit à toute partie à une procédure judiciaire – y compris à la victime d'une infraction pénale – le droit à voir un tribunal statuer sur ses droits sans retard injustifié.

C. Le droit international pertinent

69. La Déclaration des principes fondamentaux de justice relatifs aux victimes de la criminalité et aux victimes d'abus de pouvoir, adoptée par l'Assemblée générale des Nations unies dans sa résolution 40/34 du 29 novembre 1985, dispose que les victimes doivent être traitées avec compassion et dans le respect de leur dignité (annexe, paragraphe 4) et qu'il convient d'améliorer la capacité de l'appareil judiciaire et administratif à répondre aux besoins des victimes, notamment en adoptant des mesures pour limiter autant que possible les difficultés qu'elles rencontrent, protéger au besoin leur vie privée et assurer leur sécurité ainsi que celle de leur famille et de leurs témoins, et en les préservant des manœuvres d'intimidation et des représailles (annexe, paragraphe 6 d)).

70. De surcroît, les victimes d'infractions jouissent d'une protection en vertu du droit de l'Union européenne. La décision-cadre du Conseil relative au statut des victimes dans le cadre de procédures pénales (2001/220/JAI) a été adoptée le 15 mars 2001 pour établir des normes minimales en matière de droits et de protection des victimes. Son article 2 fait obligation aux États membres d'assurer aux victimes un rôle réel et approprié dans le système judiciaire pénal et de veiller à ce qu'un traitement respectueux de leur dignité personnelle leur soit réservé pendant la procédure. L'article 3 exige que l'État membre garantisse aux victimes la possibilité d'être entendues au cours de la procédure et de fournir des éléments de preuve, étant entendu cependant qu'il doit prendre les mesures appropriées pour que ses autorités n'interrogent les victimes que dans la mesure nécessaire à la procédure pénale. L'article 8 oblige les États membres à prendre des mesures pour protéger la sécurité et la vie privée des victimes au cours de la procédure pénale.

Des mesures doivent par exemple être prises pour éviter que les victimes et les auteurs d'infractions ne se trouvent en contact dans les locaux judiciaires, à moins que la procédure pénale ne l'impose. Chaque État membre doit également garantir, par tout moyen approprié compatible avec les principes fondamentaux de son droit, que les victimes qui ont besoin d'être protégées contre les conséquences de leur déposition en audience publique, notamment les plus vulnérables, puissent, par décision judiciaire, bénéficier de conditions de témoignage permettant d'atteindre cet objectif.

71. En outre, la volonté des États membres de l'Union européenne de renforcer les droits des victimes a conduit à l'adoption, le 25 octobre 2012, de la directive 2012/29/UE du Parlement européen et du Conseil établissant des normes minimales concernant les droits, le soutien et la protection des victimes de la criminalité et remplaçant la décision-cadre 2001/220/JAI du Conseil. La partie pertinente de cette directive, qui devait être transposée dans le droit des États membres avant le 16 novembre 2015, est ainsi libellée :

Considérant 19

« Une personne devrait être considérée comme une victime indépendamment du fait que l'auteur de l'infraction ait été identifié, appréhendé, poursuivi ou condamné et abstraction faite de l'éventuel lien de parenté qui les unit. (...) »

Article 20
Droit de la victime à une protection au cours de l'enquête pénale

« Sans préjudice des droits de la défense et dans le respect du pouvoir discrétionnaire du juge, les États membres veillent à ce que, au cours de l'enquête pénale :

a) les auditions de la victime soient menées sans retard injustifié après le dépôt de sa plainte concernant une infraction pénale auprès de l'autorité compétente ;

b) le nombre d'auditions de la victime soit limité à un minimum et à ce que les auditions n'aient lieu que dans la mesure strictement nécessaire au déroulement de l'enquête pénale ;

(...)

d) les États membres veillent à ce que les examens médicaux soient limités à un minimum et n'aient lieu que dans la mesure strictement nécessaire aux fins de la procédure pénale. »

Article 22
Évaluation personnalisée des victimes afin d'identifier les besoins spécifiques en matière de protection

« 1. Les États membres veillent à ce que les victimes fassent, en temps utile, l'objet d'une évaluation personnalisée, conformément aux procédures nationales, afin d'identifier les besoins spécifiques en matière de protection et de déterminer si et dans quelle

mesure elles bénéficieraient de mesures spéciales dans le cadre de la procédure pénale, comme prévu aux articles 23 et 24, en raison de leur exposition particulière au risque de victimisation secondaire et répétée, d'intimidations et de représailles.

2. L'évaluation personnalisée prend particulièrement en compte :

a) les caractéristiques personnelles de la victime ;

b) le type ou la nature de l'infraction ; et

c) les circonstances de l'infraction.

3. Dans le cadre de l'évaluation personnalisée, une attention particulière est accordée aux victimes qui ont subi un préjudice considérable en raison de la gravité de l'infraction, à celles qui ont subi une infraction fondée sur un préjugé ou un motif discriminatoire, qui pourrait notamment être lié à leurs caractéristiques personnelles, à celles que leur relation ou leur dépendance à l'égard de l'auteur de l'infraction rend particulièrement vulnérables. À cet égard, les victimes du terrorisme, de la criminalité organisée, de la traite des êtres humains, de violences fondées sur le genre, de violences domestiques, de violences ou d'exploitation sexuelles, ou d'infractions inspirées par la haine, ainsi que les victimes handicapées sont dûment prises en considération.

(...) »

Article 23
Droit à une protection des victimes ayant des besoins spécifiques en matière de protection au cours de la procédure pénale

« 1. Sans préjudice des droits de la défense et dans le respect du pouvoir discrétionnaire du juge, les États membres veillent à ce que les victimes ayant des besoins spécifiques en matière de protection qui bénéficient de mesures spéciales identifiées à la suite d'une évaluation personnalisée prévue à l'article 22, paragraphe 1, puissent bénéficier des mesures prévues aux paragraphes 2 et 3 du présent article. Une mesure spéciale envisagée à la suite de l'évaluation personnalisée n'est pas accordée si des contraintes opérationnelles ou pratiques la rendent impossible ou s'il existe un besoin urgent d'auditionner la victime, le défaut d'audition pouvant porter préjudice à la victime, à une autre personne ou au déroulement de la procédure.

2. Pendant l'enquête pénale, les mesures ci-après sont mises à la disposition des victimes ayant des besoins spécifiques de protection identifiés conformément à l'article 22, paragraphe 1 :

(...)

b) la victime est auditionnée par des professionnels formés à cet effet ou avec l'aide de ceux-ci ;

(...)

3. Pendant la procédure juridictionnelle, les mesures ci-après sont mises à la disposition des victimes ayant des besoins spécifiques de protection identifiés conformément à l'article 22, paragraphe 1 :

a) des mesures permettant d'éviter tout contact visuel entre la victime et l'auteur de l'infraction, y compris pendant la déposition, par le recours à des moyens adéquats, notamment des technologies de communication ;

b) des mesures permettant à la victime d'être entendue à l'audience sans y être présente, notamment par le recours à des technologies de communication appropriées ;

c) des mesures permettant d'éviter toute audition inutile concernant la vie privée de la victime sans rapport avec l'infraction pénale ; et

d) des mesures permettant de tenir des audiences à huis clos. »

72. Le 11 mai 2011, le Conseil de l'Europe a adopté la Convention sur la prévention et la lutte contre la violence à l'égard des femmes et la violence domestique, entrée en vigueur le 1er août 2014. Elle a été signée le 8 septembre 2011 par la Slovénie, qui ne l'a toutefois pas encore ratifiée. Ses parties pertinentes se lisent ainsi :

Article 49
Obligations générales

« 1. Les Parties prennent les mesures législatives ou autres nécessaires pour que les enquêtes et les procédures judiciaires relatives à toutes les formes de violence couvertes par le champ d'application de la présente Convention soient traitées sans retard injustifié tout en prenant en considération les droits de la victime à toutes les étapes des procédures pénales.

2. Les Parties prennent les mesures législatives ou autres nécessaires, conformément aux principes fondamentaux des droits de l'homme et en prenant en considération la compréhension de la violence fondée sur le genre, pour garantir une enquête et une poursuite effectives des infractions établies conformément à la présente Convention. »

Article 54
Enquêtes et preuves

« Les Parties prennent les mesures législatives ou autres nécessaires pour que, dans toute procédure civile ou pénale, les preuves relatives aux antécédents sexuels et à la conduite de la victime ne soient recevables que lorsque cela est pertinent et nécessaire. »

Article 56
Mesures de protection

« 1. Les Parties prennent les mesures législatives ou autres nécessaires pour protéger les droits et les intérêts des victimes, y compris leurs besoins spécifiques en tant que témoins, à tous les stades des enquêtes et des procédures judiciaires, en particulier :

a) en veillant à ce qu'elles soient, ainsi que leurs familles et les témoins à charge, à l'abri des risques d'intimidation, de représailles et de nouvelle victimisation ;

b) en veillant à ce que les victimes soient informées, au moins dans les cas où les victimes et la famille pourraient être en danger, lorsque l'auteur de l'infraction s'évade ou est libéré temporairement ou définitivement ;

c) en les tenant informées, selon les conditions prévues par leur droit interne, de leurs droits et des services à leur disposition, et des suites données à leur plainte, des chefs d'accusation retenus, du déroulement général de l'enquête ou de la procédure, et de leur rôle au sein de celle-ci ainsi que de la décision rendue ;

d) en donnant aux victimes, conformément aux règles de procédure de leur droit interne, la possibilité d'être entendues, de fournir des éléments de preuve et de présenter leurs vues, besoins et préoccupations, directement ou par le recours à un intermédiaire, et que ceux-ci soient examinés ;

e) en fournissant aux victimes une assistance appropriée pour que leurs droits et intérêts soient dûment présentés et pris en compte ;

f) en veillant à ce que des mesures pour protéger la vie privée et l'image de la victime puissent être prises ;

g) en veillant, lorsque cela est possible, à ce que les contacts entre les victimes et les auteurs d'infractions à l'intérieur des tribunaux et des locaux des services répressifs soient évités ;

h) en fournissant aux victimes des interprètes indépendants et compétents, lorsque les victimes sont parties aux procédures ou lorsqu'elles fournissent des éléments de preuve;

i) en permettant aux victimes de témoigner en salle d'audience, conformément aux règles prévues par leur droit interne, sans être présentes, ou du moins sans que l'auteur présumé de l'infraction ne soit présent, notamment par le recours aux technologies de communication appropriées, si elles sont disponibles.

2. Un enfant victime et témoin de violence à l'égard des femmes et de violence domestique doit, le cas échéant, se voir accorder des mesures de protection spécifiques prenant en compte l'intérêt supérieur de l'enfant. »

EN DROIT

I. SUR LA VIOLATION ALLÉGUÉE DES ARTICLES 3 ET 8 DE LA CONVENTION

73. Invoquant les articles 3 et 8 de la Convention, la requérante expose que la procédure pénale relative à ses allégations de violences sexuelles a connu une durée excessive, a manqué d'impartialité et lui a fait vivre plusieurs expériences traumatisantes contraires au respect de son intégrité personnelle, et que l'État a donc failli à l'obligation positive qui pesait sur lui de lui offrir une protection juridique effective contre les violences sexuelles. Elle allègue de surcroît, sous l'angle de l'article 13, qu'elle n'a pas eu accès à un recours relativement à ses griefs.

74. Compte tenu de la nature et de la substance des griefs formulés, la Cour estime qu'il y a lieu d'examiner les allégations relatives à la durée excessive de la procédure et au manque d'impartialité des juridictions internes sous le seul angle de l'article 3 de la Convention (*P.M. c. Bulgarie*, n° 49669/07, § 58, 24 janvier 2012), ainsi libellé :

Article 3

« Nul ne peut être soumis à la torture ni à des peines ou traitements inhumains ou dégradants. »

75. Les autres griefs de la requérante, qui concernent l'insuffisance alléguée de la protection dont elle a bénéficié dans le cadre de la procédure pénale, soulèvent certaines questions au sujet de l'étendue de l'obligation pesant sur l'État en matière de protection des victimes qui comparaissent en qualité de témoins dans le cadre d'une procédure pénale. Dans les circonstances spécifiques de la présente espèce, la Cour estime que ces questions doivent être examinées sous l'angle de l'article 8 de la Convention, qui se lit ainsi :

Article 8

« 1. Toute personne a droit au respect de sa vie privée et familiale, de son domicile et de sa correspondance.

2. Il ne peut y avoir ingérence d'une autorité publique dans l'exercice de ce droit que pour autant que cette ingérence est prévue par la loi et qu'elle constitue une mesure qui, dans une société démocratique, est nécessaire à la sécurité nationale, à la sûreté publique, au bien-être économique du pays, à la défense de l'ordre et à la prévention des infractions pénales, à la protection de la santé ou de la morale, ou à la protection des droits et libertés d'autrui. »

(...)

B. Sur le fond

1. Les thèses des parties

a) La requérante

85. La requérante soutient que l'enquête relative à ses allégations de violences sexuelles et la procédure pénale qui s'en est suivie ont eu une durée excessive et n'ont pas été effectives, expliquant que les autorités avaient des préjugés contre elle en raison de son origine ukrainienne. En premier lieu, la police de Maribor aurait laissé s'écouler une année sans enquêter activement sur sa plainte et n'aurait transmis un procès-verbal au parquet que quand celui-ci lui aurait enjoint de le faire. De surcroît, le tribunal de district de Maribor n'aurait pas respecté les délais fixés par la législation interne pour le déroulement du procès. à cet égard, la requérante plaide qu'il n'était pas

de sa responsabilité de tenter d'accélérer le déroulement de la procédure judiciaire.

86. En deuxième lieu, le tribunal de district de Maribor aurait refusé de faire citer certains témoins importants et de désigner un nouvel expert en orthopédie pour établir si le handicap dont souffrait X l'avait réellement empêché d'accomplir les actes exigeant l'usage de la force décrits par la requérante. De surcroît, en se fondant principalement sur le rapport de l'orthopédiste, qui serait parti du principe que la requérante était en mesure de se défendre, le tribunal aurait manqué d'impartialité. La requérante ajoute que le rapport en question est en contradiction avec d'autres éléments de preuve, dont il ressortirait que X n'était peut-être pas totalement privé de l'usage de son bras gauche.

87. Par ailleurs, la requérante reproche à l'État de ne pas avoir protégé son intégrité personnelle pendant la procédure. Ainsi, l'expert en gynécologie, B., aurait outrepassé la mission qui lui avait été confiée, dès lors qu'au lieu de répondre à la question du juge d'instruction concernant la probabilité que des rapports sexuels eussent eu lieu, il aurait cherché à découvrir si une infraction avait été commise et posé des questions à la requérante, qui l'auraient conduite à adopter une attitude défensive à son endroit (paragraphe 22 ci-dessus).

88. De surcroît, la requérante expose que, alors qu'elle avait déjà été interrogée dans le cadre de l'instruction, elle dut par la suite témoigner à quatre audiences devant le tribunal de district de Maribor, au cours desquelles le prévenu aurait été autorisé à la tourmenter en lui posant directement de nombreuses questions provocatrices et répétitives alors qu'il avait un représentant légal et que celui-ci aurait pu poser les questions. Elle affirme que cet interrogatoire lui a causé une souffrance psychologique intense et qu'elle s'est sentie contrariée, humiliée et désemparée. Le prévenu aurait de surcroît été représenté par un avocat auquel elle aurait déjà, par le passé, parlé des événements en cause, et il aurait donc pu utiliser, éventuellement à mauvais escient, les informations reçues. à cet égard, la requérante, invoquant la jurisprudence de la Cour et notamment les arrêts rendus dans les affaires *Doorson c. Pays-Bas* (26 mars 1996, *Recueil des arrêts et décisions* 1996-II), *Van Mechelen et autres c. Pays-Bas* (23 avril 1997, *Recueil* 1997-III), et *S.N. c. Suède* (n° 34209/96, CEDH 2002-V), soutient que la législation interne ne permet pas qu'un juste équilibre soit ménagé entre les droits de la défense garantis à l'accusé par l'article 6 de la Convention et le droit des victimes à l'intégrité et au respect de la vie privée protégé par les articles 3 et 8. Elle affirme que le traumatisme qu'elle a subi est à l'origine de troubles psychologiques graves et définitifs ayant perturbé son système immunitaire.

Enfin, elle soutient que la législation interne ne lui offrait aucun recours effectif relativement à ses griefs.

b) Le Gouvernement

89. Le Gouvernement plaide que l'enquête relative aux violences sexuelles dont la requérante allègue avoir été victime et la procédure pénale qui s'en est suivie ont été effectives. Il indique que la police a interrogé la requérante et X, de même que tous les témoins concernés, et que rien ne démontre qu'elle n'aurait pas transmis le procès-verbal de plainte au parquet si celui-ci n'était pas intervenu. Il considère que l'instruction a été dûment conduite et ajoute qu'elle a abouti à l'adoption d'un acte d'inculpation contre X.

90. Il soutient en outre que le procès a été conduit de manière impartiale. Pour ce qui est du rapport de l'orthopédiste, qui selon la requérante était en contradiction avec d'autres éléments de preuve, il indique que ce rapport a été établi d'après des pièces médicales et un examen clinique de X et qu'il ne contient ni incohérences ni anomalies susceptibles de jeter un doute sur sa véracité. Il explique que si le tribunal de district de Maribor a relaxé X, c'est parce que les abus sexuels allégués n'ont été vus par aucun témoin et qu'ils n'ont pas été confirmés par les résultats des examens gynécologiques. Tout en reconnaissant que la requérante présentait des symptômes évocateurs d'abus sexuels, le Gouvernement estime que le tribunal ne pouvait pas méconnaître le fait qu'à l'époque, une autre procédure pénale, non prise en compte par l'expert en psychologie pour établir son rapport, était en cours contre une autre personne soupçonnée d'abus sexuels contre la requérante. Enfin, il indique que l'expert en gynécologie n'a pas « interrogé » la requérante, mais qu'il a simplement eu une conversation avec elle en dehors du cadre de l'audience. Selon le Gouvernement, la requérante aurait pu demander que l'expert fût sanctionné si elle estimait qu'il ne remplissait pas correctement sa mission.

91. Par ailleurs, en ce qui concerne M., l'avocat commis par le tribunal pour représenter X, le Gouvernement fait valoir que X relevait d'une procédure avec représentation obligatoire et que le tribunal de district de Maribor n'a donc fait qu'appliquer les règles légales relatives à la commission d'office. De surcroît, dans sa demande tendant à ce que M. fût dessaisi de sa mission de représentation de X, la requérante n'aurait pas avancé des motifs susceptibles de justifier pareille mesure en droit interne ; il n'aurait donc pesé sur le tribunal aucune obligation d'entendre les parties sur la question en cause. Pour le Gouvernement, le fait que M. eût, par le passé, travaillé dans un cabinet d'avocats représentant le conjoint de la mère de la

requérante dans le cadre d'une procédure de divorce ne signifie pas qu'il ne devait pas défendre X.

92. Le Gouvernement plaide par ailleurs que des mesures ont été prises, durant l'instruction comme au stade du procès, pour éviter de traumatiser davantage la requérante. Ainsi, pendant l'instruction, l'intéressée aurait été auditionnée en l'absence de X et de son avocat. L'audience de jugement aurait donc constitué pour le prévenu la première occasion de lui poser des questions. La requérante ayant été l'unique témoin des actes dont elle accusait X, rien n'aurait justifié une limitation des droits de la défense au point d'empêcher le prévenu de soumettre la requérante à un contre-interrogatoire. Le Gouvernement ajoute que la requérante n'était pas mineure, que sa sécurité n'était pas en jeu et que la présente espèce doit donc être distinguée des affaires *Doorson*, *Van Mechelen et autres* et *S.N. c. Suède*, précitées. Il fait observer que le tribunal de district de Maribor a cependant tenu ses audiences à huis clos et a fait sortir X du prétoire pendant que la requérante était à la barre. Ce serait après qu'elle eut livré son témoignage que le tribunal aurait accepté, à sa demande, que le prévenu la soumît à un contre-interrogatoire à l'audience suivante.

93. à ce propos, le Gouvernement ajoute que le prévenu s'est vu refuser l'autorisation de poser certaines questions à la requérante, soit parce qu'elles étaient sans lien avec l'affaire, soit pour un autre motif. Il souligne que le tribunal a de surcroît ordonné plusieurs suspensions de séance pendant le contre-interrogatoire et que la requérante aurait pu en demander d'autres si elle l'avait jugé nécessaire. Il insiste également sur le fait que la requérante a été représentée par un avocat pendant toute la durée de la procédure.

94. Enfin, le Gouvernement soutient que la requérante aurait pu, pendant la phase d'instruction, se plaindre de la durée de la procédure auprès du président du tribunal compétent (paragraphe 61 ci-dessus), mais qu'elle ne l'a pas fait. Il reconnaît qu'elle a formé deux recours hiérarchiques sur le fondement de la loi de 2006 (paragraphes 33 et 52 ci-dessus), mais il estime que le tribunal de district de Maribor a réservé à ces deux recours une suite appropriée, en fixant une audience dans un délai de un mois à compter de la réception du premier recours et en transmettant à la requérante les motifs du jugement quelques jours seulement après avoir enregistré le second recours. S'agissant du procès, le Gouvernement concède que l'audience a été renvoyée à neuf reprises pour diverses raisons, mais il considère que seul le premier ajournement a été relativement long, ajoutant qu'il était de surcroît motivé par l'état de santé de X. Il expose par ailleurs que l'importante quantité d'éléments de preuve à recueillir a également contribué à la durée totale du procès.

2. L'appréciation de la Cour

(...)

b) La protection de l'intégrité personnelle de la requérante dans le cadre de la procédure pénale relative aux abus sexuels subis par elle

101. La Cour est appelée à examiner si, dans le cadre de la procédure pénale relative aux violences sexuelles dont la requérante alléguait avoir été victime, l'État a suffisamment protégé son droit au respect de sa vie privée, et notamment de son intégrité personnelle. Se trouve donc en cause, non pas un acte de l'État, mais l'absence ou l'insuffisance alléguées de mesures visant à protéger les droits de la victime au cours de la procédure pénale. à cet égard, la Cour rappelle que si l'article 8 a essentiellement pour objet de prémunir l'individu contre des ingérences arbitraires des pouvoirs publics, il ne se contente pas de commander à l'État de s'abstenir de pareilles ingérences : à cet engagement négatif peuvent s'ajouter des obligations positives inhérentes à un respect effectif de la vie privée ou familiale. Ces obligations peuvent impliquer l'adoption de mesures visant au respect de la vie privée jusque dans les relations des individus entre eux (*X et Y c. Pays-Bas*, 26 mars 1985, § 23, série A n° 91).

102. La frontière entre les obligations positives et les obligations négatives de l'État au titre de l'article 8 ne se prête pas à une définition précise ; les principes applicables sont néanmoins comparables. En particulier, dans les deux cas, il faut avoir égard au juste équilibre à ménager entre les intérêts concurrents en jeu (*White c. Suède*, n° 42435/02, § 20, 19 septembre 2006).

103. S'agissant des conflits qui peuvent opposer les intérêts de la défense et ceux des témoins dans le cadre d'une procédure pénale, la Cour a déjà dit à plusieurs reprises que la procédure pénale devait se dérouler de manière à ne pas mettre indûment en péril la vie, la liberté ou la sécurité des témoins, et en particulier celles des victimes appelées à déposer, ou les droits tombant, d'une manière générale, sous l'empire de l'article 8 de la Convention. Les intérêts de la défense doivent donc être mis en balance avec ceux des témoins ou des victimes appelés à déposer (*Doorson*, précité, § 70). Les procédures pénales relatives à des infractions à caractère sexuel sont souvent vécues comme une épreuve par la victime, en particulier lorsque celle-ci est confrontée contre son gré au prévenu. Ces aspects prennent encore plus de relief dans une affaire impliquant un mineur. Par conséquent, dans le cadre de pareilles procédures pénales, certaines mesures peuvent être prises afin de protéger la victime, pourvu que ces mesures puissent se concilier avec un exercice adéquat et effectif des droits de la défense (*S.N. c. Suède*, précité, § 47, et *Aigner c. Autriche*, n° 28328/03, § 37, 10 mai 2012).

104. Dans les affaires dont la Cour a jusqu'à présent eu à connaître, la question de savoir si les autorités internes étaient parvenues à ménager un juste équilibre entre les intérêts de la défense, en particulier le droit de l'accusé de faire citer et d'interroger les témoins énoncé par l'article 6 § 3 d), et les droits de la victime protégés par l'article 8, avait toujours été soulevée par l'accusé. à l'inverse, en l'espèce la Cour doit se pencher sur cette question du point de vue de la victime présumée. Elle se propose à cette fin de prendre en compte les critères énoncés dans les instruments internationaux pertinents (paragraphes 69-72 ci-dessus). à cet égard, elle note que la Convention du Conseil de l'Europe sur la prévention et la lutte contre la violence à l'égard des femmes et la violence domestique fait obligation aux parties contractantes de prendre les mesures législatives et autres nécessaires pour protéger les droits et intérêts des victimes, notamment des mesures pour mettre les victimes à l'abri des risques d'intimidation et de nouvelle victimisation, pour leur permettre d'être entendues et de présenter leurs vues, besoins et préoccupations et pour que ceux-ci soient examinés et pour leur donner la possibilité, si le droit interne applicable l'autorise, de témoigner hors la présence de l'auteur présumé de l'infraction. Par ailleurs, la directive 2012/29/UE du Parlement européen et du Conseil établissant des normes minimales concernant les droits, le soutien et la protection des victimes de la criminalité dispose, entre autres, que les auditions de la victime doivent être menées sans retard injustifié et que les examens médicaux doivent être limités à leur minimum.

105. S'agissant de la manière dont les droits de la requérante ont été protégés dans le cadre de la procédure pénale litigieuse, la Cour observe, d'une part, que les seules preuves directes disponibles dans cette affaire résidaient dans la déposition faite par l'intéressée au procès, et, d'autre part, que les autres éléments de preuve produits étaient contradictoires, puisque le rapport de la psychologue qui confirmait la réalité des abus sexuels était contredit par celui de l'orthopédiste. Elle estime dans ces conditions que l'exigence d'équité du procès commandait de donner à la défense la possibilité de contre-interroger la requérante, qui n'était plus mineure à la date de l'audience. Elle doit néanmoins déterminer si la manière dont l'intéressée a été interrogée a permis de ménager un juste équilibre entre son intégrité personnelle et les droits de la défense garantis à X.

106. à ce propos, la Cour redit qu'en règle générale, les droits garantis à l'accusé par l'article 6 §§ 1 et 3 d) de la Convention commandent d'accorder à celui-ci une occasion adéquate et suffisante de contester un témoignage à charge et d'en interroger l'auteur, au moment de la déposition ou plus tard (*Saïdi c. France*, 20 septembre 1993, § 43, série A n° 261-C, et *A.M. c. Italie*, n° 37019/97, § 25, CEDH 1999-IX). En outre, la Cour doit éviter de faire

sa propre appréciation de la conduite d'un interrogatoire, l'examen de l'admissibilité et de la pertinence des preuves relevant au premier chef des autorités nationales compétentes (*Schenk c. Suisse*, 12 juillet 1988, § 46, série A n° 140, et *Engel et autres c. Pays-Bas*, 8 juin 1976, § 91, série A n° 22). Cela étant, la Cour a aussi déjà dit que le droit de se défendre ne confère pas à une personne un droit illimité à user de n'importe quel argument pour sa défense (voir, *mutatis mutandis*, *Brandstetter c. Autriche*, 28 août 1991, § 52, série A n° 211). En conséquence, étant donné que toute confrontation directe entre les auteurs présumés d'infractions à caractère sexuel et leurs victimes présumées risque de traumatiser celles-ci davantage, la conduite d'un contre-interrogatoire par les accusés doit, de l'avis de la Cour, faire l'objet d'une évaluation attentive de la part des juridictions internes, *a fortiori* lorsque les questions ont un caractère intime.

107. L'interrogatoire de la requérante s'est étendu sur quatre audiences (paragraphes 31-32, 34-38 et 40 ci-dessus), qui se sont tenues en l'espace de sept mois, période longue qui, selon la Cour, est en elle-même préoccupante, d'autant plus que rien ne semble expliquer les longs intervalles qui ont séparé les audiences. En outre, à deux de ces audiences, X, le prévenu, par ailleurs représenté par un avocat pendant toute la durée de la procédure, interrogea personnellement la requérante. Au-delà de sa thèse consistant à dire qu'il était physiquement incapable de l'agresser, il l'interrogea en posant comme point de départ qu'elle l'avait considéré comme une personne de confiance, que c'était elle qui avait recherché sa compagnie et non le contraire, et que les accusations portées par elle contre lui étaient dues à la volonté de sa mère de lui extorquer de l'argent. La plupart de ses questions étaient donc de nature clairement personnelle.

108. La Cour relève que certaines des questions posées par X étaient formulées de manière à induire les réponses, et que d'autres furent posées plusieurs fois (paragraphes 34 et 36 ci-dessus). De plus, X ne cessait de contester la véracité des réponses de la requérante, exposant sa propre version des faits. La défense devait certes se voir reconnaître une certaine latitude pour contester la crédibilité de la requérante et mettre en lumière d'éventuelles incohérences dans sa déposition. Toutefois, la Cour estime que le contre-interrogatoire ne doit pas être utilisé comme un moyen d'intimider ou d'humilier les témoins. Or, de ce point de vue, elle considère que certaines des questions et remarques de X, par exemple celles suggérant, sans aucune preuve, que la requérante pouvait pleurer sur commande pour manipuler les gens, qu'elle s'apaiserait si elle allait dîner avec lui ou encore qu'elle lui avait confié son désir de dominer les hommes, visaient non seulement à mettre en doute la crédibilité de la requérante, mais aussi à dénigrer celle-ci.

109. La Cour estime qu'il appartenait au premier chef à la juge qui présidait la formation de jugement de veiller à ce que le respect de l'intégrité personnelle de la requérante fût correctement protégé durant le procès. Pour la Cour, le fait que la requérante ait été interrogée directement, longuement et dans les moindres détails par celui qu'elle accusait de l'avoir agressée sexuellement conférait à la situation un caractère sensible qui commandait à la présidente de contrôler la forme et le contenu des questions et commentaires de X et d'intervenir en cas de besoin. De fait, il ressort du procès-verbal d'audience qu'elle interdit à X de poser certaines questions sans lien avec l'affaire. La Cour estime cependant que les insinuations agressives de X au sujet de la requérante dépassaient elles aussi les limites de ce qui pouvait être toléré pour lui permettre de se défendre de manière effective et qu'elles auraient justifié la même réaction. étant donné la possibilité qui fut donnée à X de mener un contre-interrogatoire étendu, une limitation de ses remarques personnelles n'aurait pas indûment restreint les droits de la défense et aurait allégé ce qui fut sans nul doute une épreuve pour la requérante (paragraphes 37-38 ci-dessus).

110. S'agissant de l'argument de la requérante consistant à dire que M., le conseil de X, aurait dû être dessaisi de sa mission de représentation de X dans le cadre de la procédure au motif qu'elle l'avait consulté au sujet des agressions sexuelles avant même que la police en eût été informée, il n'appartient pas à la Cour de spéculer sur le point de savoir si la requérante et M. se connaissaient avant le procès et, dans l'affirmative, à quel titre, cette tâche étant du ressort des autorités internes. Il apparaît toutefois que la possibilité que la requérante et M. se fussent déjà rencontrés de manière informelle ne soulevait pas, au regard du droit interne, de problème de conflit d'intérêts de nature à entraîner le dessaisissement de M. (paragraphes 29, 31 et 40-42 ci-dessus). C'est pourquoi le tribunal de district de Maribor rejeta la demande de dessaisissement de M. que la requérante lui avait soumise, estimant que l'intéressée n'avait avancé aucun moyen juridique propre à la faire accueillir.

111. Or, en supposant que l'allégation de la requérante était vraie, la Cour ne peut que considérer que le contre-interrogatoire mené par M. a eu sur elle des effets psychologiques très supérieurs à l'appréhension qu'elle aurait éprouvée si elle avait été interrogée par un autre avocat. Il n'aurait donc pas fallu méconnaître totalement cet aspect au moment d'apprécier si M. devait ou non être dessaisi. Plus généralement, la Cour estime que toute information éventuellement reçue de la requérante par M. en sa qualité d'avocat, même en l'absence d'un mandat, aurait dû être traitée comme confidentielle et n'aurait pas dû être utilisée au profit d'une partie adverse dans la même affaire. La Cour considère donc que le droit interne relatif

au dessaisissement des avocats ou l'application qui en a été faite en l'espèce n'étaient pas suffisamment protecteurs des intérêts de la requérante.

112. Enfin, la requérante allègue que B., l'expert en gynécologie chargé d'établir si elle avait eu des rapports sexuels à l'époque des faits allégués, l'a contrainte à répondre à des questions accusatrices sans lien avec la mission qui lui avait été confiée. De ce point de vue, la Cour considère qu'eu égard à la nature même de la situation, c'est en premier lieu aux autorités publiques chargées de la procédure qu'il appartient de protéger l'intégrité personnelle des victimes d'infractions parties à une procédure pénale. À cet égard, la Cour estime que les autorités sont également tenues de s'assurer que les autres intervenants qui leur apportent leur concours pour conduire l'instruction ou statuer sur l'affaire traitent les victimes et les autres témoins avec dignité et ne les perturbent pas inutilement. En l'espèce, la Cour note qu'indépendamment de la place de B. dans la procédure, le Gouvernement n'a pas contesté que la responsabilité de l'État pouvait être engagée à raison de son comportement. La Cour ne voit aucune raison d'en juger autrement, compte tenu, entre autres, de ce que c'est le juge d'instruction qui, dans l'exercice de ses pouvoirs judiciaires, désigna l'expert et ordonna l'expertise contestée.

113. S'agissant de l'expertise, la Cour note par ailleurs que B. a confronté la requérante aux conclusions de la police et de l'orthopédiste, et qu'il lui a demandé pourquoi elle ne s'était pas défendue avec plus de vigueur (paragraphe 22 ci-dessus), abordant donc des aspects sans lien avec la question qu'il était censé examiner. La Cour considère que les questions et remarques de B., de même que les conclusions juridiques énoncées par lui dans son expertise n'entraient pas dans le cadre de la mission qui lui avait été confiée et dépassaient ses compétences médicales. De surcroît, rien n'indique que B. eût été formé pour mener des entretiens avec des victimes d'abus sexuels ; on aperçoit donc difficilement à quoi pouvait servir son intervention concernant des questions qui relevaient de la compétence des autorités de poursuite et de jugement. Enfin et surtout, il apparaît que la requérante a été amenée à adopter une attitude défensive qui, de l'avis de la Cour, a inutilement accru la tension liée à la procédure pénale.

114. La Cour a conscience que les autorités internes, et en particulier la juge qui présidait la formation de jugement, se trouvaient devant une tâche délicate, dès lors qu'il s'agissait de ménager un juste équilibre entre les intérêts en conflit et à garantir l'exercice effectif des droits de la défense que sont le droit à l'assistance d'un défenseur et celui d'interroger les témoins à charge. Elle reconnaît aussi que plusieurs mesures furent prises pour éviter de causer un traumatisme supplémentaire à la requérante. Ainsi, celle-ci fut entendue par le juge d'instruction hors la présence du prévenu et de

son conseil, le procès se déroula à huis clos et le prévenu fut conduit hors du prétoire pendant qu'elle faisait sa déposition (paragraphes 18, 29, 31 et 34 ci-dessus). De plus, la nervosité de la requérante durant sa déposition et son contre-interrogatoire conduisit à suspendre les audiences plusieurs fois pendant quelques minutes ou à les renvoyer à une date ultérieure (paragraphes 31 et 37-38 ci-dessus). En outre, au cours du contre-interrogatoire, la présidente avertit l'accusé qu'il ne devait pas répéter la même question plusieurs fois et elle interdit certaines questions (paragraphe 36 ci-dessus). La Cour considère néanmoins que dès lors que le prévenu et la requérante se connaissaient déjà et compte tenu du caractère intime du sujet en cause et du jeune âge de la requérante – qui était mineure au moment des agressions sexuelles alléguées – l'affaire revêtait une sensibilité particulière dont les autorités auraient dû tenir compte dans leur conduite de la procédure pénale. Elle estime que, eu égard à leur effet cumulatif, les facteurs analysés ci-dessus, qui ont eu un effet négatif sur l'intégrité personnelle de la requérante (paragraphes 107-113 ci-dessus), ont entraîné une gêne très supérieure à celle inhérente au fait de témoigner en qualité de victime d'abus sexuels et ne peuvent donc être justifiés par les exigences d'un procès équitable.

115. La Cour conclut dès lors que la manière dont la procédure pénale a été menée en l'espèce n'a pas assuré à la requérante une protection apte à ménager un juste équilibre entre ses droits et intérêts protégés par l'article 8 de la Convention et les droits de la défense garantis à X par l'article 6.

116. Il y a donc eu violation de l'article 8 de la Convention.

(...)

PAR CES MOTIFS, LA COUR

1. *Déclare*, à l'unanimité, la requête recevable ;
2. *Dit*, à l'unanimité, qu'il y a eu violation de l'article 3 de la Convention à raison du manquement des autorités de l'État défendeur à mener promptement une enquête et des poursuites à la suite des allégations d'abus sexuels formulées par la requérante ;
3. *Dit*, par six voix contre une, qu'il y a eu violation de l'article 8 de la Convention à raison du manquement des autorités de l'État défendeur à protéger l'intégrité personnelle de la requérante dans le cadre de la procédure pénale pour abus sexuels menée à la suite desdites allégations ;

(...)

Fait en anglais, puis communiqué par écrit le 28 mai 2015, en application de l'article 77 §§ 2 et 3 du règlement de la Cour.

Claudia Westerdiek	Mark Villiger
Greffière	Président

Au présent arrêt se trouve joint, conformément aux articles 45 § 2 de la Convention et 74 § 2 du règlement, l'exposé de l'opinion séparée de la juge Yudkivska.

M.V.
C.W.

OPINION EN PARTIE DISSIDENTE DE LA JUGE YUDKIVSKA

(Traduction)

Si je partage sans réserve la position de la majorité quant au fait que l'enquête sur les allégations d'abus sexuels formulées par la requérante a eu une durée excessive, incompatible avec l'article 3, je ne peux souscrire à la conclusion selon laquelle il y a également eu violation de l'article 8 en l'espèce.

L'affaire concerne le juste équilibre à ménager entre les intérêts de la défense dans une procédure pénale et ceux d'une victime appelée à témoigner. Après un examen attentif des pièces du dossier, j'estime que la Cour, une juridiction internationale, aurait des difficultés à indiquer quelles mesures supplémentaires la présidente de la formation de jugement aurait pu prendre pour protéger les intérêts de la requérante sans pour autant porter atteinte aux droits tenant à l'équité du procès garantis au prévenu.

La Cour a déjà eu à examiner sur le terrain de l'article 8 plusieurs requêtes formées par des victimes de viol, dans lesquelles les autorités avaient manqué à l'obligation positive pesant sur elles de conduire une enquête effective sur les allégations d'abus sexuels (voir, parmi les exemples les plus récents, *C.A.S. et C.S. c. Roumanie*[1] et *D.J. c. Croatie*[2], avec les autres références qui y sont citées) ; jamais, toutefois, elle ne s'était livrée à un examen aussi précis des interrogatoires conduits pendant le procès.

Qui plus est, dans l'arrêt novateur rendu par elle dans l'affaire *M.C. c. Bulgarie*[3], la Cour a dit que, dans les circonstances de l'espèce, elle devait se borner à

> « rechercher si oui ou non la législation et la pratique incriminées, ainsi que leur application en l'espèce, associées aux insuffisances alléguées de l'enquête, [avaient] été défaillantes au point d'emporter violation des obligations positives qui incombent à l'État défendeur en vertu des articles 3 et 8 de la Convention (...) [et qu'elle n'était] pas appelée à se prononcer sur les allégations d'erreurs ou d'omissions particulières de l'enquête ».

Néanmoins, dans ladite affaire, la Cour a reproché aux autorités de ne pas avoir « examin[é] tous les faits et (...) statu[é] après s'être livrées à une appréciation de l'ensemble des circonstances (...) » (*ibidem*, § 181). En l'espèce, à l'inverse, les autorités judiciaires internes ont été critiquées pour

1. *C.A.S. et C.S. c. Roumanie*, n° 26692/05, 20 mars 2012.
2. *D.J. c. Croatie*, n° 42418/10, 24 juillet 2012.
3. *M.C. c. Bulgarie,* n° 39272/98, §§ 167-168, CEDH 2003-XII.

ne pas avoir rejeté certaines questions susceptibles d'apporter un éclairage supplémentaire sur les circonstances de l'espèce.

Les praticiens du droit ne savent que trop combien il est difficile de faire aboutir des poursuites dans des affaires de viol ; il y a plusieurs raisons à cela : les viols se déroulent rarement en présence de témoins, les preuves matérielles corroborant les faits font souvent défaut et l'accusation est à l'évidence difficile à prouver, entre autres.

L'accusation se fonde donc en grande partie sur le témoignage de la victime, qui constitue très souvent le principal fondement de la condamnation. La seule stratégie de défense que peut adopter le prévenu dans ce type d'affaires consiste à réfuter la véracité des déclarations de la victime et à la discréditer. Il n'est donc guère surprenant qu'il pose parfois des questions trop intimes et trop indiscrètes – qui permettent précisément au juge d'observer le comportement de la victime en situation de contre-interrogatoire. Ce principe se trouve au cœur même du droit pour le prévenu d'interroger les témoins à charge.

Il y a de cela environ cent vingt ans, la Cour suprême des États-Unis a dit que le droit à la confrontation avait « principalement pour objet » d'éviter que

> « des dépositions ou des déclarations unilatérales (...) ne soient utilisées contre le détenu en lieu et place d'un interrogatoire et contre-interrogatoire directs du témoin offrant à l'accusé la possibilité, non seulement de tester la mémoire du témoin et d'explorer son for intérieur, mais aussi de l'obliger à faire face au jury afin que celui-ci puisse l'observer et apprécier s'il est digne de foi[4] d'après son comportement à la barre et la manière dont il livre son témoignage ».

Le droit à la confrontation a une histoire longue et riche ; il puise ses racines dans le droit romain et a connu un développement considérable dans les systèmes de *common law*, où il repose sur la conviction qu'« il est toujours plus difficile de mentir à quelqu'un « en face » que « derrière son dos » et que « même si le mensonge est proféré, il le sera souvent de manière moins convaincante ». Ce principe a été exposé par le juge Antonin Scalia dans l'arrêt rendu par la Cour suprême des États-Unis dans l'affaire *Coy v. Iowa*[5]. Dans cet arrêt qui a fait date, le juge Scalia a relaté l'histoire du droit à la confrontation, qu'il a décrit comme un « face à face », illustré par Shakespeare dans *Richard II* :

> « Shakespeare décrit donc le sens profond de la confrontation lorsqu'il fait dire à Richard II :
>
> > « Mande-les donc en notre présence : que face à face,

4. *Mattox v. United States*, 156 U.S. 237 (1895), pp. 242-243.
5. *Coy v. Iowa*, 487 U.S. 1012 (1988), p. 1019.

> fronçant sourcil contre sourcil, l'accusateur et l'accusé
>
> s'expliquent librement devant nous. »[6] »

Il conclut en disant « qu'il y a quelque chose de profondément ancré dans la nature humaine qui considère la confrontation directe entre l'accusé et l'accusateur comme « indispensable à l'équité du procès pénal ». Dans l'arrêt *California v. Green*[7], le droit à la confrontation fut décrit comme le « plus grand mécanisme juridique jamais inventé aux fins de la manifestation de la vérité ».

Contrairement à la Constitution des États-Unis, la Convention ne garantit pas à proprement parler un droit à la confrontation directe entre l'accusé et la victime. Néanmoins, dans de nombreuses affaires portant également sur des abus sexuels commis sur des mineurs, la Cour a considéré que les garanties d'équité du procès n'étaient pas respectées si l'accusé n'avait à aucun moment au cours de la procédure la possibilité de poser des questions à la victime présumée (voir, comme un des exemples récents, l'arrêt *Vronchenko c. Estonie*[8]). La garantie prévue à l'article 6 § 3 d) de la Convention est comparable – elle a pour objet d'aider le juge à observer le comportement d'un témoin pendant qu'il est entendu. Cette disposition n'a pas pour seul effet de protéger les intérêts de la défense ; elle sert aussi la justice de manière plus générale : elle contribue en effet à la manifestation de la vérité, puisque les questions posées par la défense permettent d'apprécier la crédibilité du témoin, mais aussi de mettre en lumière de nouveaux éléments factuels susceptibles d'avoir une influence importante sur les conclusions du tribunal[9]. Or, à mes yeux, dans cette affaire, la majorité a méconnu cette composante essentielle du droit du prévenu à interroger le principal témoin à charge.

En l'espèce, la requérante alléguait avoir été victime de violences sexuelles, atteintes particulièrement traumatisantes et comptant au nombre des plus graves qui puissent être portées à l'intégrité physique de l'individu. Il a ainsi été dit qu'« en dehors du meurtre, le viol constitue la forme d'atteinte la plus extrême, celle qui a le plus de conséquences physiques et psychologiques sur la victime »[10]. La procédure judiciaire représente à l'évidence un traumatisme de plus pour la victime, *a fortiori* lorsque celle-ci est mineure. En conséquence, il est important de se préoccuper de son confort psychologique et ces considérations peuvent, dans certains cas, l'emporter sur le droit de l'accusé à la confrontation.

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6. *Richard II*, Acte I, scène 1.
7. *California v. Green*, 399 U.S. 149 (1970).
8. *Vronchenko c. Estonie*, n° 59632/09, 18 juillet 2013.
9. Stefan Trechsel, *Human Rights in Criminal Proceedings*, Oxford University Press, 2005, p. 293.
10. Janet L. Barkas, *Victims*, New York: Scribner, 1978.

Selon la directive 2012/29/UE du Parlement européen et du Conseil établissant des normes minimales concernant les droits, le soutien et la protection des victimes de la criminalité, adoptée le 25 octobre 2012, des mesures doivent être prises pour les victimes les plus fragiles, notamment « des mesures permettant d'éviter toute audition inutile concernant la vie privée de la victime sans rapport avec l'infraction pénale » et « des mesures permettant de tenir des audiences à huis clos » (article 23 § 3 c) et d)).

Les autres instruments internationaux relatifs à la protection des victimes, dont ceux cités dans l'arrêt, insistent certes sur les droits des victimes au cours de la procédure pénale, mais ils soulignent aussi l'importance des droits de la défense. Nul ne conteste que sacrifier les droits de l'accusé au nom du confort psychologique de la victime conduirait à une mauvaise décision.

Dans la présente affaire, il importe de rappeler que si la requérante avait entre quatorze et quinze ans à la date des événements allégués, la procédure pénale a eu lieu cinq ou six ans plus tard, ce qui signifie, premièrement, que le traumatisme n'était plus aussi intense qu'immédiatement après l'événement et que, deuxièmement, la requérante avait atteint l'âge adulte. Il est donc difficile de faire valoir qu'elle était particulièrement vulnérable au moment où elle fut entendue par le tribunal.

Par ailleurs, la requérante fut auditionnée à huis clos, ce qui revêt une importance capitale (directive 2012/29/UE, précitée). De surcroît, le tribunal accéda à sa demande de faire sortir X du prétoire pendant l'interrogatoire. à cela s'ajoute que, comme l'a aussi noté la majorité, la juge qui présidait la formation de jugement interdit certaines questions de X, estimant qu'elles étaient sans lien avec l'affaire. Dès lors, quelles mesures supplémentaires la juge aurait-elle pu prendre pour protéger les droits de la victime sans se priver totalement de la possibilité d'apprécier sa crédibilité ?

La majorité considère que « [l]a plupart [des] questions [de X] étaient (...) de nature clairement personnelle » (paragraphe 107 de l'arrêt). Je souscris pleinement à ce constat et peux difficilement imaginer quelles questions de nature impersonnelle un accusé qui se dit innocent pourrait poser à une victime qui, selon lui, le diffame. Alors que certaines des observations de X visaient en réalité à mettre en lumière les facettes négatives de la personnalité de la requérante, la majorité les qualifie d'« insinuations agressives » dépassant « les limites de ce qui pouvait être toléré pour lui permettre de se défendre de manière effective » (paragraphe 109 de l'arrêt). Or ces observations avaient manifestement pour but de tester la crédibilité de la requérante et de permettre au tribunal d'observer son comportement face à des questions provocatrices – ce qui, je le rappelle, constitue le principe même sur lequel repose une confrontation au cours d'une audience.

La manière dont X a construit sa ligne de défense a sans nul doute été une source de tension supplémentaire pour la requérante, qui avait déjà subi un traumatisme profond. Toutefois, la présente espèce est très différente de l'affaire *Brandstetter c. Autriche*[11] citée par la majorité en ce que dans celle-ci le requérant, qui était visé par une procédure pour frelatage de vin (infraction pour laquelle il n'était passible que d'une peine d'amende et qui, en principe, n'est pas comparable à une accusation de viol), avait, au cours de la procédure, accusé délibérément et à tort un fonctionnaire d'une infraction visant à manipuler des preuves, exposant celui-ci à un risque de sanctions disciplinaires. En l'espèce, les « insinuations agressives » du requérant, par exemple les commentaires consistant à dire que « la requérante pouvait pleurer sur commande pour manipuler les gens, qu'elle s'apaiserait si elle allait dîner avec lui ou encore qu'elle lui avait confié son désir de dominer les hommes » sont essentiellement des jugements de valeur et ne peuvent être comparés à une accusation d'agression sexuelle, qui selon X était fausse. Il n'y a aucune commune mesure entre le degré d'atteinte à la vie privée que représentent ces commentaires et celui qui découle d'une accusation d'infraction grave. Je ne peux donc me rallier à l'idée que les questions de X allaient au-delà de ce qui était admissible pour lui permettre d'assurer sa défense, étant donné que se trouvaient en jeu son honneur et sa liberté.

En plus de critiquer les modalités de la confrontation entre X et la requérante, la majorité reproche aux autorités internes de n'avoir pas dessaisi M., l'avocat de X, que la requérante disait avoir déjà eu des contacts informels avec elle. Bien que ce fait n'ait pas été établi, la majorité, « supposant que l'allégation de la requérante était vraie », a estimé qu'il aurait été psychologiquement plus confortable pour la requérante d'être interrogée par un autre avocat. Une fois de plus, si les choses s'étaient déroulées ainsi, le meilleur confort psychologique de la requérante aurait eu pour contrepartie un affaiblissement du droit de X de se défendre avec l'aide d'un avocat de son choix. La majorité considère aussi, à partir d'une hypothèse pour le moins théorique, que « toute information éventuellement reçue de la requérante par M. en sa qualité d'avocat (...) aurait dû être traitée comme confidentielle et n'aurait pas dû être utilisée au profit d'une partie adverse dans la même affaire » (paragraphe 110 de l'arrêt). Or rien ne prouve dans le dossier qu'il en ait été autrement.

Enfin, la majorité critique la manière dont B., le gynécologue, a interrogé la requérante, lui reprochant plus précisément de l'avoir « confronté[e] (...) aux conclusions de la police et de l'orthopédiste et [de lui avoir] demandé pourquoi elle ne s'était pas défendue avec plus de vigueur (...), abordant

11. *Brandstetter c. Autriche*, 28 août 1991, série A nº 211.

donc des aspects sans lien avec la question qu'il était censé examiner » (paragraphe 113 de l'arrêt). En vérité, la mission confiée à B. consistait à « apprécier la probabilité que la requérante eût eu des rapports sexuels » (paragraphe 22), si bien qu'il lui fallait évaluer si son témoignage était crédible du point de vue médical. étant donné que l'hymen de la victime était intact et que X n'avait pas pu utiliser son bras gauche pour l'empêcher de résister, il ne peut être dit que les questions de B. étaient totalement dépourvues de pertinence pour le rapport qu'il devait établir.

Eu égard aux considérations qui viennent d'être exposées et au fait que dans des affaires comme celle-ci, l'absence de vision complète du déroulement du procès impose une certaine retenue au juge international, j'ai voté en faveur d'un constat de non-violation de l'article 8.

RUSLAN YAKOVENKO v. UKRAINE
(Application no. 5425/11)

FIFTH SECTION

JUDGMENT OF 4 JUNE 2015[1]

1. English original.

SUMMARY[1]

Applicant dissuaded from lodging an appeal against conviction since any appeal would have delayed his release

The very essence of the right embodied in Article 2 of Protocol No. 7 to have his or her conviction or sentence reviewed by a higher tribunal is infringed when the realisation of the right to appeal would be at the cost of the applicant's liberty, especially if for an unspecified period (see paragraph 82 of the judgment).

Article 5 § 1 of the Convention

Lawful arrest or detention – After conviction – Preventive detention of convicted prisoner until judgment became final, even after his prison sentence had expired

Article 2 of Protocol No. 7

Right of appeal in criminal matters – Review of conviction – Applicant dissuaded from lodging an appeal against conviction since any appeal would have delayed his release

*

* *

Facts
On 12 July 2010 the applicant was found guilty of grievous bodily harm and sentenced to four years and seven months' imprisonment. The court ordered that the applicant should remain in a pre-trial detention centre ("SIZO") as a preventive measure pending the entry into force of the judgment. On 15 July 2010 the term of the applicant's sentence expired since he had already spent a long period in pre-trial detention. He requested the SIZO administration to release him, but his request was rejected. On 27 July 2010 the fifteen-day time-limit for lodging appeals against the judgment of 12 July expired, and, in the absence of any appeal, the judgment became final. The applicant was released on 29 July 2010, when the SIZO received the court's order to execute the final judgment.

Law
(1) Article 5 § 1 of the Convention:
(a) *The applicant's detention from 15 to 27 July 2010* – The applicant's detention during this period had taken place after the delivery of the judgment in his criminal case, but was still considered "pre-trial detention" under the domestic legislation. The judgment of 12 July 2010 provided for two separate measures involving the

1. This summary by the Registry does not bind the Court.

applicant's deprivation of liberty: firstly, a prison sentence, and, secondly, the applicant's detention as a preventive measure until the judgment became final. While the prison sentence was to expire three days later, the second measure was to last for at least twelve days longer, given the fifteen-day time-limit for lodging appeals. In the event of an appeal, the duration of the applicant's detention would have been even longer and would have depended on the examination of the case by the appellate court. Accordingly, the applicant's detention during the period in question, even though it had taken place after the prison sentence had been served in full, could be regarded as an "other measure involving deprivation of liberty", which had taken place "after conviction" in the meaning of Article 5 § 1 (a).
The Court saw no indication that the applicant's detention pending the entry into force of the judgment of 12 July 2010 was contrary to the domestic law. However, the judgment contained no reasoning as to what had led the sentencing court to keep the applicant in detention as a preventive measure for a period that would clearly exceed the duration of the prison sentence imposed. While there might be special considerations that warranted – irrespective of the duration of the prison sentence – the applicant's deprivation of liberty as a preventive measure aimed at ensuring his availability for the judicial proceedings at the appellate level, no such considerations had been mentioned in or could be inferred from the judgment. On the contrary, the court had noted the applicant's cooperation with the investigation and decided, on that ground, to apply a milder sanction than legally envisaged. Accordingly, and as the Government had admitted, the applicant's continued detention after the expiry of his prison sentence had been unjustified and was thus in breach of Article 5 § 1.

(b) *The applicant's detention from 27 to 29 July 2010* – It had taken the domestic authorities two days to arrange for the applicant's release after there ceased to exist grounds for his detention with the entry into force of the judgment of 12 July 2010. The Ukrainian authorities had thus failed to deploy all modern means of communication to keep to a minimum the delay in implementing the decision to release the applicant. The applicant's detention during that period had therefore not been justified under Article 5 § 1.
Conclusion: violation (unanimously).

(2) Article 2 of Protocol No. 7: The domestic courts had considered it necessary to keep the applicant in detention as a preventive measure pending the entry into force of the first-instance court's judgment even after the prison sentence imposed on him by that judgment had already expired. In the absence of any appeal, the period in question had lasted for twelve days. Had the applicant decided to appeal, this would have delayed the entry into force of the judgment for an unspecified period. Accordingly, the realisation of the applicant's right to appeal would have been at the price of his liberty, especially as the length of his detention would have been

unspecified. That circumstance had infringed the very essence of his right embodied in Article 2 of Protocol No. 7.
Conclusion: violation (unanimously).

Article 41: 3,000 euros in respect of non-pecuniary damage.

Case-law cited by the Court

Airey v. Ireland, 9 October 1979, Series A no. 32
Ananyev and Others v. Russia, nos. 42525/07 and 60800/08, 10 January 2012
Austin and Others v. the United Kingdom [GC], nos. 39692/09 and 2 others, ECHR 2012
B. v. Austria, 28 March 1990, Series A no. 175
Baranowski v. Poland, no. 28358/95, ECHR 2000-III
Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania [GC], no. 47848/08, ECHR 2014
Del Río Prada v. Spain [GC], no. 42750/09, ECHR 2013
Dimitrov v. Bulgaria (dec.), no. 55861/00, 9 May 2006
Erkalo v. the Netherlands, 2 September 1998, *Reports of Judgments and Decisions* 1998-VI
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Melnik v. Ukraine, no. 72286/01, 28 March 2006
Mokallal v. Ukraine, no. 19246/10, 10 November 2011
Mooren v. Germany [GC], no. 11364/03, 9 July 2009
Murray v. the Netherlands, no. 10511/10, 10 December 2013
Nikolov v. Bulgaria, no. 38884/97, 30 January 2003
Pesti and Frodl v. Austria (dec.), nos. 27618/95 and 27619/95, ECHR 2000-I
Plesó v. Hungary, no. 41242/08, 2 October 2012
Quinn v. France, 22 March 1995, Series A no. 311
Saadi v. the United Kingdom [GC], no. 13229/03, ECHR 2008
Shukhardin v. Russia, no. 65734/01, 28 June 2007

Solmaz v. Turkey, no. 27561/02, 16 January 2007
Stoichkov v. Bulgaria, no. 9808/02, 24 March 2005
T. v. the United Kingdom [GC], no. 24724/94, 16 December 1999
Van Droogenbroeck v. Belgium, 24 June 1982, Series A no. 50
Wemhoff v. Germany, 27 June 1968, Series A no. 7

In the case of Ruslan Yakovenko v. Ukraine,

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

Mark Villiger, *President*,
Angelika Nußberger,
Boštjan M. Zupančič,
Ganna Yudkivska,
Vincent A. De Gaetano,
André Potocki,
Aleš Pejchal, *judges*,
and Milan Blaško, *Deputy Section Registrar*,

Having deliberated in private on 21 April 2015,

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

PROCEDURE

1. The case originated in an application (no. 5425/11) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Ukrainian national, Mr Ruslan Anatoliyovych Yakovenko ("the applicant"), on 17 January 2011.

2. The applicant was represented by Mr O.V. Levytskyy, a lawyer practising in Kyiv. The Ukrainian Government ("the Government") were represented by their then Agent, Mr N. Kulchytskyy.

3. The applicant complained of the unlawfulness of his detention and of a violation of his right of appeal in criminal proceedings.

4. On 12 December 2012 notice of the application was given to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1979 and lives in Korolivka, in the Kyiv Region.

6. On 12 July 2010 the Bila Tserkva Town Court ("the Bila Tserkva Court") found the applicant guilty of inflicting grievous bodily injuries on a certain Mr N. on 12 May 2006. Although this type of crime was punishable with five to eight years' imprisonment, the court considered it possible to apply a more lenient sanction to the applicant. It had regard, in particular, to

the fact that he had pleaded guilty and had shown remorse. Accordingly, the Bila Tserkva Court sentenced the applicant to four years and seven months' imprisonment. It also decided to include in the served part of the applicant's sentence the period from 20 October 2005 to 3 May 2006 (six months and fourteen days), during which he had been detained in the context of another criminal case. Lastly, in fixing the applicant's sentence the court had regard to the fact that he "had spent more than four years in [pre-trial] detention facilities in which the detention conditions were considerably harsher than in a post-conviction prison, and the previous judgments in respect of him had been quashed". No further information is available regarding the earlier detention of the applicant, the other criminal cases involving him, or the judgments that had been quashed.

7. In the operative part of its judgment, the Bila Tserkva Court also ruled that the applicant should remain in a pre-trial detention centre ("SIZO") as a preventive measure until the judgment became final. It further noted that the judgment was amenable to appeal within fifteen days of the date of its delivery.

8. On 15 July 2010 the term of the applicant's sentence expired, and he asked the SIZO administration to release him. His request was rejected. On the same day the SIZO administration, however, applied to the Bila Tserkva Court for permission to release the applicant subject to an undertaking not to abscond, given that he had served his prison sentence in full. No reply was received.

9. On 19 July 2010 the applicant's lawyer applied once again to the SIZO administration for the applicant's immediate release. He submitted, in particular, that there were no grounds for his client's continued detention. A copy of that letter was also sent to the Kyiv Region Prosecutor's Office.

10. On 27 July 2010 the fifteen-day time-limit for lodging an appeal against the judgment of 12 July 2010 expired and, in the absence of an appeal, it became final.

11. On the same day the SIZO administration wrote to the applicant's lawyer stating that it could not release the applicant until either the preventive measure in respect of him was changed or the judgment became final. It was noted in the letter that, in any event, it was for the Bila Tserkva Court to authorise the applicant's release.

12. On 29 July 2010 the SIZO received the court's order to enforce the final judgment and the applicant was released.

13. On 5 August 2010 the State Prisons Department wrote to the applicant's lawyer in reply to his complaints regarding the delayed release of the applicant, stating that there had been no violation of the Code of Criminal Procedure.

II. RELEVANT DOMESTIC LAW AT THE MATERIAL TIME

A. Code of Criminal Procedure (1960)

14. Article 148 specified the purpose and grounds for the application of preventive measures. It stated, in particular, that a preventive measure was to be imposed where there were sufficient grounds to believe that a suspect, an accused, a defendant or a convicted person would attempt to abscond, fail to comply with procedural decisions, obstruct the establishment of the truth in the case, or pursue criminal activities.

15. At the stage of judicial proceedings a detainee could be released only on the basis of a decision of the judge or the court to that effect (Article 165). As also provided in Article 165, a preventive measure could be lifted or changed if the measure applied previously was no longer necessary.

16. Although during the pre-trial investigation a detainee was to be released immediately by the administration of the detention facility if the term of his or her detention had expired and if no court ruling on its extension had been received by that time (Article 156 *in fine*), no such provision existed in respect of the procedure for releasing a detainee at the stage of judicial proceedings.

17. Article 274 concerned the application, lifting or change of a preventive measure by a trial court. It obliged the court to be guided by the relevant provisions of Chapter 13 ("Preventive measures" – Articles 148 to 165-3).

18. Article 324 required the sentencing court to decide, in particular, on the preventive measure to be applied to a convicted person until the judgment became final.

19. Article 343 reiterated in substance the above provision and further specified that the court could remand a convicted person in custody as a preventive measure only on the grounds provided for in the relevant provisions of Chapter 13.

20. Article 358 listed the issues which the appellate court could consider at a preparatory hearing. It could decide, in particular, to change, lift or apply a preventive measure in respect of a convicted person.

21. Under Article 401, a judgment would become final if it was not challenged on appeal before the statutory deadline (within fifteen days of the date of its delivery – Article 349). If an appeal was lodged, a judgment would become final after the examination of the case by the appellate court (unless it was quashed). An acquittal judgment, or a judgment lifting the punishment, was to be enforced immediately, whereas a judgment involving a guilty verdict was to be enforced once it had become final. Article 404

provided that the court that delivered the judgment had to send the case for enforcement no later than three days after the judgment became final.

B. Civil Code (2003)

22. Article 1176 imposed on the State an obligation to "fully compensate an individual for the damage caused to him or her by unlawful conviction, unlawful imposition of criminal liability, unlawful application of a preventive measure [or] arrest ... regardless of the guilt of officials of the bodies of inquiry, pre-trial investigation authorities, prosecutors' offices or courts" (first paragraph). It further specified that "the right to compensation for damage caused to an individual by unlawful actions of the bodies of inquiry, pre-trial investigation authorities, prosecutors' offices or courts [would] arise in cases envisaged by law" (second paragraph).

C. 1994 Law of Ukraine on the procedure for compensation for damage caused to citizens by the unlawful acts of bodies of inquiry, pre-trial investigation authorities, prosecutors' offices and courts ("the Compensation Act")

23. Under section 1, a person was entitled to compensation for damage caused, in particular, by an unlawful conviction, unlawful indictment, unlawful arrest or remand in custody. In the listed cases, damage was to be compensated for regardless of whether the officials from the bodies of inquiry, pre-trial investigation authorities, prosecutors' offices or courts were guilty.

24. Section 2 listed the cases in which the right to compensation arose. They included the following: (1) an acquittal judgment; (1-1) a judicial decision acknowledging, in particular, that the detention was unlawful; and (2) discontinuation of the criminal proceedings on the grounds of a lack of *corpus delicti* or of proof of guilt of an accused.

THE LAW

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

25. The applicant complained that his detention from 15 to 29 July 2010 had been unlawful. He relied on Article 5 § 1 of the Convention, the relevant part of which reads as follows:

> "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:

(a) the lawful detention of a person after conviction by a competent court;

...

(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. Admissibility

1. Exhaustion of domestic remedies

(a) The parties' submissions

26. The Government argued that the applicant had not complied with the rule of exhaustion of domestic remedies. They conceded that his detention from 15 to 29 July 2010 had indeed been groundless. Relying on Article 1176 of the Civil Code (see paragraph 22 above), they maintained that it had been open to the applicant to seek damages but that he had failed to avail himself of that remedy.

27. The applicant disagreed. He submitted, in particular, that in order for a remedy to be effective in his case, it should have been able to ensure his immediate release once the term of his prison sentence had expired. He had applied for release to the SIZO administration and to the prosecution authorities. However, the SIZO administration had considered his release impossible until the judgment became final. As to the prosecutor's office, it had not found it necessary to intervene at all.

(b) The Court's assessment

(i) General case-law principles

28. The Court notes that the rule of exhaustion of domestic remedies is based on the assumption, reflected in Article 13 of the Convention, with which it has close affinity, that the domestic legal system provides an effective remedy which can deal with the substance of an arguable complaint under the Convention and grant appropriate relief. In this way, it is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (see *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, § 93, 10 January 2012, with further references).

29. An applicant is normally only required to have recourse to domestic remedies which are available and sufficient to afford redress in respect of the

breaches alleged. The existence of these remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness. It is incumbent on the Government claiming non-exhaustion to satisfy the Court on these points, that is to say, that the remedy to which they refer was accessible and capable of providing redress in respect of the applicant's complaints, and offered a reasonable prospect of success. However, once the question of this burden of proof has been satisfied it falls to applicants to establish that the remedy advanced by the Government had in fact been used or was for some reason inadequate and ineffective in their case, or that there existed special circumstances exempting them from the requirement to have recourse to it (see, for example, *Melnik v. Ukraine*, no. 72286/01, § 67, 28 March 2006).

30. The Court further notes that, where a violation of Article 5 § 1 is in issue, Article 5 §§ 4 and 5 of the Convention constitutes *lex specialis* in relation to the more general requirements of Article 13 (see *Dimitrov v. Bulgaria* (dec.), no. 55861/00, 9 May 2006). Accordingly, in order to decide whether an applicant was required to make use of a particular domestic remedy in respect of his or her complaint under Article 5 § 1 of the Convention, the Court must evaluate the effectiveness of that remedy from the standpoint of the above-mentioned provisions.

(ii) Existence of a preventive remedy in compliance with Article 5 § 4

31. The Court observes that from the day when a charge is determined, even if only by a court of first instance, the defendant is detained "after conviction by a competent court" within the meaning of Article 5 § 1 (a) (see paragraphs 46-51 below for a more detailed review of the relevant principles established in the Court's case-law).

32. The Court has held in its case-law that in such circumstances the judicial supervision of the deprivation of liberty required under Article 5 § 4 is considered to be already incorporated into the initial conviction and sentence. However, whenever fresh issues affecting the lawfulness of such detention arise, Article 5 § 4 comes back into play (see, as a recent authority, *Stoichkov v. Bulgaria*, no. 9808/02, §§ 64-65, 24 March 2005, with further references).

33. The Court is prepared to accept that in the present case a fresh issue concerning the lawfulness of the applicant's detention arose for him once his prison sentence had expired but he had not been released. At that stage he had no possibility of bringing judicial proceedings, by which the lawfulness of his continued detention thereafter would have been decided speedily and his release would have been ordered. Thus, the case was no longer before

the first-instance court. As to an ordinary appeal, its examination would have been likely to last longer than the detention of which the applicant complained (twelve days). Moreover, it is not improbable that lodging an appeal would have entailed further extension of his detention as a preventive measure until the judgment became final. The Court will, however, analyse this issue in more detail.

34. As regards the applicant's applications to the SIZO administration and the prosecution, those authorities were not "a court" within the meaning of Article 5 § 4 of the Convention.

35. It follows that there were no effective domestic remedies for the applicant to exhaust with a view to putting an end to the alleged violation of Article 5 § 1.

(iii) Existence of a compensatory remedy in compliance with Article 5 § 5

36. The Court reiterates that Article 5 § 5 is complied with where it is possible to apply for compensation in respect of a deprivation of liberty effected in conditions contrary to paragraphs 1 to 4 of Article 5 where that deprivation has been established, either by a domestic authority or by the Court. The effective enjoyment of the right to compensation guaranteed by Article 5 § 5 must be ensured with a sufficient degree of certainty (see *Lobanov v. Russia*, no. 16159/03, § 54, 16 October 2008, with further references).

37. The Court observes that in the present case the Government confined their objection to a statement that the applicant's detention had been without basis and that he could claim damages under Article 1176 of the Civil Code. The Court notes, however, that that provision is worded in quite general terms: it neither establishes legal preconditions for claiming compensation nor provides for specific mechanisms or procedures. Instead, Article 1176 refers to a separate law regulating those issues. It appears that it is the special law on compensation which should be applicable (see paragraphs 23-24 above). The Government did not refer to that law in their observations. Nor did they specify which provision of the domestic law the applicant's detention had in fact violated. The Government also failed to cite any relevant domestic case-law in this regard. It therefore remains unclear on what grounds and using which mechanisms the applicant could have obtained a judicial finding at the domestic level that his detention had been unlawful and could have claimed compensation for damages in that regard.

38. In such circumstances, the Court is not persuaded by the Government's argument that the remedy advanced by them was effective and had to be pursued by the applicant.

(iv) Conclusion

39. In the light of the foregoing considerations, the Court concludes that the applicant did not have at his disposal any effective domestic remedy to pursue in respect of his complaint under Article 5 § 1 of the Convention. The Court therefore rejects the Government's objection in this regard.

2. Other considerations as to admissibility

40. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. Nor is it inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

41. The applicant submitted that his detention from 15 to 29 July 2010 had been without basis and was thus contrary to Article 5 § 1 of the Convention.

42. In their observations on the admissibility of this complaint (see paragraph 26 above), the Government agreed with the applicant on this point. They did not, however, submit any observations on the merits of the complaint.

2. The Court's assessment

43. The Court considers that for the purposes of its analysis the applicant's detention should be divided into two distinct periods:

(a) from 15 to 27 July 2010, that is after the delivery of the judgment by the first-instance court and before it became final; and

(b) during the subsequent two days, from 27 to 29 July 2010, the time the authorities took to complete all the administrative formalities with a view to implementing the applicant's release after the judgment of the trial court had become final.

44. The Court will examine each period of the applicant's detention separately to see whether they complied with Article 5 § 1 of the Convention.

(a) The applicant's detention from 15 to 27 July 2010

(i) Grounds for the applicant's deprivation of liberty

(α) General case-law principles

45. The Court reiterates that Article 5 enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty. Sub-paragraphs (a) to (f) of

Article 5 § 1 contain an exhaustive list of permissible grounds on which individuals may be deprived of their liberty, and no deprivation of liberty will be compatible with Article 5 § 1 unless it falls within one of those grounds (see, among other authorities, *Austin and Others v. the United Kingdom* [GC], nos. 39692/09 and 2 others, § 60, ECHR 2012).

46. The Court notes that a defendant is considered to be detained "after conviction by a competent court" within the meaning of Article 5 § 1 (a) once the judgment has been delivered at first instance, even where it is not yet enforceable and remains amenable to appeal. The Court has held in this connection that the phrase "after conviction" cannot be interpreted as being restricted to the case of a final conviction, for this would exclude the arrest at the hearing of convicted persons who appeared for trial while still at liberty, whatever remedies are still open to them (see *Wemhoff v. Germany*, 27 June 1968, p. 23, § 9, Series A no. 7). Furthermore, a person convicted at first instance and detained pending appeal cannot be considered to be detained for the purpose of bringing him or her before the competent legal authority on reasonable suspicion of having committed an offence under Article 5 § 1 (c) (see, in particular, *Solmaz v. Turkey*, no. 27561/02, § 25, 16 January 2007).

47. The Court has consistently stated in its case-law that it is mindful of significant differences among the Contracting States on the question whether a person convicted at first instance has started serving a prison sentence while an appeal is still pending. However, the Court reiterates that the important guarantees of Article 5 of the Convention are not dependent on national legislation (see *B. v. Austria*, 28 March 1990, § 39, Series A no. 175, and *Solmaz*, cited above, § 26). Thus, even if the domestic law of a member State provides that a sentence only becomes final on completion of all appeals, pre-trial detention comes to an end for the purposes of the Convention with the finding of guilt and the sentence imposed at first instance (see *Solmaz*, cited above, § 26).

48. For example, in *Grubić v. Croatia* (no. 5384/11, §§ 30-45, 30 October 2012) the applicant, who had been convicted and sentenced to thirty years' imprisonment by a first-instance court, complained of the unlawfulness of several months of his detention after the delivery of the judgment at first instance. His deprivation of liberty during that period was still considered "pre-trial detention" under the domestic legislation. The Court examined his complaint from the standpoint of Article 5 § 1 (a) of the Convention and found no indication of arbitrariness.

49. The Court has also held in its case-law that the word "conviction" for the purposes of Article 5 § 1 (a), having regard to the French text ("*condamnation*"), has to be understood as signifying both a finding of guilt

after it has been established in accordance with the law that there has been an offence, and the imposition of a penalty or other measure involving the deprivation of liberty (see *Guzzardi v. Italy*, 6 November 1980, § 100, Series A no. 39; *Van Droogenbroeck v. Belgium*, 24 June 1982, § 35, Series A no. 50; and, for more recent case-law, *Del Río Prada v. Spain* [GC], no. 42750/09, § 123, ECHR 2013).

50. Furthermore, the word "after" in sub-paragraph (a) of Article 5 § 1 does not simply mean that the detention must follow the conviction in point of time: in addition, the detention must result from, "follow and depend upon" or occur "by virtue of" the conviction. In short, there must be a sufficient causal connection between the conviction and the deprivation of liberty in issue (see *Murray v. the Netherlands*, no. 10511/10, § 77, 10 December 2013, with further references).

51. Thus, the Court has previously found that various forms of preventive detention beyond the prison sentence constituted an applicant's detention "after conviction by a competent court" (see, for example, *Van Droogenbroeck*, cited above, §§ 33-42; *M. v. Germany*, no. 19359/04, § 96, ECHR 2009; and *James, Wells and Lee v. the United Kingdom*, nos. 25119/09 and 2 others, §§ 197-99, 18 September 2012). The detention in issue was not part of a penalty in such circumstances, but rather ensued from another "measure involving the deprivation of liberty", as noted in paragraph 49 above.

(β) Application of the above principles to the present case

52. The Court notes that the applicant's detention during this period took place after the delivery of the judgment in his criminal case, but was still considered "pre-trial detention" under the domestic legislation.

53. Regardless of the classification at the domestic level, the Court notes that this period of the applicant's detention no longer fell under Article 5 § 1 (c) (see, in particular, paragraph 46 above). It remains to be seen whether it was justified under sub-paragraph (a) of Article 5 § 1 of the Convention, since no other sub-paragraph of this provision is in principle applicable to the situation at hand.

54. The Court observes that the judgment of 12 July 2010 provided for two separate measures involving the applicant's deprivation of liberty: firstly, a prison sentence, and, secondly, the applicant's detention as a preventive measure until the judgment became final. Although the penalty imposed was to expire three days later, the second measure was to last for at least twelve days longer, given the fifteen-day time-limit for lodging appeals. Had the applicant lodged an appeal, the duration of his detention would

have been even longer and would have depended on the time taken by the appellate court to examine his case.

55. Accordingly, the Court considers that, even though the detention of which the applicant complained took place after the prison sentence imposed on him had been served in full, it could be regarded as another "measure involving the deprivation of liberty", which took place "after conviction" within the meaning of Article 5 § 1 (a).

56. In sum, the Court concludes that this period of the applicant's detention falls within the exception set out in sub-paragraph (a) of Article 5 § 1 of the Convention. It remains to be seen, however, whether this provision has been complied with.

(ii) Lawfulness of the applicant's detention during the period from 15 to 27 July 2010

(α) General case-law principles

57. The Court reiterates that any deprivation of liberty must, in addition to falling within one of the exceptions set out in sub-paragraphs (a) to (f) of Article 5 § 1, be "lawful". 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 and lays down the obligation to conform to the substantive and procedural rules thereof (see, among many other authorities, *Erkalo v. the Netherlands*, 2 September 1998, § 52, *Reports of Judgments and Decisions* 1998-VI, and *Baranowski v. Poland*, no. 28358/95, § 50, ECHR 2000-III).

58. In assessing whether detention is lawful, the Court must also ascertain whether the domestic law itself is in conformity with the Convention, including the general principles expressed or implied therein. The "quality of the law" implies that where a national law authorises deprivation of liberty it must be sufficiently accessible, precise and foreseeable in its application to avoid all risk of arbitrariness. The standard of "lawfulness" set by the Convention requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Where deprivation of liberty is concerned, it is essential that the domestic law define clearly the conditions for detention (see *Del Río Prada*, cited above, § 125, with further references).

59. Furthermore, arbitrary detention cannot be compatible with Article 5 § 1, as the notion of "arbitrariness" in this context extends beyond the lack of conformity with national law. As a consequence, a deprivation of liberty that is lawful under domestic law can still be arbitrary and thus contrary to the Convention (see *Mooren v. Germany* [GC], no. 11364/03, § 77, 9 July 2009).

60. The Court has not previously formulated a general definition of what types of conduct on the part of the authorities might constitute "arbitrariness" for the purposes of Article 5 § 1. However, key principles that have been developed on a case-by-case basis demonstrate that the notion of arbitrariness in the context of Article 5 varies to a certain extent depending on the type of detention involved (see *Saadi v. the United Kingdom* [GC], no. 13229/03, § 68, ECHR 2008, and *Plesó v. Hungary*, no. 41242/08, § 57, 2 October 2012). One general principle established in the Court's case-law is that detention will be "arbitrary" where, despite complying with the letter of national law, there has been an element of bad faith or deception on the part of the authorities or where the domestic authorities neglected to attempt to apply the relevant legislation correctly (see *Mooren*, cited above, § 78).

61. Furthermore, the requirement that detention must not be arbitrary implies the need for a relationship of proportionality between the ground of detention relied upon and the detention in question (see *James, Wells and Lee*, cited above, § 195). The scope of the proportionality test to be applied in a given case varies depending on the type of detention involved. In the context of detention pursuant to Article 5 § 1 (a), the Court has generally been satisfied that the decision to impose a sentence of detention and the length of that sentence are matters for the national authorities rather than for this Court (see *T. v. the United Kingdom* [GC], no. 24724/94, § 103, 16 December 1999, and *Saadi*, cited above, § 71). At the same time, in assessing whether there were indications of arbitrariness in the applicants' preventive detention not constituting a part of the sentence but still falling under Article 5 § 1 (a), the Court has found it necessary to identify the purpose of their detention under Article 5 § 1 (a) and has pursued the proportionality test (see *James, Wells and Lee*, cited above, § 205).

(β) Application of the above principles to the present case

62. The Court sees no indication that the decision of the Bila Tserkva Court to keep the applicant in detention until the judgment became final was contrary to the domestic law. Furthermore, the applicable legal provisions appear clear and foreseeable in their application. Thus, the Code of Criminal Procedure of Ukraine explicitly states that the sentencing court must decide which preventive measure should be applied to the convicted person until the judgment becomes final (see paragraph 18 above). It also appears from the domestic legislation that the duration of the preventive measure does not depend on the duration of the prison sentence imposed, and can therefore be longer than that sentence.

63. The Court still has to satisfy itself that the applicant's detention during the period in issue, despite its compliance with domestic law, was not arbitrary and thus contrary to the Convention.

64. The Court does not consider that there was any bad faith on the part of the Bila Tserkva Court in its decision on the applicant's continued detention as a preventive measure. At the same time, the Court observes that the judgment contained no reasoning in that regard, apart from a general statement in the operative part on the application of the measure. The sentencing court's reasons for maintaining the applicant's detention as a preventive measure therefore remain unclear, particularly given that it meant that the detention would exceed the duration of the prison sentence imposed.

65. The Court accepts that there might be special considerations warranting, irrespective of the duration of the prison sentence, a convicted person's deprivation of liberty as a preventive measure aimed at ensuring his or her availability for the judicial proceedings at the appellate level in the event that the first-instance court's judgment is challenged on appeal. However, no such considerations were mentioned in, or can be inferred from, the judgment of the Bila Tserkva Court of 12 July 2010. On the contrary, the court noted the applicant's cooperation with the investigation and decided, on that ground, to apply a milder sanction than provided for in the relevant legislation (see paragraph 6 above). Accordingly, the applicant's continued detention beyond the duration of his prison sentence was unjustified. The Court notes in this connection that the Government admitted this in their observations (see paragraph 26 above).

66. In view of the above considerations, the Court concludes that the applicant's detention from 15 to 27 July 2010 was in breach of Article 5 § 1 of the Convention.

(b) The applicant's detention from 27 to 29 July 2010

67. The Court notes that the judgment of the Bila Tserkva Court of 12 July 2010 became final on 27 July 2010. Accordingly, the grounds for the applicant's detention, which had been ordered as a preventive measure until that judgment became final, ceased to exist. Moreover, that period of the applicant's detention was not related to the enforcement of the prison sentence imposed on him, because it had already expired.

68. The Court reiterates that some delay in implementing a decision to release a detainee is understandable, and often inevitable, in view of practical considerations relating to the running of the courts and the observance of particular formalities. However, the national authorities must attempt to keep this to a minimum (see *Quinn v. France*, 22 March 1995, § 42,

Series A no. 311; *Giulia Manzoni v. Italy*, 1 July 1997, § 25 *in fine*, *Reports* 1997-IV; *K.-F. v. Germany*, 27 November 1997, § 71, *Reports* 1997-VII; and *Mancini v. Italy*, no. 44955/98, § 24, ECHR 2001-IX). Administrative formalities connected with release cannot justify a delay of more than a few hours (see *Nikolov v. Bulgaria*, no. 38884/97, § 82, 30 January 2003). It is for the Contracting States to organise their legal system in such a way that their law-enforcement authorities can meet the obligation to avoid unjustified deprivations of liberty (see, for example, *Shukhardin v. Russia*, no. 65734/01, § 93, 28 June 2007, and *Mokallal v. Ukraine*, no. 19246/10, § 44, 10 November 2011).

69. In the present case it took the domestic authorities two days to arrange for the applicant's release once the grounds for his detention had ceased to exist after the judgment of 12 July 2010 became final. Given the prominent place which the right to liberty holds in a democratic society, the respondent State should have deployed all modern means of communication to minimise the delay in implementing the decision to release the applicant, as required by the relevant case-law (see *Mokallal*, cited above, § 44). The Court is not satisfied that the Ukrainian authorities complied with that requirement in the present case.

70. It follows that the applicant's detention during this period was not justified under Article 5 § 1 of the Convention.

(c) Conclusion

71. In the light of all the foregoing considerations, the Court concludes that there has been a violation of Article 5 § 1 of the Convention in respect of the entire period of the applicant's detention complained of (15-29 July 2010).

II. ALLEGED VIOLATION OF ARTICLE 2 § 1 OF PROTOCOL No. 7

72. The applicant also complained under Article 2 of Protocol No. 7 that he had been effectively deprived of the right to appeal against the judgment in his criminal case. The provision relied on reads as follows:

> "1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.
>
> 2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal."

A. Admissibility

73. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. Nor is it inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

74. The applicant submitted that he had effectively been obliged to choose between exercising his right to appeal against the judgment in his criminal case, on the one hand, and his liberty, on the other. In other words, had he decided to appeal, this would have considerably delayed his release.

75. The Government did not comment on the applicant's argument. They observed that, under the domestic legislation, he had had the right to lodge an appeal against the judgment of 12 July 2010, but that he had chosen not to do so. Accordingly, the Government submitted that the applicant's rights under Article 2 of Protocol No. 7 had not been violated.

76. The Court notes that the Contracting States in principle enjoy a wide margin of appreciation in determining how the right secured by Article 2 of Protocol No. 7 to the Convention is to be exercised (see *Krombach v. France*, no. 29731/96, § 96, ECHR 2001-II).

77. As is apparent from the Court's case-law, this provision mostly regulates institutional matters, such as accessibility of the court of appeal or the scope of review in appellate proceedings (see, for example, *Pesti and Frodl v. Austria* (dec.), nos. 27618/95 and 27619/95, ECHR 2000-I).

78. In so far as the accessibility issue is concerned, the Court has considered it acceptable that in certain countries a defendant wishing to appeal may sometimes be required to seek permission to do so. However, it is a well-established case-law principle that any restrictions contained in domestic legislation on the right to a review secured in Article 2 of Protocol No. 7 must, by analogy with the right of access to a court embodied in Article 6 § 1 of the Convention, pursue a legitimate aim and not infringe the very essence of that right (see *Krombach*, cited above, § 96; *Gurepka v. Ukraine*, no. 61406/00, § 59, 6 September 2005; and *Galstyan v. Armenia*, no. 26986/03, § 125, 15 November 2007).

79. The Court reiterates that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly so of the right of access to a court in view of the prominent place held in a democratic society by the right to a fair trial (see *Airey v. Ireland*, 9 October 1979, § 24, Series A no. 32, and *García Manibardo v. Spain*, no. 38695/97, § 43, ECHR 2000-II). Bearing the above principle

in mind, the Court has also held in its case-law that hindrance in fact can contravene the Convention just like a legal impediment (see *Golder v. the United Kingdom*, 21 February 1975, § 26, Series A no. 18, and, for a more recent reference, *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 113, ECHR 2014).

80. Turning to the present case, the Court observes that there was a clear procedure envisaged in the Ukrainian legislation for appealing against a judgment in criminal proceedings. The Court will assess whether the applicant was, however, hindered in his right to lodge an appeal and, if so, whether that hindrance could be regarded as having infringed the very essence of his right embodied in Article 2 of Protocol No. 7.

81. The Court notes that the domestic courts considered it necessary to keep the applicant in detention as a preventive measure until the first-instance court's judgment became final, even after the prison sentence imposed on him by that judgment had already expired. In the absence of an appeal, the period in question lasted for twelve days. Had the applicant decided to appeal, this would have delayed for an unspecified period of time the point at which the judgment became final.

82. Accordingly, the Court agrees with the applicant's argument that the exercise of his right to appeal would have been at the price of his liberty, especially given that the length of his detention would have been uncertain. The Court therefore finds that this circumstance infringed the very essence of his right under Article 2 of Protocol No. 7.

83. There has therefore been a violation of this provision.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

84. 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

85. The applicant claimed 3,000 euros (EUR) in respect of non-pecuniary damage.

86. The Government contested that claim as unsubstantiated and excessive.

87. Having regard to all the circumstances of the present case, the Court accepts that the applicant suffered non-pecuniary damage which cannot be

compensated for solely by the finding of a violation. Making its assessment on an equitable basis, the Court awards the applicant's claim in full.

B. Costs and expenses

88. The applicant also claimed EUR 1,330 for the costs and expenses incurred before the Court. He requested the Court to transfer this amount to his representative's bank account.

89. The Government contested the above claim as excessive.

90. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court allows the applicant's claim in full and awards him EUR 1,330 for costs and expenses.

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 5 § 1 of the Convention;
3. *Holds* that there has been a violation of Article 2 of Protocol No. 7;
4. *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 Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

   (i) EUR 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

   (ii) EUR 1,330 (one thousand three hundred and thirty euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be transferred to his representative's bank account;

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

Done in English, and notified in writing on 4 June 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško	Mark Villiger
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Zupančič is annexed to this judgment.

M.V.
M.B.

CONCURRING OPINION OF JUDGE ZUPANČIČ

This case presents us with a genuine "prisoner's dilemma". Due to the peculiar nature of Ukrainian criminal procedure, the applicant spent his entire time in prison in "pre-trial detention" although that detention had *de facto* been post-trial and pre-sentencing. In the end, the trial court calculated the sentence by including all the "pre-trial" time spent in detention. Accordingly, the applicant was due to be released immediately after the subsequent pronouncement of the sentence.

A dilemma thus arose for the applicant. If he accepted the judgment and sentence as final, he was free to walk out of prison. However, if he chose to exercise his right of appeal guaranteed by the Convention, the Constitution and the criminal procedure, he was destined to remain in what was dubbed "pre-trial" detention.

In other words, by a quirk of the system he was prevented, or at the very least seriously discouraged, from exercising his right of appeal as per Article 2, paragraph 1, of Protocol No. 7:

Right of appeal in criminal matters

> "1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.
>
> ... "

I agree with the outcome in this case, of course, but propose to draw an analogy here with the well-known precept of criminal procedure concerning the so-called "prohibition of *reformatio in peius*". Some legal authors maintain that this is a right of constitutional rank, namely, that the defendant, where he is the sole appellant, must have the assurance that his sentence on appeal will not be harsher than the sentence pronounced by the lower-instance court.[1]

However, no such guarantee is enshrined in the Convention or its Protocols; neither do we believe that the prohibition of *reformatio in peius* is *per se* of constitutional importance.

What is of constitutional importance, on the other hand, is the defendant's right of appeal. The latter is, as per H.L.A. Hart, a *prescriptive* norm, whereas the prohibition of *reformatio in peius* is an *instrumental* rule *vis-à-vis* the prescriptive norm.

On the other hand, the immediate *ratio legis* of the prohibition of *reformatio in peius* is also very pragmatic. If the appellate courts are to have

1. See, for example, C. Herke and D. Tóth, "Theoretical and Practical Issues of the Prohibition of *Reformatio in Peius* in Hungary", Issues of Business and Law, Volume 3 (2011), at www.herke.hu/tan/11litv.pdf.

access to certain kinds of cases in order to be able to streamline the criminal case-law, appellants convicted in the lower-instance courts are not to be discouraged from lodging their appeals.

Nevertheless, even from this down-to-earth perspective, the prohibition of *reformatio in peius* is perceived as a traditional right of defendants who have been convicted in a non-final judgment in continental criminal proceedings; it is a legitimate appendage to their post-trial procedural position, irrespective of the narrower *ratio legis* enunciated above. Even if only tangentially, therefore, these defendants are supposed to benefit from this guarantee. Thus, from their own point of view, as well as from the point of view of the rule of law, criminal defendants must not be seriously discouraged from appealing against their convictions.

However, this is precisely what happened in the case before us. If the defendant had appealed against his conviction, his "pre-trial" detention would have been extended for the period it would have taken the appellate court to decide the case. Thus, he was barred from appealing against the judgment of the first-instance court. Accordingly, his right of appeal guaranteed under Article 2, paragraph 1, of Protocol No. 7 (*supra*) was in fact violated.

If we were to consider *in abstracto* the prohibition of *reformatio in peius* as a procedural right appended to the right of appeal, the discouragement inherent in this case regarding the defendant's right to appeal would have been deemed to infringe the same *ratio legis*. For this reason, his case never reached the appellate court. It would, however, unquestionably have been in his interest *as well as* in the interest of the rule of law for the appellate court to have had the opportunity to adjudicate the case.

However, the Convention does not yet directly recognise the prohibition of *reformatio in peius* as a right of the defendant. Moreover, there is no case-law of the European Court of Human Rights on the matter. But the idea of not discouraging appellants does apply even within the Strasbourg system. As was pointed out by Judge Wojtyczek in paragraph 11 of his separate opinion in *Janowiec and Others v. Russia* ([GC], nos. 55508/07 and 29520/09, ECHR 2013),

> "[it] should be noted that the instant case was referred to the Grand Chamber at the request of the applicants. While the Convention does not set out a prohibition of *reformatio in peius*, the situation is paradoxical, in that a remedy provided for by Article 43 of the Convention and used by the applicants with a view to ensuring protection of [their] human rights has ultimately led to a Grand Chamber judgment which is much less favourable to them than the Chamber judgment."

RUSLAN YAKOVENKO c. UKRAINE
(Requête n° 5425/11)

CINQUIÈME SECTION

ARRÊT DU 4 JUIN 2015[1]

1. Traduction ; original anglais.

SOMMAIRE[1]

Requérant dissuadé de faire appel de sa condamnation, car tout recours aurait retardé sa remise en liberté

Il y a atteinte à la substance même du droit garanti par l'article 2 du Protocole nº 7 de faire examiner par une juridiction supérieure la déclaration de culpabilité ou la condamnation lorsque l'exercice du droit à un double degré de juridiction se ferait au prix de la liberté du requérant, surtout si c'est pour une période indéterminée (paragraphe 82 de l'arrêt).

Article 5 § 1 de la Convention

Arrestation ou détention régulières – Après condamnation – Détention à titre préventif d'un détenu condamné jusqu'à ce que le jugement devienne définitif, même après que sa peine d'emprisonnement est arrivée à son terme

Article 2 du Protocole nº 7

Droit à un double degré de juridiction en matière pénale – Examen de la condamnation – Requérant dissuadé de faire appel de sa condamnation, car tout recours aurait retardé sa remise en liberté

*

* *

En fait
Le 12 juillet 2010, le requérant fut reconnu coupable de coups et blessures graves et condamné à quatre ans et sept mois d'emprisonnement. Le tribunal ordonna son maintien en détention dans un centre de détention provisoire (« SIZO ») à titre préventif en attendant que le jugement devînt exécutoire. Le 15 juillet 2010, la peine d'emprisonnement du requérant parvint à son terme, car celui-ci avait déjà passé une longue période en détention provisoire. Le requérant demanda à l'administration du SIZO de le remettre en liberté, mais sa demande fut rejetée. Le 27 juillet 2010, le délai d'appel de quinze jours applicable au jugement du 12 juillet 2010 vint à expiration et, en l'absence d'appel, ce jugement devint définitif. Le requérant fut remis en liberté le 29 juillet 2010, lorsque le SIZO reçut l'ordonnance d'exécution du jugement définitif.

1. Rédigé par le greffe, il ne lie pas la Cour.

En droit

1. Article 5 § 1 de la Convention :

a) *La détention du requérant du 15 au 27 juillet 2010* – La détention du requérant pendant cette période est intervenue après le prononcé du jugement dans son procès pénal mais était néanmoins considérée comme de la « détention provisoire » en droit interne. Le jugement du 12 juillet 2010 infligeait au requérant deux mesures privatives de liberté distinctes : premièrement, une peine d'emprisonnement et, deuxièmement, une détention à titre préventif jusqu'à ce que le jugement devînt définitif. La peine imposée devait expirer trois jours plus tard, mais la seconde mesure devait durer au moins douze jours de plus du fait du délai de quinze jours prévu pour l'introduction des appels. Si le requérant avait présenté un recours, sa détention aurait été encore plus longue et aurait dépendu de la durée de l'examen de l'affaire par la juridiction d'appel. Par conséquent, même si la période de détention en question est intervenue après que le requérant avait purgé l'intégralité de sa peine d'emprisonnement, elle pouvait être considérée comme une « autre mesure privative de liberté » appliquée « après condamnation » au sens de l'article 5 § 1 a).

La Cour ne décèle aucun élément indiquant que la détention qui a été imposée au requérant en attendant que le jugement du 12 juillet 2010 devienne définitif était contraire au droit interne. Cependant, le jugement ne mentionnait aucune motivation expliquant ce qui avait conduit le tribunal à maintenir le requérant en détention à titre préventif pendant une période qui était manifestement appelée à excéder la durée de la peine d'emprisonnement qui avait été infligée à l'intéressé. Si des considérations spéciales ont pu, indépendamment de la durée de la peine d'emprisonnement, justifier que l'on privât de liberté le requérant à titre préventif afin de s'assurer qu'il serait disponible pour la procédure d'appel, le jugement ne mentionnait ni ne permettait de déduire pareilles considérations. Le tribunal y relevait au contraire la coopération dont avait fait preuve le requérant à l'égard des enquêteurs et décidait pour ce motif de lui appliquer une sanction plus clémente que celle qui était prévue dans la législation. Par conséquent, et comme l'admet le Gouvernement, le maintien du requérant en détention au-delà du terme de sa peine d'emprisonnement était injustifié et s'analyse donc en une violation de l'article 5 § 1.

b) *La détention du requérant du 27 au 29 juillet 2010* – Il a fallu deux jours aux autorités nationales pour organiser la remise en liberté du requérant après que le jugement du 12 juillet 2010 était devenu définitif et que les motifs de sa détention avaient cessé d'exister. Les autorités ukrainiennes n'ont donc pas déployé tous les moyens modernes de communication afin de réduire à son minimum le délai d'exécution de la décision de remettre le requérant en liberté. La détention du requérant pendant cette période n'était donc pas justifiée au regard de l'article 5 § 1.

Conclusion : violation (unanimité).

2. Article 2 du Protocole n° 7 : les juridictions nationales ont jugé utile de maintenir le requérant en détention à titre préventif jusqu'à ce que le jugement de première instance devînt définitif, même après que la peine d'emprisonnement que ledit jugement lui avait infligée fut arrivée à son terme. En l'absence d'appel, la période en question a duré douze jours. Si le requérant avait décidé de former un recours, cela aurait reporté pour une période indéterminée le moment où le jugement serait devenu exécutoire. Par conséquent, l'exercice par le requérant de son droit de recours se serait fait au prix de sa liberté, en particulier étant donné que la durée de la détention aurait été incertaine. Cette circonstance a porté atteinte à la substance même du droit garanti par l'article 2 du Protocole n° 7.
Conclusion : violation (unanimité).

Article 41 : 3 000 euros pour dommage moral.

Jurisprudence citée par la Cour

Airey c. Irlande, 9 octobre 1979, série A n° 32
Ananyev et autres c. Russie, n^os^ 42525/07 et 60800/08, 10 janvier 2012
Austin et autres c. Royaume-Uni [GC], n^os^ 39692/09 et 2 autres, CEDH 2012
B. c. Autriche, 28 mars 1990, série A n° 175
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Centre de ressources juridiques au nom de Valentin Câmpeanu c. Roumanie [GC], n° 47848/08, CEDH 2014
Choukhardine c. Russie, n° 65734/01, 28 juin 2007
Del Río Prada c. Espagne [GC], n° 42750/09, CEDH 2013
Dimitrov c. Bulgarie (déc.), n° 55861/00, 9 mai 2006
Erkalo c. Pays-Bas, 2 septembre 1998, *Recueil des arrêts et décisions* 1998-VI
Galstyan c. Arménie, n° 26986/03, 15 novembre 2007
García Manibardo c. Espagne, n° 38695/97, CEDH 2000-II
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Grubić c. Croatie, n° 5384/11, 30 octobre 2012
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Stoichkov c. Bulgarie, n° 9808/02, 24 mars 2005
T. c. Royaume-Uni [GC], n° 24724/94, 16 décembre 1999
Van Droogenbroeck c. Belgique, 24 juin 1982, série A n° 50
Wemhoff c. Allemagne, 27 juin 1968, série A n° 7

En l'affaire Ruslan Yakovenko c. Ukraine,

La Cour européenne des droits de l'homme (cinquième section), siégeant en une chambre composée de :

Mark Villiger, *président*,
Angelika Nußberger,
Boštjan M. Zupančič,
Ganna Yudkivska,
Vincent A. De Gaetano,
André Potocki,
Aleš Pejchal, *juges*,

et de Milan Blaško, *greffier adjoint de section*,

Après en avoir délibéré en chambre du conseil le 21 avril 2015,

Rend l'arrêt que voici, adopté à cette date :

PROCÉDURE

1. À l'origine de l'affaire se trouve une requête (n° 5425/11) dirigée contre l'Ukraine et dont un ressortissant de cet État, M. Ruslan Anatoliyovych Yakovenko (« le requérant »), a saisi la Cour le 17 janvier 2011 en vertu de l'article 34 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales (« la Convention »).

2. Le requérant a été représenté par M^e^ O.V. Levytskyy, avocat à Kiev. Le gouvernement ukrainien (« le Gouvernement ») a été représenté par son agent, M. N. Kulchytskyy.

3. Le requérant se plaignait de l'illégalité de sa détention et d'une violation de son droit à un double degré de juridiction en matière pénale.

4. Le 12 décembre 2012, la requête a été communiquée au Gouvernement.

EN FAIT

I. LES CIRCONSTANCES DE L'ESPÈCE

5. Le requérant est né en 1979 et réside à Korolivka, dans la région de Kiev.

6. Le 12 juillet 2010, le tribunal municipal de Bila Tserkva (« tribunal de Bila Tserkva ») reconnut le requérant coupable d'avoir, le 12 mai 2006, infligé des coups et blessures graves à un certain M. N. Bien que ce type d'infraction fût punissable d'une peine de cinq à huit ans d'emprisonnement, le tribunal estima qu'il était possible d'appliquer au requérant une sanction

plus clémente. Il tint en particulier compte du fait que le requérant avait plaidé coupable et qu'il avait manifesté des remords. Le tribunal condamna donc le requérant à quatre ans et sept mois d'emprisonnement. Il décida également de décompter de la peine à purger la période comprise entre le 20 octobre 2005 et le 3 mai 2006 (six mois et quatorze jours) pendant laquelle l'intéressé avait été détenu dans le contexte d'une autre affaire pénale. Enfin, pour fixer la peine, le tribunal prit aussi en considération le fait que l'intéressé « avait passé plus de quatre ans dans des lieux de détention [provisoire] où les conditions de vie étaient considérablement plus dures que dans une prison pour détenus condamnés, ainsi que la circonstance que les jugements antérieurs le concernant avaient été annulés ». Aucune autre information n'est disponible concernant la période de détention antérieure du requérant, les autres affaires pénales dans lesquelles il avait été impliqué ou les jugements qui avaient été annulés.

7. Le dispositif du jugement du tribunal de Bila Tserkva ordonnait également que le requérant devait demeurer dans un centre de détention provisoire (« SIZO ») à titre préventif jusqu'à ce que le jugement devînt définitif. Il indiquait par ailleurs que le jugement était susceptible d'appel dans les quinze jours à compter de la date de son prononcé.

8. Le 15 juillet 2010, la peine qui avait été infligée au requérant parvint à son terme et l'intéressé demanda à l'administration du SIZO de le remettre en liberté. Sa demande fut rejetée. Le même jour, étant donné que le requérant avait purgé l'intégralité de sa peine, l'administration du SIZO sollicita toutefois auprès du tribunal de Bila Tserkva l'autorisation de le libérer sous réserve que l'intéressé s'engageât à ne pas prendre la fuite. Le SIZO ne reçut aucune réponse.

9. Le 19 juillet 2010, l'avocat du requérant sollicita de nouveau auprès de l'administration du SIZO une remise en liberté immédiate de son client. Il arguait en particulier que rien ne justifiait que son client restât en détention. Une copie de cette lettre fut également adressée au parquet régional de Kiev.

10. Le 27 juillet 2010, le délai d'appel de quinze jours applicable au jugement du 12 juillet 2010 vint à expiration et, en l'absence d'appel, ce jugement devint définitif.

11. Le même jour, l'administration du SIZO écrivit à l'avocat du requérant pour lui expliquer qu'elle ne pouvait pas remettre celui-ci en liberté tant que la mesure préventive le concernant n'avait pas été modifiée ou que le jugement n'était pas devenu définitif. Elle précisait dans sa lettre que, en tout état de cause, c'était au tribunal de Bila Tserkva qu'il appartenait d'autoriser la remise en liberté du requérant.

12. Le 29 juillet 2010, le SIZO ayant reçu de la part du tribunal une ordonnance d'exécution du jugement définitif, le requérant fut remis en liberté.

13. Le 5 août 2010, en réponse à l'avocat du requérant qui se plaignait de la remise en liberté tardive de son client, les services pénitentiaires de l'État adressèrent audit avocat une lettre indiquant que le code de procédure pénale n'avait pas été méconnu.

II. LE DROIT INTERNE PERTINENT À L'ÉPOQUE DES FAITS

A. Le code de procédure pénale (1960)

14. L'article 148 précisait la finalité des mesures préventives et les motifs justifiant de les mettre en œuvre. Il indiquait en particulier qu'il y avait lieu d'appliquer une mesure préventive lorsqu'il existait des motifs suffisants de croire qu'un suspect, un accusé, un défendeur ou une personne condamnée risquait de prendre la fuite, de ne pas respecter les décisions procédurales, de faire obstruction à l'établissement de la vérité dans le cadre de l'affaire ou de se livrer à des activités pénalement répréhensibles.

15. Au stade de la procédure judiciaire, la remise en liberté d'un détenu nécessitait impérativement une décision du juge ou du tribunal (article 165). L'article 165 prévoyait également la possibilité de lever ou de modifier une mesure préventive si la mesure qui était jusque-là appliquée n'était plus nécessaire.

16. Même si, au stade de l'enquête préliminaire, l'administration du centre de détention était tenue de remettre immédiatement en liberté un détenu dont la durée de la détention avait expiré si elle n'avait reçu à la date d'expiration aucune décision judiciaire prolongeant cette détention (article 156 *in fine*), il n'existait pas de disposition analogue concernant la procédure de remise en liberté d'un détenu au stade de la procédure judiciaire.

17. L'article 274 concernait l'application, la levée ou la modification d'une mesure préventive par une juridiction de première instance. Il contraignait le tribunal à suivre les dispositions pertinentes du chapitre 13 (« Mesures préventives » – articles 148 à 165-3).

18. L'article 324 imposait à la juridiction de jugement de statuer, en particulier, sur la mesure préventive à appliquer à une personne condamnée en attendant que le jugement devînt définitif.

19. L'article 343 rappelait en substance la disposition ci-dessus et précisait que le tribunal ne pouvait ordonner à titre préventif le placement d'une personne condamnée en détention provisoire que pour les motifs énoncés dans les dispositions pertinentes du chapitre 13.

20. L'article 358 énumérait les points que la juridiction d'appel pouvait examiner en audience préparatoire. La juridiction d'appel avait en particulier la possibilité de modifier, de lever ou d'appliquer une mesure préventive à des personnes condamnées.

21. L'article 401 disposait qu'un jugement devenait définitif dès lors qu'il n'avait pas été contesté en appel avant l'expiration du délai légal (quinze jours à compter de la date de son prononcé – article 349). Si un recours était déposé, le jugement devenait définitif après l'examen de l'affaire par la juridiction d'appel (à moins qu'il ne fût annulé). Un jugement d'acquittement ou un jugement ordonnant la levée d'une sanction étaient exécutoires immédiatement, tandis qu'un jugement comportant un verdict de culpabilité n'était exécutoire qu'une fois devenu définitif. L'article 404 prévoyait que la juridiction qui prononçait le jugement disposait de trois jours au maximum après que le jugement fut devenu définitif pour ordonner son exécution.

B. Le code civil (2003)

22. L'article 1176 imposait à l'État l'obligation « d'indemniser intégralement un individu du préjudice qu'il a[vait] subi du fait d'une condamnation irrégulière, d'une reconnaissance irrégulière de sa responsabilité pénale, de l'application irrégulière d'une mesure préventive [ou] d'une arrestation irrégulière (…) qu'il y ait eu ou non faute de la part d'agents de l'État travaillant au sein des organes d'enquête, des autorités chargées de l'enquête préliminaire, des parquets ou des tribunaux » (paragraphe 1). Il précisait en outre qu'« un individu victime d'un préjudice à la suite d'actes illégaux commis par un organe d'enquête, une autorité chargée des enquêtes préliminaires, un parquet ou un tribunal dispos[ait] d'un droit à être indemnisé dans les cas prévus par la loi » (paragraphe 2).

C. La loi ukrainienne de 1994 sur la procédure d'indemnisation en cas de préjudice causé aux citoyens par des actes illégaux commis par les organes d'enquête, les autorités chargées des enquêtes préliminaires, les parquets et les tribunaux (« la loi sur l'indemnisation »)

23. L'article 1 reconnaissait le droit d'une personne d'être indemnisée du préjudice subi, en particulier du fait d'une condamnation irrégulière, d'une mise en accusation irrégulière et d'une arrestation ou d'une mise en détention provisoire irrégulières. Dans les cas mentionnés, le préjudice ouvrait droit à indemnisation qu'il y ait eu ou non faute de la part d'agents de l'État travaillant au sein des organes d'enquête, des autorités chargées de l'enquête préliminaire, des parquets ou des tribunaux.

24. L'article 2 énumérait les cas dans lesquels un droit à indemnisation était prévu, à savoir : 1) un jugement d'acquittement ; 1-1) une décision judiciaire reconnaissant, en particulier, l'irrégularité de la détention, et 2) l'abandon des poursuites pénales pour absence de corps du délit ou pour absence de preuve de la culpabilité d'un accusé.

EN DROIT

I. SUR LA VIOLATION ALLÉGUÉE DE L'ARTICLE 5 § 1 DE LA CONVENTION

25. Le requérant allègue que sa détention pendant la période allant du 15 au 29 juillet 2010 était irrégulière. Il invoque l'article 5 § 1 de la Convention, ainsi libellé dans sa partie pertinente :

> « 1. Toute personne a droit à la liberté et à la sûreté. Nul ne peut être privé de sa liberté, sauf dans les cas suivants et selon les voies légales :
>
> a) s'il est détenu régulièrement après condamnation par un tribunal compétent ;
>
> (...)
>
> c) s'il a été arrêté et détenu en vue d'être conduit devant l'autorité judiciaire compétente, lorsqu'il y a des raisons plausibles de soupçonner qu'il a commis une infraction ou qu'il y a des motifs raisonnables de croire à la nécessité de l'empêcher de commettre une infraction ou de s'enfuir après l'accomplissement de celle-ci ;
>
> (...) »

A. Recevabilité

1. Épuisement des voies de recours internes

a) Thèses des parties

26. Le Gouvernement estime que le requérant n'a pas respecté la règle de l'épuisement des voies de recours internes. Il reconnaît que la détention du requérant du 15 au 29 juillet 2010 était dépourvue de fondement. Invoquant l'article 1176 du code civil (paragraphe 22 ci-dessus), il soutient que le requérant avait la possibilité de demander réparation mais que celui-ci a omis d'exercer cette voie de recours.

27. Le requérant récuse cette thèse. Il soutient en particulier que, pour qu'un recours soit effectif dans son cas, il aurait fallu qu'il lui assure une libération immédiate dès sa peine d'emprisonnement parvenue à son terme. Il aurait sollicité sa libération auprès de l'administration du SIZO et des autorités de poursuite, mais l'administration du SIZO aurait considéré qu'il

était impossible de le remettre en liberté tant que le jugement n'était pas devenu définitif. Quant au parquet, il n'aurait pas jugé utile d'intervenir du tout.

b) Appréciation de la Cour

i. Principes généraux se dégageant de la jurisprudence de la Cour

28. La Cour note que la règle de l'épuisement des voies de recours internes repose sur l'hypothèse, objet de l'article 13 de la Convention, avec lequel elle présente d'étroites affinités, que l'ordre interne offre un recours effectif habilitant à examiner le contenu d'un grief défendable fondé sur la Convention et à offrir le redressement approprié. Elle constitue de ce fait un aspect important du principe voulant que le mécanisme de sauvegarde instauré par la Convention revête un caractère subsidiaire par rapport aux systèmes nationaux de protection des droits de l'homme (*Ananyev et autres c. Russie*, n^{os} 42525/07 et 60800/08, § 93, 10 janvier 2012, avec d'autres références).

29. Un requérant n'est normalement tenu de se prévaloir que des recours internes disponibles et suffisants pour lui permettre d'obtenir réparation des violations qu'il allègue. Ces recours doivent exister à un degré suffisant de certitude, en pratique comme en théorie, sans quoi leur manquent l'effectivité et l'accessibilité voulues. Il incombe au Gouvernement excipant du non-épuisement des voies de recours internes de convaincre la Cour à cet égard, c'est-à-dire de prouver que le recours auquel il se réfère était accessible et susceptible d'offrir au requérant le redressement de ses griefs, et présentait des perspectives raisonnables de succès. Cependant, une fois cela démontré, c'est au requérant qu'il revient d'établir que le recours évoqué par le Gouvernement a en fait été employé ou bien, pour une raison quelconque, n'était ni adéquat ni effectif dans son cas, ou qu'il existait des circonstances spéciales le dispensant de l'exercer (voir, par exemple, *Melnik c. Ukraine*, n^{o} 72286/01, § 67, 28 mars 2006).

30. La Cour note en outre que lorsqu'une violation de l'article 5 § 1 est en jeu, l'article 5 §§ 4 et 5 de la Convention constitue une *lex specialis* par rapport aux exigences plus générales de l'article 13 (*Dimitrov c. Bulgarie* (déc.), n^{o} 55861/00, 9 mai 2006). Par conséquent, pour décider si un requérant était tenu d'exercer un recours interne particulier pour faire redresser son grief fondé sur l'article 5 § 1 de la Convention, la Cour doit apprécier le caractère effectif dudit recours du point de vue des dispositions précitées.

ii. Existence d'un recours préventif conforme à l'article 5 § 4

31. La Cour observe qu'à compter du jour où il est statué sur une accusation, ne serait-ce que par un tribunal de première instance, le défendeur est détenu « après condamnation par un tribunal compétent » au sens de l'article 5 § 1 a) (voir aux paragraphes 46 à 51 ci-dessous une analyse plus détaillée des principes pertinents établis dans la jurisprudence de la Cour).

32. La Cour a dit dans un certain nombre d'arrêts qu'en pareilles circonstances, le contrôle juridictionnel de la privation de liberté prescrit à l'article 5 § 4 était considéré comme ayant déjà eu lieu à l'occasion de la condamnation initiale. Cependant, à chaque fois que des questions nouvelles ayant une incidence sur la légalité de la détention se posent, l'article 5 § 4 entre de nouveau en jeu (voir, comme exemple récent, *Stoichkov c. Bulgarie*, n° 9808/02, §§ 64-65, 24 mars 2005, avec d'autres références).

33. La Cour est disposée à admettre qu'en l'espèce une question nouvelle concernant la légalité de la détention du requérant s'est posée dès lors que la peine d'emprisonnement de ce dernier était arrivée à son terme sans qu'il fût remis en liberté. À ce stade, il était privé de toute possibilité d'engager une procédure judiciaire qui lui aurait permis de faire statuer à bref délai sur la régularité de son maintien en détention et d'obtenir sa remise en liberté. En effet, l'affaire n'était plus du ressort du tribunal de première instance. Par ailleurs, si le requérant avait formé un appel ordinaire, on peut supposer que son examen aurait duré plus longtemps que la détention qui se trouve à l'origine de son grief (douze jours). De plus, il n'est pas à exclure que l'introduction d'un appel aurait encore prolongé la détention à titre préventif jusqu'à ce que l'arrêt devînt définitif. Quoi qu'il en soit, la Cour analysera cette question de manière plus détaillée.

34. Concernant les demandes qui ont été faites par le requérant auprès de l'administration du SIZO et du parquet, ces autorités ne constituaient pas « un tribunal » au sens de l'article 5 § 4 de la Convention.

35. Il s'ensuit que le requérant n'a disposé d'aucun recours interne effectif dont il aurait pu se prévaloir afin de mettre un terme à la violation alléguée de l'article 5 § 1.

iii. Existence d'un recours indemnitaire conforme à l'article 5 § 5

36. La Cour rappelle que le paragraphe 5 de l'article 5 se trouve respecté dès lors que l'on peut demander réparation du chef d'une privation de liberté opérée dans des conditions contraires aux paragraphes 1 à 4 de cet article lorsque cette privation a été établie soit par une autorité nationale soit par elle-même. La jouissance effective du droit à réparation garanti par l'article 5 § 5 doit se trouver assurée à un degré suffisant de certitude

(*Lobanov c. Russie*, n° 16159/03, § 54, 16 octobre 2008, avec d'autres références).

37. La Cour observe qu'en l'espèce le Gouvernement se borne à exciper de l'absence de fondement pour la détention du requérant et de la possibilité pour l'intéressé de demander réparation en vertu de l'article 1176 du code civil. La Cour note toutefois que la disposition en question est libellée en des termes très généraux : elle n'établit pas les conditions juridiques préalables requises pour qu'il soit possible de demander une réparation, et ne prévoit pas non plus de mécanisme ou de procédure spécifique. Tout au contraire, l'article 1176 renvoie à une autre loi qui régit ces aspects. Il apparaît que c'est la loi spéciale sur l'indemnisation qui trouve à s'appliquer (paragraphes 23-24 ci-dessus). Le Gouvernement ne mentionne pas cette loi dans ses observations. Il ne précise pas non plus à quelle disposition du droit interne la détention du requérant a en fait contrevenu. Par ailleurs, le Gouvernement omet de citer, le cas échéant, la jurisprudence nationale pertinente en la matière. Il demeure donc difficile de déterminer sur quels fondements et au moyen de quels mécanismes le requérant aurait pu faire constater l'irrégularité de sa détention par une juridiction nationale et demander réparation du préjudice subi à cet égard.

38. Dans ces conditions, la Cour juge que l'argument du Gouvernement selon lequel le recours qu'il évoquait était effectif et devait être exercé par le requérant n'est pas convaincant.

iv. Conclusion

39. Au regard des considérations qui précèdent, la Cour conclut que le requérant n'a disposé d'aucun recours interne effectif pour faire valoir son grief tiré de l'article 5 § 1 de la Convention. La Cour rejette donc l'exception formulée par le Gouvernement à cet égard.

2. Autres considérations relatives à la recevabilité

40. Constatant que le grief n'est pas manifestement mal fondé au sens de l'article 35 § 3 a) de la Convention et qu'il ne se heurte par ailleurs à aucun autre motif d'irrecevabilité, la Cour le déclare recevable.

B. Sur le fond

1. Thèses des parties

41. Le requérant soutient que sa détention du 15 au 29 juillet 2010 était dépourvue de fondement et donc contraire à l'article 5 § 1 de la Convention.

42. Dans ses observations sur la recevabilité de ce grief (paragraphe 26 ci-dessus), le Gouvernement exprime son accord avec le requérant sur ce point. Il ne formule toutefois aucune observation sur le bien-fondé du grief.

2. Appréciation de la Cour

43. La Cour considère que, aux fins de son analyse, la détention du requérant doit être subdivisée en deux périodes distinctes :

a) du 15 au 27 juillet 2010, c'est-à-dire après le prononcé du jugement par le tribunal de première instance et avant que ce jugement ne devienne définitif ; et

b) la période de deux jours qui a suivi, à savoir du 27 au 29 juillet 2010, qui correspond au temps dont les autorités ont eu besoin pour satisfaire à toutes les formalités administratives nécessaires à la mise en œuvre de la libération du requérant une fois le jugement de première instance devenu définitif.

44. La Cour examinera séparément ces deux périodes de détention en vue de déterminer la conformité de chacune d'elles avec l'article 5 § 1 de la Convention.

a) La détention du requérant du 15 au 27 juillet 2010

i. Motifs de la privation de liberté infligée au requérant

α) Principes généraux se dégageant de la jurisprudence de la Cour

45. La Cour rappelle que l'article 5 consacre un droit fondamental de l'homme, à savoir la protection de l'individu contre les atteintes arbitraires de l'État à son droit à la liberté. Les alinéas a) à f) de l'article 5 § 1 énumèrent limitativement les motifs autorisant la privation de liberté. Pareille mesure n'est pas conforme à l'article 5 § 1 si elle ne relève pas de l'un de ces motifs (voir, parmi beaucoup d'autres, *Austin et autres c. Royaume-Uni* [GC], n^{os} 39692/09 et 2 autres, § 60, CEDH 2012).

46. La Cour note qu'un défendeur est considéré comme détenu « après condamnation par un tribunal compétent » au sens de l'article 5 § 1 a) dès que le jugement a été rendu en première instance, même si celui-ci n'est pas encore exécutoire et reste susceptible de recours. La Cour a dit à cet égard que l'expression « après condamnation » ne saurait être interprétée comme se limitant à l'hypothèse d'une condamnation définitive, car cela exclurait l'arrestation à l'audience de personnes condamnées ayant comparu libres, quels que soient les recours qui leur étaient encore ouverts (*Wemhoff c. Allemagne*, 27 juin 1968, p. 23, § 9, série A n^{o} 7). De plus, une personne condamnée en première instance et qui est détenue en attendant l'issue de la procédure d'appel ne saurait être considérée comme étant détenue

en vue d'être conduite devant l'autorité judiciaire compétente du chef de raisons plausibles de la soupçonner d'avoir commis une infraction, au sens de l'article 5 § 1 c) (voir, en particulier, *Solmaz c. Turquie*, n° 27561/02, § 25, 16 janvier 2007).

47. La Cour a constamment affirmé dans sa jurisprudence qu'elle était attentive aux grandes différences qui existent entre les États contractants sur le point de savoir si une personne condamnée en première instance commence déjà à purger sa peine d'emprisonnement pendant la procédure de recours. Elle rappelle cependant que les garanties importantes de l'article 5 de la Convention ne dépendent pas de la législation nationale (*B. c. Autriche*, 28 mars 1990, § 39, série A n° 175, et *Solmaz*, précité, § 26). Ainsi, même si le droit interne d'un État membre prévoit qu'une peine ne devient définitive qu'une fois tous les recours épuisés, la détention provisoire cesse au sens de la Convention avec la condamnation et le prononcé de la peine en première instance (*ibidem*).

48. Par exemple, dans l'affaire *Grubić c. Croatie* (n° 5384/11, §§ 30-45, 30 octobre 2012), le requérant, qui avait été reconnu coupable et condamné à une peine de trente ans d'emprisonnement en première instance, se plaignait de l'irrégularité de la détention qu'il avait subie pendant plusieurs mois après le prononcé du jugement de première instance. La privation de liberté qui lui avait été infligée pendant cette période était toujours considérée comme de la « détention provisoire » par le droit interne. La Cour a examiné son grief sous l'angle de l'article 5 § 1 a) de la Convention et n'a décelé aucun indice d'arbitraire.

49. La Cour affirme également dans sa jurisprudence que par « condamnation » (« *conviction* » en anglais) au sens de l'article 5 § 1 a), il faut entendre, eu égard au texte français, à la fois une déclaration de culpabilité consécutive à l'établissement légal d'une infraction et l'infliction d'une peine ou autre mesure privative de liberté (*Guzzardi c. Italie*, 6 novembre 1980, § 100, série A n° 39, *Van Droogenbroeck c. Belgique*, 24 juin 1982, § 35, série A n° 50, et, pour un exemple récent, *Del Río Prada c. Espagne* [GC], n° 42750/09, § 123, CEDH 2013).

50. De plus, le mot « après » utilisé à l'alinéa a) de l'article 5 § 1 n'implique pas un simple ordre chronologique de succession entre condamnation et détention : la seconde doit de surcroît résulter de la première, se produire « à la suite et par suite » – ou « en vertu » – de celle-ci. En bref, il doit exister entre elles un lien de causalité suffisant (*Murray c. Pays-Bas*, n° 10511/10, § 77, 10 décembre 2013, avec d'autres références).

51. Ainsi, la Cour a précédemment conclu que diverses formes de détention à titre préventif imposées en sus de la peine d'emprisonnement constituaient une détention infligée « après condamnation par un tribunal

compétent » (voir, par exemple, *Van Droogenbroeck*, précité, §§ 33-42, *M. c. Allemagne*, n° 19359/04, § 96, CEDH 2009, et *James, Wells et Lee c. Royaume-Uni*, n^os^ 25119/09 et 2 autres, §§ 197-199, 18 septembre 2012). En pareilles circonstances, la détention en cause ne fait pas partie d'une sanction, mais découle plutôt d'une autre « mesure privative de liberté », comme indiqué au paragraphe 49 ci-dessus.

β) Application en l'espèce des principes susmentionnés

52. La Cour note que la détention du requérant pendant cette période est intervenue après le prononcé du jugement dans son procès pénal, mais qu'elle était néanmoins considérée comme de la « détention provisoire » sous l'empire du droit interne.

53. La Cour observe que, indépendamment de sa qualification dans l'ordre interne, cette période de détention infligée au requérant ne relevait plus de l'article 5 § 1 c) (voir, en particulier, le paragraphe 46 ci-dessus). Il reste à déterminer si elle était justifiée sous l'angle de l'alinéa a) de l'article 5 § 1, puisqu'aucun autre alinéa de cette disposition ne peut en principe s'appliquer à la situation en jeu.

54. La Cour observe que le jugement du 12 juillet 2010 infligeait au requérant deux mesures privatives de liberté distinctes : premièrement, une peine d'emprisonnement, et, deuxièmement, la détention à titre préventif jusqu'à ce que le jugement devînt définitif. La peine imposée devait expirer trois jours plus tard, mais la seconde mesure devait durer au moins douze jours de plus du fait du délai de quinze jours prévu pour l'introduction des appels. Si le requérant avait formé un recours, la durée de sa détention aurait été encore plus longue et aurait dépendu du temps nécessaire à la juridiction d'appel pour examiner son recours.

55. Par conséquent, la Cour considère que, bien que la détention dont le requérant tire grief soit postérieure à l'accomplissement par celui-ci de l'intégralité de la peine d'emprisonnement qui lui avait été infligée, elle peut passer pour une autre « mesure privative de liberté » intervenue « après condamnation » au sens de l'article 5 § 1 a).

56. En bref, la Cour conclut que cette période de détention subie par le requérant relève de l'exception prévue à l'alinéa a) de l'article 5 § 1 de la Convention. Il reste toutefois à déterminer si cette disposition a été respectée.

ii. Régularité de la détention du requérant du 15 au 27 juillet 2010

α) Principes généraux se dégageant de la jurisprudence de la Cour

57. La Cour rappelle que toute privation de liberté doit non seulement relever de l'une des exceptions prévues dans les alinéas a) à f) de l'article 5 § 1, mais aussi être « régulière ». En matière de « régularité » d'une détention, y compris l'observation des « voies légales », la Convention renvoie pour l'essentiel à la législation nationale et consacre l'obligation d'en observer les normes de fond comme de procédure (voir, parmi beaucoup d'autres, *Erkalo c. Pays-Bas*, 2 septembre 1998, § 52, *Recueil des arrêts et décisions* 1998-VI, et *Baranowski c. Pologne*, n° 28358/95, § 50, CEDH 2000-III).

58. Pour apprécier la régularité d'une détention, la Cour doit également s'assurer que le droit interne lui-même est conforme à la Convention, y compris aux principes généraux qui s'y trouvent contenus, de manière explicite ou implicite. La « qualité de la loi » implique qu'une loi nationale autorisant une privation de liberté soit suffisamment accessible, précise et prévisible dans son application afin d'éviter tout danger d'arbitraire. Le critère de « légalité » fixé par la Convention exige donc que toute loi soit suffisamment précise pour permettre au citoyen – en s'entourant au besoin de conseils éclairés – de prévoir, à un degré raisonnable dans les circonstances de la cause, les conséquences de nature à dériver d'un acte déterminé. Lorsqu'il s'agit d'une privation de liberté, il est essentiel que le droit interne définisse clairement les conditions de détention (*Del Río Prada*, précité, § 125, avec d'autres références).

59. De plus, une détention arbitraire ne saurait être compatible avec l'article 5 § 1, la notion d'« arbitraire » dans ce contexte allant au-delà du défaut de conformité avec le droit national. En conséquence, une privation de liberté peut être régulière selon la législation interne tout en étant arbitraire et donc contraire à la Convention (*Mooren c. Allemagne* [GC], n° 11364/03, § 77, 9 juillet 2009).

60. Jusqu'à présent, la Cour n'a pas défini de manière générale les attitudes des autorités qui sont susceptibles de relever de l'« arbitraire » au sens de l'article 5 § 1. Cependant, les principes clés qu'elle a dégagés au cas par cas démontrent que la notion d'arbitraire dans le contexte de l'article 5 varie dans une certaine mesure suivant le type de détention en cause (*Saadi c. Royaume-Uni* [GC], n° 13229/03, § 68, CEDH 2008, et *Plesó c. Hongrie,* n° 41242/08, § 57, 2 octobre 2012). D'après l'un des principes généraux consacrés par la jurisprudence, une détention est « arbitraire » lorsque, même si elle est parfaitement conforme à la législation nationale, il y a eu un élément de mauvaise foi ou de tromperie de la part des autorités ou lorsque

les autorités internes ne se sont pas employées à appliquer correctement la législation pertinente (*Mooren*, précité, § 78).

61. De plus, l'exigence selon laquelle la détention doit être dénuée de tout caractère arbitraire implique la nécessité d'un rapport de proportionnalité entre le motif de la détention qui est invoqué et la détention en question (*James, Wells et Lee*, précité, § 195). L'ampleur de l'examen du critère de proportionnalité à appliquer dans un cas donné varie suivant le type de détention en cause. Dans le contexte d'une détention correspondant au cas de figure énoncé à l'article 5 § 1 a), la Cour estime en général que la décision d'infliger une peine de détention et la durée de cette peine sont des questions qui relèvent des autorités nationales et non de sa propre compétence (*T. c. Royaume-Uni* [GC], n° 24724/94, § 103, 16 décembre 1999, et *Saadi*, précité, § 71). Pour autant, en vue de déceler d'éventuels indices d'arbitraire dans la détention infligée à titre préventif à un requérant en plus de la peine proprement dite mais toujours dans le cadre de l'article 5 § 1 a), la Cour juge utile de déterminer l'objectif de la détention fondée sur l'article 5 § 1 a) et procède à l'examen du critère de proportionnalité (*James, Wells et Lee*, précité, § 205).

β) Application en l'espèce des principes susmentionnés

62. La Cour juge que rien n'indique que la décision prise par le tribunal de Bila Tserkva de maintenir le requérant en détention jusqu'à ce que le jugement devienne définitif a méconnu le droit interne. De plus, les dispositions légales pertinentes apparaissent claires et prévisibles dans leur application. Ainsi, le code de procédure pénale ukrainien disposait explicitement que la juridiction de jugement devait statuer sur le type de mesure préventive à appliquer à la personne condamnée en attendant que le jugement devînt définitif (paragraphe 18 ci-dessus). Il ressort également de la législation interne que la durée de la mesure préventive ne dépendait pas de celle de la peine d'emprisonnement qui avait été infligée et pouvait donc être plus longue que ladite peine.

63. La Cour doit encore se convaincre que, bien que conforme au droit interne, la détention qui a été infligée au requérant pendant la période en cause n'était pas arbitraire et n'était donc pas contraire à la Convention.

64. La Cour ne pense pas que le tribunal de Bila Tserkva ait fait preuve de mauvaise foi lorsqu'il a décidé de maintenir le requérant en détention à titre préventif. Cela étant, la Cour observe que le jugement ne mentionnait aucune motivation à cet égard, hormis une déclaration générale figurant dans le dispositif et portant sur l'application de la mesure. Les raisons qui ont poussé la juridiction de jugement à maintenir le requérant en détention à titre préventif demeurent donc obscures, d'autant plus que cette décision

impliquait que la détention dépasserait la durée de la peine d'emprisonnement imposée au requérant.

65. La Cour admet que des considérations spéciales puissent, indépendamment de la durée de la peine d'emprisonnement, justifier que l'on prive de liberté à titre préventif une personne condamnée afin de s'assurer qu'elle sera disponible pour la procédure d'appel dans les cas où un recours a été formé contre le jugement de première instance. Toutefois, le jugement rendu par le tribunal de Bila Tserkva le 12 juillet 2010 ne mentionnait ni ne permettait de déduire pareilles considérations. Le tribunal y relevait au contraire la coopération dont le requérant avait fait preuve à l'égard des enquêteurs et décidait pour ce motif de lui imposer une sanction plus clémente que celle qui était prévue dans la législation applicable (paragraphe 6 ci-dessus). Par conséquent, le maintien du requérant en détention au-delà du terme de sa peine d'emprisonnement était injustifié. La Cour relève à cet égard que le Gouvernement reconnaît ce point dans ses observations (paragraphe 26 ci-dessus).

66. Compte tenu de ce qui précède, la Cour conclut que la détention du requérant du 15 au 27 juillet 2010 était contraire à l'article 5 § 1 de la Convention.

b) La détention du requérant du 27 au 29 juillet 2010

67. La Cour note que le jugement rendu par le tribunal de Bila Tserkva le 12 juillet 2010 est devenu définitif le 27 juillet 2010. Les motifs qui justifiaient la détention du requérant, laquelle avait été ordonnée à titre préventif jusqu'à ce que le jugement devînt définitif, ont donc cessé d'exister à cette dernière date. De plus, cette période de détention n'était pas liée à l'exécution de la peine d'emprisonnement infligée au requérant, puisque celle-ci était déjà arrivée à son terme.

68. La Cour réaffirme qu'un certain délai dans l'exécution d'une décision de remise en liberté est compréhensible, et souvent inévitable, compte tenu des nécessités pratiques du fonctionnement des juridictions et de l'accomplissement de formalités particulières. Cependant, les autorités nationales doivent s'efforcer de réduire autant que possible ce délai (*Quinn c. France,* 22 mars 1995, § 42, série A n° 311, *Giulia Manzoni c. Italie*, 1er juillet 1997, § 25 *in fine*, *Recueil* 1997-IV, *K.-F. c. Allemagne*, 27 novembre 1997, § 71, *Recueil* 1997-VII, et *Mancini c. Italie*, n° 44955/98, § 24, CEDH 2001-IX). Les formalités administratives occasionnées par une remise en liberté ne sauraient justifier un délai supérieur à quelques heures (*Nikolov c. Bulgarie,* n° 38884/97, § 82, 30 janvier 2003). Il appartient aux États contractants d'organiser leur système judiciaire de telle sorte que leurs services d'application des lois puissent satisfaire à l'obligation d'éviter toute privation de

liberté injustifiée (voir, par exemple, *Choukhardine c. Russie*, nº 65734/01, § 93, 28 juin 2007, et *Mokallal c. Ukraine*, nº 19246/10, § 44, 10 novembre 2011).

69. En l'espèce, il a fallu aux autorités nationales deux jours pour organiser la remise en liberté du requérant après que le jugement du 12 juillet 2010 fut devenu définitif et que les motifs de sa détention eurent donc cessé d'exister. Compte tenu de la place primordiale que le droit à la liberté occupe dans une société démocratique, l'État défendeur aurait dû déployer tous les moyens modernes de communication de l'information afin de réduire à son minimum le délai d'exécution de la décision de remise en liberté du requérant, comme le veut la jurisprudence en la matière (*ibidem*). La Cour n'est pas convaincue que les autorités ukrainiennes se soient conformées à cette exigence en l'espèce.

70. Il s'ensuit que la détention du requérant pendant cette période n'était pas justifiée au regard de l'article 5 § 1 de la Convention.

c) Conclusion

71. Eu égard à l'ensemble des considérations qui précèdent, la Cour conclut à la violation de l'article 5 § 1 de la Convention pour l'intégralité de la période de détention dont le requérant tire grief, à savoir du 15 au 29 juillet 2010.

II. SUR LA VIOLATION ALLÉGUÉE DE L'ARTICLE 2 § 1 DU PROTOCOLE Nº 7

72. Invoquant l'article 2 du Protocole nº 7, le requérant se plaint également d'avoir été privé de fait du droit à un double degré de juridiction dans la procédure pénale le concernant. Cette disposition est ainsi libellée :

> « 1. Toute personne déclarée coupable d'une infraction pénale par un tribunal a le droit de faire examiner par une juridiction supérieure la déclaration de culpabilité ou la condamnation. L'exercice de ce droit, y compris les motifs pour lesquels il peut être exercé, sont régis par la loi.
>
> 2. Ce droit peut faire l'objet d'exceptions pour des infractions mineures telles qu'elles sont définies par la loi ou lorsque l'intéressé a été jugé en première instance par la plus haute juridiction ou a été déclaré coupable et condamné à la suite d'un recours contre son acquittement. »

A. Sur la recevabilité

73. Constatant que ce grief n'est pas manifestement mal fondé au sens de l'article 35 § 3 a) de la Convention et qu'il ne se heurte par ailleurs à aucun autre motif d'irrecevabilité, la Cour le déclare recevable.

B. Sur le fond

74. Le requérant soutient qu'il a de fait été contraint de choisir entre l'exercice de son droit à un double degré de juridiction dans la procédure pénale le concernant, d'une part, et de sa liberté, d'autre part. En d'autres termes, s'il avait décidé de former un recours, cela aurait considérablement retardé sa remise en liberté.

75. Le Gouvernement ne formule aucun commentaire à ce sujet. Il observe que la législation nationale reconnaissait au requérant le droit de former un recours contre le jugement rendu le 12 juillet 2010, mais que l'intéressé a choisi de ne pas s'en prévaloir. Par conséquent, le Gouvernement soutient qu'il n'y a pas eu violation des droits du requérant garantis par l'article 2 du Protocole n° 7.

76. La Cour note que les États contractants disposent en principe d'un large pouvoir d'appréciation pour décider des modalités d'exercice du droit prévu par l'article 2 du Protocole n° 7 à la Convention (*Krombach c. France*, n° 29731/96, § 96, CEDH 2001-II).

77. Comme il ressort de la jurisprudence de la Cour, cette disposition règle pour l'essentiel des aspects institutionnels, comme l'accessibilité de la juridiction d'appel ou la portée du contrôle exercé par une telle juridiction (voir, par exemple, *Pesti et Frodl c. Autriche* (déc.), n^{os} 27618/95 et 27619/95, CEDH 2000-I).

78. En ce qui concerne l'accessibilité, la Cour considère qu'il est acceptable que, dans certains pays, le justiciable désireux de saisir l'autorité de recours doive quelquefois solliciter une autorisation à cette fin. Toutefois, selon un principe bien établi dans la jurisprudence, les limitations apportées par les législations internes au droit de recours mentionné par l'article 2 du Protocole n° 7 doivent, par analogie avec le droit d'accès à un tribunal consacré par l'article 6 § 1 de la Convention, poursuivre un but légitime et ne pas porter atteinte à la substance même de ce droit (*Krombach*, précité, § 96, *Gourepka c. Ukraine*, n° 61406/00, § 59, 6 septembre 2005, et *Galstyan c. Arménie,* n° 26986/03, § 125, 15 novembre 2007).

79. La Cour rappelle que la Convention a pour but de protéger des droits non pas théoriques ou illusoires, mais concrets et effectifs. Cela vaut en particulier pour le droit d'accès aux tribunaux, eu égard à la place éminente que le droit à un procès équitable occupe dans une société démocratique (*Airey c. Irlande*, 9 octobre 1979, § 24, série A n° 32, et *García Manibardo c. Espagne*, n° 38695/97, § 43, CEDH 2000-II). Gardant à l'esprit le principe ci-dessus, la Cour a également dit dans ses arrêts qu'un obstacle de fait pouvait enfreindre la Convention à l'égal d'un obstacle juridique (*Golder c. Royaume-Uni*, 21 février 1975, § 26, série A n° 18, et,

pour un exemple récent, *Centre de ressources juridiques au nom de Valentin Câmpeanu c. Roumanie* [GC], nº 47848/08, § 113, CEDH 2014).

80. Pour en venir au cas d'espèce, la Cour relève que la législation ukrainienne prévoyait une procédure claire pour les recours en matière pénale. La Cour recherchera si un obstacle a toutefois empêché le requérant d'exercer son droit de recours et, le cas échéant, si cet obstacle peut être réputé avoir porté atteinte à la substance même de son droit garanti par l'article 2 du Protocole nº 7.

81. La Cour observe que les juridictions internes ont jugé nécessaire de maintenir le requérant en détention à titre préventif jusqu'à ce que le jugement de première instance devînt définitif, même après que la peine d'emprisonnement que ledit jugement lui avait infligée fut arrivée à son terme. En l'absence d'appel, la période en question a duré douze jours. Si le requérant avait décidé de former un recours, cela aurait différé pour une durée indéterminée le moment où le jugement serait devenu définitif.

82. Par conséquent, la Cour souscrit à l'argument du requérant selon lequel l'exercice par lui de son droit à un double degré de juridiction se serait fait au prix de sa liberté, en particulier étant donné que la durée de sa détention aurait été incertaine. La Cour juge donc que cette circonstance a porté atteinte dans le chef du requérant à la substance même du droit garanti par l'article 2 du Protocole nº 7.

83. Dès lors, la Cour conclut qu'il y a eu en l'espèce violation de cette disposition.

III. SUR L'APPLICATION DE L'ARTICLE 41 DE LA CONVENTION

84. Aux termes de l'article 41 de la Convention,

> « Si la Cour déclare qu'il y a eu violation de la Convention ou de ses Protocoles, et si le droit interne de la Haute Partie contractante ne permet d'effacer qu'imparfaitement les conséquences de cette violation, la Cour accorde à la partie lésée, s'il y a lieu, une satisfaction équitable. »

A. Dommage

85. Le requérant réclame 3 000 euros (EUR) au titre du préjudice moral qu'il aurait subi.

86. Le Gouvernement conteste cette demande, qu'il estime infondée et excessive.

87. Au vu de l'ensemble des circonstances de la présente affaire, la Cour reconnaît que le requérant a subi un préjudice moral que le seul constat d'une violation ne suffit pas à réparer. Statuant en équité, elle accueille en entier la demande du requérant.

B. Frais et dépens

88. Le requérant demande également 1 330 EUR en remboursement des frais et dépens qu'il dit avoir engagés au titre de la procédure devant la Cour. Il prie celle-ci de faire virer cette somme sur le compte bancaire de son représentant.

89. Le Gouvernement conteste cette demande, qu'il estime excessive.

90. Selon la jurisprudence de la Cour, un requérant ne peut obtenir le remboursement de ses frais et dépens que dans la mesure où se trouvent établis leur réalité, leur nécessité et le caractère raisonnable de leur taux. En l'espèce, compte tenu des documents dont elle dispose et des critères exposés ci-dessus, la Cour accueille en entier la demande de l'intéressé et alloue à ce dernier 1 330 EUR au titre des frais et dépens.

C. Intérêts moratoires

91. La Cour juge approprié de calquer le taux des intérêts moratoires sur le taux d'intérêt de la facilité de prêt marginal de la Banque centrale européenne majoré de trois points de pourcentage.

PAR CES MOTIFS, LA COUR, À L'UNANIMITÉ,

1. *Déclare* la requête recevable ;
2. *Dit* qu'il y a eu violation de l'article 5 § 1 de la Convention ;
3. *Dit* qu'il y a eu violation de l'article 2 du Protocole n° 7 à la Convention ;
4. *Dit*

a) que l'État défendeur doit verser au requérant, dans les trois mois à compter du jour où l'arrêt sera devenu définitif conformément à l'article 44 § 2 de la Convention, les sommes suivantes, à convertir dans la monnaie de l'État défendeur au taux applicable à la date du règlement :

i. 3 000 EUR (trois mille euros), plus tout montant pouvant être dû à titre d'impôt, pour dommage moral,

ii. 1 330 EUR (mille trois cent trente euros), plus tout montant pouvant être dû par le requérant à titre d'impôt, pour frais et dépens, à virer sur le compte bancaire du représentant du requérant ;

b) qu'à compter de l'expiration dudit délai et jusqu'au versement, ces montants seront à majorer d'un intérêt simple à un taux égal à celui de la facilité de prêt marginal de la Banque centrale européenne applicable pendant cette période, augmenté de trois points de pourcentage.

Fait en anglais, puis communiqué par écrit le 4 juin 2015, en application de l'article 77 §§ 2 et 3 du règlement de la Cour.

Milan Blaško	MarkVilliger
Greffier adjoint	Président

Au présent arrêt se trouve joint, conformément aux articles 45 § 2 de la Convention et 74 § 2 du règlement, l'exposé de l'opinion séparée du juge Zupančič.

M.V.
M.B.

OPINION CONCORDANTE DU JUGE ZUPANČIČ

(Traduction)

Dans cette affaire, le requérant s'est trouvé confronté à un « dilemme du prisonnier » au sens littéral du terme. Du fait de la nature particulière de la procédure pénale ukrainienne, tout le temps qu'il a passé en prison l'a été au titre de la « détention provisoire » (« *pre-trial detention* » en anglais), bien que cette détention fût *de facto* postérieure au procès (*post-trial*) et antérieure au prononcé de la peine. Finalement, la juridiction de jugement fixa la peine en y incluant tout le temps passé en détention avant le procès (détention provisoire). Par conséquent, le requérant fut libérable presque immédiatement après le prononcé de sa peine.

Le requérant se trouva alors face à un dilemme. S'il acceptait le jugement et la peine comme étant définitifs, il était libre de sortir de prison. Cependant, s'il choisissait d'exercer son droit à un double degré de juridiction garanti par la Convention, par la Constitution et par la procédure pénale, il était voué à demeurer en détention dite « provisoire ».

En d'autres termes, sous l'effet d'une bizarrerie du système, le requérant fut empêché, ou à tout le moins sérieusement dissuadé, d'exercer son droit à un double degré de juridiction tel que garanti par l'article 2 § 1 du Protocole n° 7 :

Droit à un double degré de juridiction en matière pénale

> « 1. Toute personne déclarée coupable d'une infraction pénale par un tribunal a le droit de faire examiner par une juridiction supérieure la déclaration de culpabilité ou la condamnation. L'exercice de ce droit, y compris les motifs pour lesquels il peut être exercé, sont régis par la loi.
>
> (...) »

J'approuve naturellement la conclusion donnée à cette affaire, mais je propose ici d'établir une analogie avec le précepte de procédure pénale bien connu d'« interdiction de la *reformatio in pejus* ». Certains auteurs d'ouvrages juridiques soutiennent que ce principe, qui procure au défendeur, quand il est aussi le seul appelant, la garantie que la peine prononcée en appel ne sera pas plus lourde que celle qui a été fixée par la juridiction inférieure, est un droit de rang constitutionnel[1].

1. Voir, par exemple, Herke C. et Tóth D., *Theoretical and Practical Issues of the Prohibition of Reformatio in Peius in Hungary*, Issue of Business and Law, volume 3 (2011), à l'adresse www.herke.hu/tan/11litv.pdf.

Cependant, ni la Convention ni ses Protocoles ne consacrent pareille garantie ; et nous ne croyons pas non plus que l'interdiction de la *reformatio in pejus* revête en soi une importance constitutionnelle.

Ce qui revêt une importance constitutionnelle, en revanche, c'est le droit du défendeur à un double degré de juridiction. Il s'agit là, d'après H.L.A. Hart, d'une norme *prescriptive*, tandis que l'interdiction de la *reformatio in pejus* constitue une règle *instrumentale* qui fait pendant à la norme prescriptive.

Par ailleurs, la *ratio legis* immédiate de l'interdiction de la *reformatio in pejus* est également très pragmatique. Si l'on veut que les juridictions d'appel aient accès à certains types d'affaires afin d'être en mesure d'harmoniser la jurisprudence pénale, il ne faut pas dissuader les appelants qui ont été condamnés par les instances inférieures de présenter un appel.

Néanmoins, même considérée sous cet angle réaliste, l'interdiction de la *reformatio in pejus* est perçue dans le cadre de la procédure pénale en droit continental comme un droit traditionnel des défendeurs qui ont été condamnés par une décision de justice non définitive ; elle accompagne de manière légitime la position procédurale qui est la leur après le procès, indépendamment de la *ratio legis* plus étroite énoncée plus haut. Même si tel n'est pas l'objectif premier, ces défendeurs sont donc censés bénéficier de cette garantie. Ainsi, dans leur propre intérêt, comme dans celui de l'état de droit, il faut se garder de décourager sérieusement les défendeurs au pénal de faire appel de leur condamnation.

Pourtant, c'est précisément ce qui s'est produit en l'espèce. Si le défendeur avait fait appel de sa condamnation, sa détention « provisoire » aurait été prolongée pour une durée correspondant au temps qui aurait été nécessaire à la juridiction d'appel pour se prononcer. Le requérant a donc été dissuadé de faire appel du jugement qui avait été rendu en première instance. Il y a par conséquent eu violation de son droit à un double degré de juridiction garanti par l'article 2 § 1 du Protocole n° 7 (cité plus haut).

Si nous devions considérer *in abstracto* l'interdiction de la *reformatio in pejus* comme un droit procédural accompagnant le droit à un double degré de juridiction, la dissuasion inhérente à cette affaire concernant le droit du défendeur à un double degré de juridiction aurait été jugée contraire à cette même *ratio legis*. C'est pourquoi le cas du requérant n'est jamais parvenu jusqu'à la juridiction d'appel. Il aurait pourtant incontestablement été dans l'intérêt du requérant *tout autant que* dans celui de l'état de droit que la juridiction d'appel ait l'opportunité de statuer sur l'affaire.

Cependant, la Convention ne reconnaît pas encore directement l'interdiction de la *reformatio in pejus* comme un droit du défendeur. De plus, il n'existe aucune jurisprudence de la Cour européenne des droits de l'homme

en la matière. Mais l'idée de ne pas dissuader les appelants s'applique même au sein du système de Strasbourg. Comme l'a noté le juge Wojtyczek au point 11 de son opinion séparée jointe à l'arrêt *Janowiec et autres c. Russie* ([GC], n^{os} 55508/07 et 29520/09, CEDH 2013),

> « [il] convient de noter que la présente affaire a été renvoyée en Grande Chambre à la demande des requérants. Si la Convention n'énonce pas d'interdiction de la *reformatio in pejus*, il y a une situation paradoxale dans la mesure où une voie de recours prévue à l'article 43 de la Convention et utilisée par des requérants en vue d'assurer la protection de droits de l'homme a finalement débouché sur un arrêt de Grande Chambre beaucoup moins favorable pour eux que l'arrêt de chambre ».

DELFI AS v. ESTONIA
(Application no. 64569/09)

GRAND CHAMBER

JUDGMENT OF 16 JUNE 2015[1]

1. Judgment delivered by the Grand Chamber following referral of the case in accordance with Article 43 of the Convention.

SUMMARY[1]

Award of damages against Internet news portal for offensive comments posted on its site by anonymous third parties

In order to resolve the question whether domestic court decisions holding an Internet news portal liable for comments posted by third parties are in breach of its freedom of expression, the following aspects are relevant: the context of the comments, the measures applied by the portal to prevent or remove defamatory comments, the liability of the actual authors of the comments as an alternative to the portal's liability, and the consequences of the domestic proceedings for the portal. The protection of the rights and interests of others and of society as a whole may entitle Contracting States to impose liability on Internet news portals, without contravening Article 10 if they fail to take measures to remove clearly unlawful comments without delay, even without notice from the alleged victim or from third parties (see paragraphs 142 and 159 of the judgment).

Article 10

Freedom to impart information – Freedom of expression – Award of damages against Internet news portal for offensive comments posted on its site by anonymous third parties – User-generated expressive activity on the Internet – "Duties and responsibilities" of Internet news portals – Prescribed by law – Foreseeability – Necessary in a democratic society – Individual's fundamental rights should in principle override the economic interests of the operator of a search engine and the interests of other Internet users – Effective measures to limit dissemination of hate speech or speech inciting violence cannot be equated to "private censorship" – Proportionality of sanction

*

* *

Facts

The applicant company owned one of the largest Internet news portals in Estonia. In 2006, following the publication of an article on this portal concerning a ferry company, a number of comments containing personal threats and offensive language directed against the ferry-company owner were posted underneath the article. Defamation proceedings were instituted against the applicant company, which was ultimately ordered to pay 320 euros (EUR) in damages.

1. This summary by the Registry does not bind the Court.

Law

Article 10: This was the first case in which the Court had to examine a complaint concerning user-generated expressive activity on the Internet. While acknowledging the important benefits that could be derived from the Internet in the exercise of freedom of expression, the Court reiterated that the possibility of imposing liability for defamatory or other types of unlawful speech must, in principle, be retained, constituting an effective remedy for violations of personality rights. Moreover, the Court observed that, in the present case, the impugned comments constituted hate speech and direct incitement to violence, that the applicant company's news portal was one of the biggest Internet media in the country and that there had been public concern about the controversial nature of the comments it attracted. Therefore, the scope of examination of the case was limited to the assessment of the "duties and responsibilities" of Internet news portals, in the light of Article 10 § 2, when they provided, for economic purposes, a platform for user-generated comments on previously published content and some users engaged in clearly unlawful forms of speech.

The Court was satisfied that domestic legal instruments made it foreseeable that a media publisher running an Internet news portal for an economic purpose could, in principle, be held liable under domestic law for the uploading of clearly unlawful comments on its news portal. As a professional publisher, the applicant company was in fact in a position to assess the risks related to its activities and must have been able to foresee the legal consequences which these could entail. Therefore, the interference in issue was "prescribed by law" within the meaning of Article 10 of the Convention.

As regards the necessity of the interference with the applicant company's freedom to impart information, the Court attached particular weight to the professional and commercial nature of the news portal, and to the fact that the applicant company had an economic interest in the posting of comments. Moreover, only the applicant company had the technical means to modify or delete the comments published on the news portal. Against this background, its involvement in making public the comments on its articles on the portal went beyond that of a passive, purely technical service provider.

As to whether the liability of the actual authors of the comments could serve as an alternative to the liability of the Internet news portal, the Court observed that anonymity on the Internet, while an important factor, had to be balanced against other rights and interests. In reaching this conclusion, it was mindful of the interest of Internet users in not disclosing their identity, but also pointed to the sometimes very negative effects of an unlimited dissemination of information on the Internet. In this regard, the Court referred to a judgment of the Court of Justice of the European Union in which it found that the individual's fundamental rights, as a rule, overrode the economic interests of the operator of a search engine and the

interests of other Internet users[2]. Moreover, the Internet allowed for different degrees of anonymity, with providers sometimes being the only ones able to identify Internet users that wished to remain anonymous *vis-à-vis* the public. In the present case, the uncertain effectiveness of measures allowing the establishment of the identity of the authors of the comments, coupled with the lack of instruments put in place by the Internet portal with a view to making it possible for a victim of hate speech effectively to bring a claim against the authors of the comments, supported the domestic courts' view that the injured person had to have the choice of bringing a claim against the applicant company or the authors of the comments.

As to the measures taken by the applicant company to tackle the publication of unlawful comments on its portal, an obligation for large news portals to take effective measures to limit the dissemination of hate speech and speech inciting violence could not be equated to "private censorship". In fact, the ability of a potential victim of such speech to continuously monitor the Internet was more limited than the ability of a large commercial Internet news portal to prevent or remove unlawful comments. Notwithstanding the fact that mechanisms had been in place on the applicant company's website to deal with comments amounting to hate speech or speech inciting to violence and that in many cases these mechanisms could function as an appropriate tool for balancing the rights and interests of all involved, they had been insufficient in the specific circumstances of the case, as the unlawful comments had remained online for six weeks.

Finally, a sanction of EUR 320 could by no means be considered disproportionate to the breach established by the domestic courts. It also did not appear that the applicant company had had to change its business model as a result of the domestic proceedings. It followed from the above that the domestic courts' imposition of liability on the applicant company had been based on relevant and sufficient grounds and had not constituted a disproportionate restriction on its right to freedom of expression.

Conclusion: no violation (fifteen votes to two).

Case-law cited by the Court

A. v. Norway, no. 28070/06, 9 April 2009
Ahmet Yıldırım v. Turkey, no. 3111/10, ECHR 2012
Animal Defenders International v. the United Kingdom [GC], no. 48876/08, ECHR 2013
Ashby Donald and Others v. France, no. 36769/08, 10 January 2013
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K.U. v. Finland, no. 2872/02, ECHR 2008
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Krone Verlag GmbH & Co. KG v. Austria (no. 4), no. 72331/01, 9 November 2006
Kruslin v. France, 24 April 1990, Series A no. 176-A
Lehideux and Isorni v. France, 23 September 1998, *Reports* 1998-VII
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Thoma v. Luxembourg, no. 38432/97, ECHR 2001-III
Timciuc v. Romania (dec.), no. 28999/03, 12 October 2010

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VgT Verein gegen Tierfabriken v. Switzerland, no. 24699/94, ECHR 2001-VI
Von Hannover v. Germany (no. 2) [GC], nos. 40660/08 and 60641/08, ECHR 2012
Witzsch v. Germany (dec.), no. 7485/03, 13 December 2005

In the case of Delfi AS v. Estonia,

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

Dean Spielmann, *President*,
Josep Casadevall,
Guido Raimondi,
Mark Villiger,
Işıl Karakaş,
Ineta Ziemele,
Boštjan M. Zupančič,
András Sajó,
Ledi Bianku,
Nona Tsotsoria,
Vincent A. De Gaetano,
Angelika Nußberger,
Julia Laffranque,
Linos-Alexandre Sicilianos,
Helena Jäderblom,
Robert Spano,
Jon Fridrik Kjølbro, *judges*,

and Johan Callewaert, *Deputy Grand Chamber Registrar*,

Having deliberated in private on 9 July 2014 and 18 March 2015,

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

PROCEDURE

1. The case originated in an application (no. 64569/09) against the Republic of Estonia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Delfi AS, a public limited liability company registered in Estonia ("the applicant company"), on 4 December 2009.

2. The applicant company was represented by Mr V. Otsmann and Ms K. Turk, lawyers practising in Tallinn. The Estonian Government ("the Government") were represented by their Agent, Ms M. Kuurberg, of the Ministry of Foreign Affairs.

3. The applicant company alleged that its freedom of expression had been violated, in breach of Article 10 of the Convention, by the fact that it had been held liable for the third-party comments posted on its Internet news portal.

4. The application was allocated to the Fifth Section of the Court (Rule 52 § 1 of the Rules of Court). On 1 February 2011 the Court changed the composition of its Sections (Rule 25 § 1) and the application was assigned to the newly composed First Section. On 10 October 2013 a Chamber composed of Isabelle Berro-Lefèvre, President, Elisabeth Steiner, Khanlar Hajiyev, Mirjana Lazarova Trajkovska, Julia Laffranque, Ksenija Turković, Dmitry Dedov, judges, and André Wampach, Deputy Section Registrar, delivered its judgment. It decided unanimously to declare the application admissible and held that there had been no violation of Article 10 of the Convention.

5. On 8 January 2014 the applicant company requested that the case be referred to the Grand Chamber in accordance with Article 43 of the Convention, and a panel of the Grand Chamber accepted the request on 17 February 2014.

6. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24.

7. The applicant company and the Government each filed further observations on the merits (Rule 59 § 1).

8. In addition, third-party comments were received from the following organisations, which had been granted leave by the President of the Grand Chamber to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3 (a)): the Helsinki Foundation for Human Rights; the non-governmental organisation, Article 19; Access; Media Legal Defence Initiative, acting together with its twenty-eight associated organisations; and the European Digital Media Association, the Computer & Communications Industry Association and the pan-European association of European Internet Services Providers Associations, acting jointly.

9. A hearing took place in public in the Human Rights Building, Strasbourg, on 9 July 2014 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Ms M. Kuurberg, *Agent*,
Ms M. Kaur,
Ms K. Mägi, *Advisers*;

(b) *for the applicant company*
Mr V. Otsmann,
Ms K. Turk, *Counsel*.

The Court heard addresses by Mr Otsmann, Ms Turk and Ms Kuurberg, as well as their replies to questions put by Judges Ziemele, Spano, Raimondi, Villiger and Bianku.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The applicant company is a public limited liability company (*aktsiaselts*), registered in Estonia.

A. Background to the case

11. The applicant company is the owner of Delfi, an Internet news portal that published up to 330 news articles a day at the time of the lodging of the application. Delfi is one of the largest news portals on the Internet in Estonia. It publishes news in Estonian and Russian in Estonia, and also operates in Latvia and Lithuania.

12. At the material time, at the end of the body of the news articles there were the words "add your comment" and fields for comments, the commenter's name and his or her e-mail address (optional). Below these fields there were buttons labelled "publish the comment" and "read comments". The part for reading comments left by others was a separate area which could be accessed by clicking on the "read comments" button. The comments were uploaded automatically and were, as such, not edited or moderated by the applicant company. The articles received about 10,000 readers' comments daily, the majority posted under pseudonyms.

13. Nevertheless, there was a system of notice-and-take-down in place: any reader could mark a comment as *leim* (Estonian for an insulting or mocking message or a message inciting hatred on the Internet) and the comment was removed expeditiously. Furthermore, comments that included certain stems of obscene words were automatically deleted. In addition, a victim of a defamatory comment could directly notify the applicant company, in which case the comment was removed immediately.

14. The applicant company had made efforts to advise users that the comments did not reflect its own opinion and that the authors of comments were responsible for their content. On Delfi's website there were Rules on posting comments which included the following.

> "The Delfi message board is a technical medium allowing users to publish comments. Delfi does not edit the comments. An author of a comment is liable for his or her comment. It is worth noting that there have been cases in the Estonian courts where authors have been punished for the contents of a comment ...

Delfi prohibits comments whose content does not comply with good practice.

These are comments that

– contain threats;

– contain insults;

– incite hostility and violence;

– incite illegal activities ...

– contain off-topic links, spam or advertisements;

– are without substance and/or off topic;

– contain obscene expressions and vulgarities ...

Delfi reserves the right to remove such comments and restrict their authors' access to the writing of comments ..."

The functioning of the notice-and-take-down system was also explained in the Rules on posting comments.

15. The Government submitted that in Estonia Delfi had a notorious history of publishing defamatory and degrading comments. Thus, on 22 September 2005 the weekly newspaper *Eesti Ekspress* had published an open letter from its editorial board to the Minister of Justice, the Chief Public Prosecutor and the Chancellor of Justice in which concern was expressed about the incessant taunting of people on public websites in Estonia. Delfi was named as a source of brutal and arrogant mockery. The addressees of the public letter responded to it in the 29 September 2005 edition of *Eesti Ekspress*. The Minister of Justice emphasised that the insulted persons had the right to defend their honour and reputation in court by bringing a suit against Delfi and claiming damages. The Chief Public Prosecutor referred to the legal grounds which made threats, incitement to social hatred, and sexual abuse of minors punishable under criminal law, and noted that liability for defamation and insults was dealt with under civil procedure. The Chancellor of Justice referred to the legal provisions designed to ensure freedom of expression as well as the protection of everyone's honour and good name, including sections 1043 and 1046 of the Obligations Act (*Võlaõigusseadus*).

B. Article and comments published on the Internet news portal

16. On 24 January 2006 the applicant company published an article on the Delfi portal under the heading "SLK Destroyed Planned Ice Road". Ice roads are public roads over the frozen sea which are open between the Estonian mainland and some islands in winter. The abbreviation "SLK" stands for AS Saaremaa Laevakompanii (Saaremaa Shipping Company, a

public limited liability company). SLK provides a public ferry transport service between the mainland and certain islands. At the material time, L. was a member of the supervisory board of SLK and the company's sole or majority shareholder.

17. On 24 and 25 January 2006 the article attracted 185 comments. About twenty of them contained personal threats and offensive language directed at L.

18. On 9 March 2006 L.'s lawyers requested the applicant company to remove the offensive comments and claimed 500,000 Estonian kroons (EEK) (approximately 32,000 euros (EUR)) in compensation for non-pecuniary damage. The request concerned the following twenty comments.

"1. (1) there are currents in [V]äinameri

(2) open water is closer to the places you referred to, and the ice is thinner.

Proposal – let's do the same as in 1905, let's go to [K]uressaare with sticks and put [L.] and [Le.] in a bag

2. bloody shitheads...

they're loaded anyway thanks to that monopoly and State subsidies and have now started to worry that cars may drive to the islands for a couple of days without anything filling their purses. burn in your own ship, sick Jew!

3. good that [La.'s] initiative has not broken down the lines of the web flamers. go ahead, guys, [L.] into the oven!

4. [little L.] go and drown yourself

5. aha... [I] hardly believe that that happened by accident... assholes fck

6. rascal!!! [in Russian]

7. What are you whining for, knock this bastard down once and for all[.] In future the other ones ... will know what they risk, even they will only have one little life.

8. ... is goddamn right. Lynching, to warn the other [islanders] and would-be men. Then nothing like that will be done again! In any event, [L.] very much deserves that, doesn't he.

9. "a good man lives a long time, a shitty man a day or two"

10. If there was an ice road, [one] could easily save 500 for a full car, fckng [L.] pay for that economy, why does it take 3 [hours] for your ferries if they are such good icebreakers, go and break ice in Pärnu port ... instead, fcking monkey, I will cross [the strait] anyway and if I drown, it's your fault

11. and can't anyone stand up to these shits?

12. inhabitants of Saaremaa and Hiiumaa islands, do 1:0 to this dope.

13. wonder whether [L.] won't be knocked down in Saaremaa? screwing one's own folk like that.

14. The people will chatter for a couple of days on the Internet, but the crooks (and also those who are backed and whom we ourselves have elected to represent us) pocket the money and pay no attention to this flaming – no one gives a shit about this.

Once [M.] and other big crooks also used to boss around, but their greed struck back (RIP). Will also strike back for these crooks sooner or later. As they sow, so shall they reap, but they should nevertheless be contained (by lynching as the State is powerless towards them – it is really them who govern the State), because they only live for today. Tomorrow, the flood.

15. this [V.] will one day get hit with a cake by me.

damn, as soon as you put a cauldron on the fire and there is smoke rising from the chimney of the sauna, the crows from Saaremaa are there – thinking that ... a pig is going to be slaughtered. no way

16. bastards!!!! Ofelia also has an ice class, so this is no excuse why Ola was required!!!

17. Estonian State, led by scum [and] financed by scum, of course does not prevent or punish antisocial acts by scum. But well, every [L.] has his Michaelmas ... and this cannot at all be compared to a ram's Michaelmas.[1] Actually feel sorry for [L.] – he's a human, after all... :D :D :D

18. ... if after such acts [L.] should all of a sudden happen to be on sick leave and also next time the ice road is destroyed ... will he [then] dare to act like a pig for the third time? :)

19. fucking bastard, that [L.]... could have gone home with my baby soon ... anyway his company cannot guarantee a normal ferry service and the prices are such that ... real creep ... a question arises whose pockets and mouths he has filled up with money so that he's acting like a pig from year to year

20. you can't make bread from shit; and paper and internet can stand everything; and just for my own fun (really the State and [L.] do not care about the people's opinion) ... just for fun, with no greed for money – I pee into [L.'s] ear and then I also shit onto his head. :)"

19. On the same day, that is about six weeks after their publication, the offensive comments were removed by the applicant company.

20. On 23 March 2006 the applicant company responded to the request from L.'s lawyers. It informed L. that the comments had been removed under the notice-and-take-down obligation, and refused the claim for damages.

C. Civil proceedings against the applicant company

21. On 13 April 2006 L. brought a civil suit in the Harju County Court against the applicant company.

1. This is an allusion to an Estonian saying, "Every ram has its Michaelmas", which historically refers to slaughtering wethers (castrated rams) in autumn around Michaelmas day (29 September) but is nowadays used to mean that one cannot escape one's fate.

22. At the hearing of 28 May 2007, the representatives of the applicant company submitted, *inter alia*, that in cases like that concerning the "Bronze Night" (disturbances of public order related to the relocation of the Bronze Soldier monument in April 2007) Delfi had removed between 5,000 and 10,000 comments per day, on its own initiative.

23. By a judgment of 25 June 2007, L.'s claim was dismissed. The County Court found that the applicant company's liability was excluded under the Information Society Services Act (*Infoühiskonna teenuse seadus*), which was based on Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce). The court considered that the comments section on the applicant company's news portal was to be distinguished from its journalistic section. The administration of the former by the applicant company was essentially of a mechanical and passive nature. The applicant company could not be considered the publisher of the comments, nor did it have any obligation to monitor them.

24. On 22 October 2007 the Tallinn Court of Appeal allowed an appeal by L. It considered that the County Court had erred in finding that the applicant company's liability was excluded under the Information Society Services Act. The County Court's judgment was quashed and the case was referred back to the first-instance court for fresh consideration.

25. On 21 January 2008 the Supreme Court declined to hear an appeal by the applicant company.

26. On 27 June 2008 the Harju County Court, having re-examined the case, found for L. In accordance with the Court of Appeal's instructions, it relied on the Obligations Act and deemed the Information Society Services Act inapplicable. It observed that the applicant company had indicated on its website that comments were not edited, that the posting of comments that were contrary to good practice was prohibited, and that the applicant company reserved the right to remove such comments. A system was put in place whereby users could notify the applicant company of any inappropriate comments. However, the County Court considered that this was insufficient and did not allow adequate protection for the personality rights of others. The court found that the applicant company itself was to be considered the publisher of the comments, and it could not avoid responsibility by publishing a disclaimer stating that it was not liable for the content of the comments.

27. The County Court found that the news article itself published on the Delfi news portal was a balanced one. A number of comments, however, were vulgar in form; they were humiliating and defamatory, and impaired

L.'s honour, dignity and reputation. The comments went beyond justified criticism and amounted to simple insults. The court concluded that freedom of expression did not extend to protection of the comments concerned and that L.'s personality rights had been violated. L. was awarded EEK 5,000 (EUR 320) in compensation for non-pecuniary damage.

28. On 16 December 2008 the Tallinn Court of Appeal upheld the County Court's judgment. It emphasised that the applicant company had not been required to exercise prior control over comments posted on its news portal. However, having chosen not to do so, it should have created some other effective system which would have ensured rapid removal of unlawful comments. The Court of Appeal considered that the measures taken by the applicant company were insufficient and that it was contrary to the principle of good faith to place the burden of monitoring the comments on their potential victims.

29. The Court of Appeal rejected the applicant company's argument that its liability was excluded under the Information Society Services Act. It noted that the applicant company was not a technical intermediary in respect of the comments, and that its activity was not of a merely technical, automatic and passive nature; instead, it invited users to post comments. Thus, the applicant company was a provider of content services rather than of technical services.

30. On 10 June 2009 the Supreme Court dismissed an appeal by the applicant company. It upheld the Court of Appeal's judgment in substance, but partly modified its reasoning.

31. The Supreme Court held as follows.

> "10. The Chamber finds that the allegations set out in the appeal do not serve as a basis for reversing the judgment of the Court of Appeal. The conclusion reached in the Court of Appeal's judgment is correct, but the legal reasoning of the judgment must be amended and supplemented on the basis of Article 692 § 2 of the Code of Civil Procedure.
>
> 11. The parties do not dispute the following circumstances:
>
> (a) on 24 January 2006 the defendant's Internet portal 'Delfi' published an article entitled 'SLK Destroyed Planned Ice Road';
>
> (b) the defendant provided visitors to the Internet portal with the opportunity to comment on articles;
>
> (c) of the comments published [*avaldatud*[2]] on the aforementioned article, twenty contain content which is derogatory towards the plaintiff [L.];

2. The Estonian words *avaldama/avaldaja* mean both publish/publisher and disclose/discloser.

(d) the defendant removed the derogatory comments after the plaintiff's letter of 9 March 2006.

12. The legal dispute between the parties relates to whether the defendant as an entrepreneur is the publisher within the meaning of the Obligations Act, whether what was published (the content of comments) is unlawful, and whether the defendant is liable for the publication of comments with unlawful content.

13. The Chamber agrees with the conclusion of the Court of Appeal that the defendant does not fall within the circumstances precluding liability as specified in section 10 of the ISSA [Information Society Services Act].

According to section 2(6) of the Technical Regulations and Standards Act, an information society service is a service specified in section 2(1) of the ISSA. According to this provision, 'information society services' are services provided in the form of economic or professional activities at the direct request of a recipient of the services, without the parties being simultaneously present at the same location, and such services involve the processing, storage or transmission of data by electronic means intended for the digital processing and storage of data. Hence, important conditions for the provision of information society services are that the services are provided without the physical presence of the parties, the data are transmitted by electronic means, and the service is provided for a fee on the basis of a request by the user of the service.

Sections 8 to 11 of the ISSA establish the liability of providers of different information society services. Section 10 of the ISSA states that where a service is provided that consists of the storage of information provided by a recipient of the service, the service provider is not liable for the information stored at the request of a recipient of the service, on condition that: (a) the provider does not have actual knowledge of the contents of the information and, as regards claims for damages, is not aware of any facts or circumstances indicating any illegal activity or information; (b) the provider, upon having knowledge or becoming aware of the aforementioned facts, acts expeditiously to remove or to disable access to the information. Hence, the provision in question is applied in the event that the service provided consists in storing data on [the service provider's] server and enabling users to have access to these data. Subject to the conditions specified in section 10 of the ISSA, the provider of such a service is exempted from liability for the content of information stored by it, because the provider of the service merely fulfils the role of an intermediary within the meaning of the provision referred to, and does not initiate or modify the information.

Since the Information Society Services Act is based on Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), the principles and objectives of that Directive must also be taken into account in the interpretation of the provisions of the Act in question. Articles 12 to 15 of the Directive, which form the basis for sections 8 to 11 of the ISSA, are complemented by Recital 42 of the preamble to the Directive, according to which the exemptions from liability established in Articles 12 to 15 cover only cases where the activity of the information society service provider is limited to the technical process of operating and giving access to a communication network over which information made

available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient; this activity is of a mere technical, automatic and passive nature, which implies that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored. Hence, the providers of so-called 'content services' who have control over the content of the information stored cannot rely on the exemptions specified in Articles 12 to 15 of the Directive.

The Chamber shares the opinion of the Court of Appeal that the activities of the defendant in publishing the comments are not merely of a technical, automatic and passive nature. The objective of the defendant is not merely the provision of an intermediary service. The defendant has integrated the comments section into its news portal, inviting visitors to the website to complement the news with their own judgments [*hinnangud*] and opinions (comments). In the comments section, the defendant actively calls for comments on the news items appearing on the portal. The number of visits to the defendant's portal depends on the number of comments; the revenue earned from advertisements published on the portal, in turn, depends on the [number of visits]. Thus, the defendant has an economic interest in the posting of comments. The fact that the defendant is not the author of the comments does not mean that the defendant has no control over the comments section. The defendant sets out the rules for the comments section and makes changes to it (removes a comment) if those rules are breached. By contrast, a user of the defendant's service cannot change or delete a comment he or she has posted. He or she can only report an inappropriate comment. Thus, the defendant can determine which of the comments added will be published and which will not be published. The fact that the defendant does not make use of this possibility does not lead to the conclusion that the publishing of comments is not under the defendant's control. The Chamber agrees with the opinion of the Court of Appeal that the defendant, which governs the information stored in the comments section, provides a content service, for which reason the circumstances precluding liability, as specified in section 10 of the ISSA, do not apply in the present case.

14. It is not disputed that the defendant is the publisher of an article entitled 'SLK Destroyed Planned Ice Road', published on the Delfi Internet portal on 24 January 2006. The County Court also found that the defendant must be regarded as the publisher of the comments. The Court of Appeal, agreeing with that opinion, noted that the fact that the defendant relied on a violation of its right to freedom of expression showed that it considered itself – and not the authors of the comments – to be the publisher of the comments. In the opinion of the Chamber, in the present case both the defendant and the authors of the comments are the publishers of the comments within the meaning of the Obligations Act. The plaintiff has the right to choose against whom to bring the suit. The suit has only been brought against the defendant [Delfi].

The Chamber has explained the definitions of "disclosure" and "discloser" in paragraph 24 of its judgment of 21 December 2005 in civil case no. 3-2-1-95-05, finding that for the purposes of section 1047 of the Obligations Act, disclosure [*avaldamine*] means communication of information to third parties and the discloser is a person who communicates the information to third parties. In addition, the

Chamber explained that in the case of publication [*avaldamine*] of information in the media, the discloser/publisher [*avaldaja*] can be a media company as well as the person who transmitted the information to the media publication. Publishing of news and comments on an Internet portal is also a journalistic activity [*ajakirjanduslik tegevus*]. At the same time, because of the nature of Internet media [*internetiajakirjandus*], it cannot reasonably be required of a portal operator to edit comments before publishing them in the same manner as applies for a printed media publication [*trükiajakirjanduse väljaanne*]. While the publisher [(*väljaandja*) of a printed media publication] is, through editing, the initiator of the publication of a comment, on the Internet portal the initiator of publication is the author of the comment, who makes it accessible to the general public through the portal. Therefore, the portal operator is not the person to whom information is disclosed. Because of [their] economic interest in the publication of comments, both a publisher [*väljaandja*] of printed media and an Internet portal operator are publishers/disclosers [*avaldajad*] as entrepreneurs.

In cases concerning a value judgment [*väärtushinnang*] that prejudices and denigrates a person's honour and good name, in determining the definition of publication/disclosure and publisher/discloser it is irrelevant whether the value judgment is derived from the published/disclosed information or is derogatory because of its substantive meaning ... Hence, publication/disclosure is communication to third parties of a value judgment on a person (section 1046(1) of the Obligations Act) and/or of information which allows a value judgment to be made, and a publisher/discloser is a person who communicates such judgments [*hinnangud*] and information to third parties. In the present case the comments have been made accessible to an unlimited number of persons (the general public).

15. In reply to the allegations in the defendant's appeal to the effect that the Court of Appeal wrongly applied Article 45 of the Constitution since, in justifying the interference with freedom of expression, it relied on the principle of good faith, and not the law, and that the removal of a comment from the portal is an interference with the freedom of expression of the person posting the comment, the Chamber explains the following.

The exercise of any fundamental right is restricted by Article 19 § 2 of the Constitution, which provides that everyone must honour and consider the rights and freedoms of others, and must observe the law in exercising his or her rights and freedoms and in fulfilling his or her duties. The first sentence of the first paragraph of Article 45 of the Constitution provides for everyone's right to freedom of expression, that is, the right to disseminate information of any content in any manner. That right is restricted by the prohibition on injuring a person's honour and good name, as laid down in the Constitution (Article 17). The Chamber is of the opinion that in handling the conflict between freedom of expression on the one hand, and honour and good name on the other, regard must be had to the fact that Article 17 of the Constitution, which is formulated as a prohibition, does not completely preclude any interference with a person's honour and good name, but only prohibits defamation thereof (section 1046 of the Obligations Act). In other words, disregarding the aforementioned prohibition would not be in conformity with the Constitution (Article 11 of the Constitution). The second sentence of the first paragraph of Article 45 of the Constitution includes

the possibility of restricting the freedom of expression by law in order to protect a person's honour and good name.

In the interests of the protection of a person's honour and good name, the following provisions of the Obligations Act may be regarded as restricting the freedom of expression: sections 1045(1)(4), 1046(1), 1047(1), (2) and (4), 1055(1) and (2), and 134(2). The County Court found that injuring the plaintiff's honour was not justified and was therefore unlawful; as there was no discussion of the [news] topic in the comments, the plaintiff was simply insulted in order to degrade him. The Court of Appeal also agreed with that opinion. The Chamber finds that if section 1046 of the Obligations Act is interpreted in conformity with the Constitution, injuring a person's honour is unlawful. The legal assessment by the courts of the twenty comments of a derogatory nature is substantiated. The courts have correctly found that those comments are defamatory since they are of a vulgar nature, degrade human dignity and contain threats.

The Chamber does not agree with the opinion of the Court of Appeal that the removal of comments of an unlawful nature interfering with the personality rights of the plaintiff is not an interference with the freedom of expression of the authors of the comments. The Chamber considers that the application of any measure restricting a fundamental right in any manner may be regarded as an interference with the exercise of that fundamental right. Interference by an Internet portal operator with the freedom of expression of persons posting comments is, however, justified by the obligation of the portal operator-entrepreneur to respect the honour and good name of third parties, as arising from the Constitution (Article 17) and the law (section 1046 of the Obligations Act), and to avoid causing them harm (section 1045(1)(4) of the Obligations Act).

16. According to the judgment of the Court of Appeal, the contents of the comments were unlawful; they were linguistically inappropriate. Value judgments ... are inappropriate if it is obvious to a sensible reader that their meaning is vulgar and intended to degrade human dignity and ridicule a person. The comments did not contain any information which would have required excessive verification on the initiative of the portal operator. Hence, the defendant's allegation that it was not and should not have been aware of the unlawfulness of the comments is groundless.

On account of the obligation arising from law to avoid causing harm, the defendant should have prevented the publication of comments with clearly unlawful content. The defendant did not do so. In accordance with section 1047(3) of the Obligations Act, the disclosure of information or other matters is not deemed to be unlawful if the person who discloses the information or other matters or the person to whom such matters are disclosed has a legitimate interest in the disclosure, and if the person who discloses the information has verified the information or other matters with a thoroughness which corresponds to the gravity of the potential violation. The publication of linguistically inappropriate value judgments injuring another person's honour cannot be justified by relying on the circumstances specified in section 1047(3) of the Obligations Act: such judgments are not derived from any information disclosed but are created and published for the purpose of damaging the honour and good name of the party concerned. Hence, the publication of comments of a clearly unlawful nature was also

unlawful. After the disclosure, the defendant failed to remove the comments – the unlawful content of which it should have been aware of – from the portal on its own initiative. In such circumstances, the courts have reasonably found that the defendant's inactivity is unlawful. The defendant is liable for the damage caused to the plaintiff, since the courts have established that the defendant has not proved the absence of culpability [*süü*] (section 1050(1) of the Obligations Act)."

D. Subsequent developments

32. On 1 October 2009 Delfi announced on its Internet portal that persons who had posted offensive comments were not allowed to post a new comment until they had read and accepted the Rules on posting comments. Furthermore, it was announced that Delfi had set up a team of moderators who carried out follow-up moderation of comments posted on the portal. First of all, the moderators reviewed all user notices of inappropriate comments. The compliance of comments with the Rules on posting comments was monitored as well. According to the information published, the number of comments posted by Delfi's readers in August 2009 had been 190,000. Delfi's moderators had removed 15,000 comments (about 8%), mainly consisting of spam or irrelevant comments. The percentage of defamatory comments had been less than 0.5% of the total number of comments.

II. RELEVANT DOMESTIC LAW AND PRACTICE

33. The Constitution of the Republic of Estonia (*Eesti Vabariigi põhiseadus*) provides as follows.

Article 17

"No one's honour or good name shall be defamed."

Article 19

"1. Everyone has the right to free self-realisation.

2. Everyone shall honour and consider the rights and freedoms of others, and shall observe the law in exercising his or her rights and freedoms and in fulfilling his or her duties."

Article 45

"1. Everyone has the right freely to disseminate ideas, opinions, beliefs and other information by word, print, picture or other means. This right may be restricted by law to protect public order, morals, and the rights and freedoms, health, honour and the good name of others. This right may also be restricted by law for State and local government public servants, to protect a State or business secret or information received in confidence which has become known to them by reason of their office, and the family and private life of others, as well as in the interests of justice.

2. There is to be no censorship."

34. Section 138 of the Civil Code (General Principles) Act (*Tsiviilseadustiku üldosa seadus*) provides that rights are to be exercised and obligations performed in good faith. A right must not be exercised in an unlawful manner or with the aim of causing damage to another person.

35. Subsection 2 of section 134 of the Obligations Act (*Võlaõigusseadus*) provides:

> "In the case of an obligation to compensate for damage arising from ... a breach of a personality right, in particular from defamation, the obligated person shall compensate the aggrieved person for non-pecuniary damage only if this is justified by the gravity of the breach, in particular by physical or emotional distress."

36. Section 1043 of the Obligations Act provides that a person (tortfeasor) who unlawfully causes damage to another person (victim) must compensate for the damage if the tortfeasor is culpable (*süüdi*) of causing the damage or is liable for causing the damage pursuant to the law.

37. Section 1045 of the Obligations Act provides that the causing of damage is unlawful if, *inter alia*, it results from a breach of a personality right of the victim.

38. The Obligations Act further provides.

Section 1046 – Unlawfulness of damage to personality rights

> "(1) Injuring a person's honour, *inter alia*, by passing an undue value judgment, unjustified use of a person's name or image, or breaching the inviolability of a person's private life or another personality right, is unlawful unless otherwise provided by law. In establishing such unlawfulness, the type of the breach, the reason and motive for the breach and the gravity of the breach relative to the aim pursued thereby shall be taken into consideration.
>
> (2) The breach of a personality right is not unlawful if the breach is justified in view of other legal rights protected by law and the rights of third parties or public interests. In such cases, unlawfulness shall be established on the basis of a comparative assessment of the different legal rights and interests protected by law."

Section 1047 – Unlawfulness of disclosure of incorrect information

> "(1) A breach of personality rights or interference with the economic or professional activities of a person by way of disclosure [*avaldamine*] of incorrect information, or by way of incomplete or misleading disclosure of information concerning the person or the person's activities, is unlawful unless the person who discloses such information proves that, at the time of such disclosure, he or she was not aware and was not required to be aware that such information was incorrect or incomplete.
>
> (2) Disclosure of defamatory matters concerning a person, or matters which may adversely affect a person's economic situation, is deemed to be unlawful unless the person who discloses such matters proves that they are true.

(3) Regardless of the provisions of subsections (1) and (2) of this section, the disclosure of information or other matters is not deemed to be unlawful if the person who discloses the information or other matters or the person to whom such matters are disclosed has a legitimate interest in the disclosure, and if the person who discloses the information has verified the information or other matters with a thoroughness which corresponds to the gravity of the potential breach.

(4) In the event of disclosure of incorrect information, the victim may demand that the person who has disclosed such information refute the information or publish a correction at his or her own expense, regardless of whether the disclosure of the information was unlawful or not."

Section 1050 – Culpability [*süü*] as basis for liability

"(1) Unless otherwise provided by law, a tortfeasor is not liable for the causing of damage if the tortfeasor proves that he or she is not culpable [*süüdi*] of causing the damage.

(2) The situation, age, education, knowledge, abilities and other personal characteristics of a person shall be taken into consideration in the assessment of the culpability [*süü*] of the person for the purposes of this Chapter.

(3) If several persons are liable for compensation for damage and, pursuant to law, one or more of them are liable for compensation for unlawfully caused damage regardless of whether or not they are culpable, the wrongfulness of the behaviour and the form of the culpability of the persons liable for compensation for the damage shall be taken into consideration in apportioning among them the obligation to compensate for the damage."

Section 1055 – Prohibition on damaging actions

"(1) If unlawful damage is caused continually or a threat is made that unlawful damage will be caused, the victim or the person who is threatened has the right to demand the cessation of the behaviour causing the damage or of the threats of such behaviour. In the event of bodily injury, damage to health or a breach of the inviolability of personal life or of any other personality rights, it may be demanded, *inter alia*, that the tortfeasor be prohibited from approaching others (restraining order), that the use of housing or communications be regulated, or that other similar measures be applied.

(2) The right to demand the cessation of behaviour causing damage as specified in subsection (1) of this section shall not apply if it is reasonable to expect that such behaviour can be tolerated in conditions of human coexistence or in view of a significant public interest. In such cases, the victim shall have the right to make a claim for compensation for damage caused unlawfully.

..."

39. The Information Society Services Act (*Infoühiskonna teenuse seadus*) provides as follows.

Section 8 – Restricted liability in the case of mere transmission of information and provision of access to a public data communications network

"(1) Where a service is provided that consists of the mere transmission in a public data communication network of information provided by a recipient of the service, or the provision of access to a public data communication network, the service provider shall not be liable for the information transmitted, on condition that the provider:

1. does not initiate the transmission;

2. does not select the receiver of the transmission; and

3. does not select or modify the information contained in the transmission.

(2) The acts of transmission and of provision of access within the meaning of subsection 1 of this section include the automatic, intermediate and transient storage of the information transmitted, in so far as this takes place for the sole purpose of carrying out the transmission in the public data communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission."

Section 9 – Restricted liability in the case of temporary storage of information in cache memory

"(1) Where a service is provided that consists of the transmission in a public data communication network of information provided by a recipient of the service, the service provider shall not be liable for the automatic, intermediate and temporary storage of that information if the method of transmission concerned requires caching for technical reasons and the caching is performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service at their request, on condition that:

1. the provider does not modify the information;

2. the provider complies with conditions on access to the information;

3. the provider complies with rules regarding the updating of the information, specified in a manner widely recognised and used in the industry;

4. the provider does not interfere with the lawful use of technology which is widely recognised and used by the industry to obtain data on the use of the information;

5. the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court, the police or a State supervisory authority has ordered such removal."

Section 10 – Restricted liability in the case of provision of an information storage service

"(1) Where a service is provided that consists of the storage of information provided by a recipient of the service, the service provider shall not be liable for the information stored at the request of a recipient of the service, on condition that:

1. the provider does not have actual knowledge of the content of the information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent;

2. the provider, upon obtaining knowledge or awareness of the facts specified in paragraph 1 of this subsection, acts expeditiously to remove or to disable access to the information.

(2) Subsection 1 of this section shall not apply when the recipient of the service is acting under the authority or the control of the provider."

Section 11 – No obligation to monitor

"(1) A service provider specified in sections 8 to 10 of this Act is not obliged to monitor information upon the mere transmission thereof or provision of access thereto, temporary storage thereof in cache memory or storage thereof at the request of the recipient of the service, nor is the service provider obliged actively to seek information or circumstances indicating illegal activity.

(2) The provisions of subsection 1 of this section shall not restrict the right of an official exercising supervision to request the disclosure of such information by a service provider.

(3) Service providers are required promptly to inform the competent supervisory authorities of alleged illegal activities undertaken or information provided by recipients of their services specified in sections 8 to 10 of this Act, and to communicate to the competent authorities information enabling the identification of recipients of their service with whom they have storage agreements.

..."

40. Articles 244 et seq. of the Code of Civil Procedure (*Tsiviilkohtumenetluse seadustik*) provide for pre-trial taking of evidence (*eeltõendamismenetlus*) – a procedure in which evidence may be taken before the judicial proceedings have even been initiated if it can be presumed that evidence might be lost or that using the evidence afterwards might involve difficulties.

41. In a judgment of 21 December 2005 (case no. 3-2-1-95-05), the Supreme Court found that, for the purposes of section 1047 of the Obligations Act, disclosure (*avaldamine*) meant disclosure of information to third parties. A person who transmitted information to a media publisher (*meediaväljaanne*) could be considered a discloser (*avaldaja*) even if he or she was not the publisher of the article (*ajaleheartikli avaldaja*) in question. The

Supreme Court has reiterated the same position in its subsequent judgments, for example in a judgment of 21 December 2010 (case no. 3-2-1-67-10).

42. In a number of domestic cases, actions for defamation have been brought against several defendants, including, for example, a publisher of a newspaper and the author of an article (Supreme Court judgment of 7 May 1998 in case no. 3-2-1-61-98), a publisher of a newspaper and an interviewee (Supreme Court judgment of 1 December 1997 in case no. 3-2-1-99-97), and solely against a publisher of a newspaper (Supreme Court judgments of 30 October 1997 in case no. 3-2-1-123-97, and 10 October 2007 in case no. 3-2-1-53-07).

43. Following the Supreme Court's judgment of 10 June 2009 in the case giving rise to the present case before the Court (case no. 3-2-1-43-09), several lower courts have resolved the issue of liability in respect of comments relating to online news articles in a similar manner. Thus, in a judgment of 21 February 2012, the Tallinn Court of Appeal (case no. 2-08-76058) upheld a lower court's judgment concerning a defamed person's claim against a publisher of a newspaper. The publisher was found liable for defamatory online comments posted by readers in the newspaper's online comments section. The courts found that the publisher was a content service provider. They rejected the publisher's request for a preliminary ruling from the Court of Justice of the European Union (CJEU), finding that it was evident that the defendant did not satisfy the criteria for a passive service provider as previously interpreted by the CJEU and the Supreme Court, and that the relevant rules were sufficiently clear. Therefore, no new directions from the CJEU were needed. The courts also noted that, pursuant to the judgment of 23 March 2010 of the CJEU (Joined Cases C-236/08 to C-238/08, *Google France SARL and Google Inc.* [2010] ECR I-2417), it was for the national courts to assess whether the role played by a service provider was neutral, in the sense that its conduct was merely technical, automatic and passive, pointing to a lack of knowledge of or control over the data which it stored. The courts considered that this was not the case in the matter before them. As the publisher had already deleted the defamatory comments by the time of the delivery of the judgment, no ruling was made on that issue; the plaintiff's claim in respect of non-pecuniary damage was dismissed. A similar judgment was handed down by the Tallinn Court of Appeal on 27 June 2013 (case no. 2-10-46710). In that case as well, an Internet news portal was held liable for defamatory comments posted by readers and the plaintiff's claim in respect of non-pecuniary damage was dismissed.

III. RELEVANT INTERNATIONAL INSTRUMENTS

A. Council of Europe documents

44. On 28 May 2003, at the 840th meeting of the Ministers' Deputies, the Committee of Ministers of the Council of Europe adopted a declaration on freedom of communication on the Internet. The relevant parts of the declaration read as follows.

"The member states of the Council of Europe,

...

Convinced also that it is necessary to limit the liability of service providers when they act as mere transmitters, or when they, in good faith, provide access to, or host, content from third parties;

Recalling in this respect Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce);

Stressing that freedom of communication on the Internet should not prejudice the human dignity, human rights and fundamental freedoms of others, especially minors;

Considering that a balance has to be found between respecting the will of users of the Internet not to disclose their identity and the need for law enforcement authorities to trace those responsible for criminal acts;

...

Declare that they seek to abide by the following principles in the field of communication on the Internet:

Principle 1: Content rules for the Internet

Member states should not subject content on the Internet to restrictions which go further than those applied to other means of content delivery.

...

Principle 3: Absence of prior state control

Public authorities should not, through general blocking or filtering measures, deny access by the public to information and other communication on the Internet, regardless of frontiers. This does not prevent the installation of filters for the protection of minors, in particular in places accessible to them, such as schools or libraries.

Provided that the safeguards of Article 10, paragraph 2, of the Convention for the Protection of Human Rights and Fundamental Freedoms are respected, measures may be taken to enforce the removal of clearly identifiable Internet content or, alternatively, the blockage of access to it, if the competent national authorities have taken a provisional or final decision on its illegality.

...

Principle 6: Limited liability of service providers for Internet content

Member states should not impose on service providers a general obligation to monitor content on the Internet to which they give access, that they transmit or store, nor that of actively seeking facts or circumstances indicating illegal activity.

Member states should ensure that service providers are not held liable for content on the Internet when their function is limited, as defined by national law, to transmitting information or providing access to the Internet.

In cases where the functions of service providers are wider and they store content emanating from other parties, member states may hold them co-responsible if they do not act expeditiously to remove or disable access to information or services as soon as they become aware, as defined by national law, of their illegal nature or, in the event of a claim for damages, of facts or circumstances revealing the illegality of the activity or information.

When defining under national law the obligations of service providers as set out in the previous paragraph, due care must be taken to respect the freedom of expression of those who made the information available in the first place, as well as the corresponding right of users to the information.

In all cases, the above-mentioned limitations of liability should not affect the possibility of issuing injunctions where service providers are required to terminate or prevent, to the extent possible, an infringement of the law.

Principle 7: Anonymity

In order to ensure protection against online surveillance and to enhance the free expression of information and ideas, member states should respect the will of users of the Internet not to disclose their identity. This does not prevent member states from taking measures and co-operating in order to trace those responsible for criminal acts, in accordance with national law, the Convention for the Protection of Human Rights and Fundamental Freedoms and other international agreements in the fields of justice and the police."

45. In its Recommendation CM/Rec(2007)16 to member States on measures to promote the public service value of the Internet (adopted on 7 November 2007), the Committee of Ministers noted that the Internet could, on the one hand, significantly enhance the exercise of certain human rights and fundamental freedoms while, on the other, it could adversely affect these and other such rights. It recommended that the member States draw up a clear legal framework delineating the boundaries of the roles and responsibilities of all key stakeholders in the field of new information and communication technologies.

46. Recommendation CM/Rec(2011)7 of the Committee of Ministers to member states on a new notion of media (adopted on 21 September 2011) reads as follows.

"...

The Committee of Ministers, under the terms of Article 15. *b* of the Statute of the Council of Europe recommends that member states:

– **adopt a new, broad notion of media** which encompasses all actors involved in the production and dissemination, to potentially large numbers of people, of content (for example information, analysis, comment, opinion, education, culture, art and entertainment in text, audio, visual, audiovisual or other form) and applications which are designed to facilitate interactive mass communication (for example social networks) or other content-based large-scale interactive experiences (for example online games), while retaining (in all these cases) editorial control or oversight of the contents;

– **review regulatory needs in respect of all actors** delivering services or products in the media ecosystem so as to guarantee people's right to seek, receive and impart information in accordance with Article 10 of the European Convention on Human Rights, and to extend to those actors relevant safeguards against interference that might otherwise have an adverse effect on Article 10 rights, including as regards situations which risk leading to undue self-restraint or self-censorship;

– **apply the criteria set out in the appendix hereto when considering a graduated and differentiated response** for actors falling within the new notion of media based on relevant Council of Europe media-related standards, having regard to their specific functions in the media process and their potential impact and significance in ensuring or enhancing good governance in a democratic society;

..."

The Appendix to the Recommendation states as follows, in so far as relevant.

"7. A differentiated and graduated approach requires that each actor whose services are identified as media or as an intermediary or auxiliary activity benefit from both the appropriate form (differentiated) and the appropriate level (graduated) of protection and that responsibility also be delimited in conformity with Article 10 of the European Convention on Human Rights and other relevant standards developed by the Council of Europe.

...

30. Editorial control can be evidenced by the actors' own policy decisions on the content to make available or to promote, and on the manner in which to present or arrange it. Legacy media sometimes publicise explicitly written editorial policies, but they can also be found in internal instructions or criteria for selecting or processing (for example verifying or validating) content. In the new communications environments, editorial policies can be embedded in mission statements or in terms and conditions of use (which may contain very detailed provisions on content), or may be expressed informally as a commitment to certain principles (for example netiquette, motto).

...

32. Editorial process can involve users (for example peer review and take down requests) with ultimate decisions taken according to an internally defined process and having regard to specified criteria (reactive moderation). New media often resort to *ex post* moderation (often referred to as post-moderation) in respect of user generated content, which may at first sight be imperceptible. Editorial processes may also be automated (for example in the case of algorithms *ex ante* selecting content or comparing content with copyrighted material).

...

35. Again, it should be noted that different levels of editorial control go along with different levels of editorial responsibility. Different levels of editorial control or editorial modalities (for example *ex ante* as compared with *ex post* moderation) call for differentiated responses and will almost certainly permit best to graduate the response.

36. Consequently, a provider of an intermediary or auxiliary service which contributes to the functioning or accessing of a media but does not – or should not – itself exercise editorial control, and therefore has limited or no editorial responsibility, should not be considered to be media. However, their action may be relevant in a media context. Nonetheless, action taken by providers of intermediary or auxiliary services as a result of legal obligations (for example take down of content in response to a judicial order) should not be considered as editorial control in the sense of the above.

...

63. The importance of the role of intermediaries should be underlined. They offer alternative and complementary means or channels for the dissemination of media content, thus broadening outreach and enhancing effectiveness in media's achievements of its purposes and objectives. In a competitive intermediaries and auxiliaries market, they may significantly reduce the risk of interference by authorities. However, given the degree to which media have to rely on them in the new ecosystem, there is also a risk of censorship operated through intermediaries and auxiliaries. Certain situations may also pose a risk of private censorship (by intermediaries and auxiliaries in respect of media to which they provide services or content they carry)."

47. On 16 April 2014 Recommendation CM/Rec(2014)6 of the Committee of Ministers to member States on a Guide to human rights for Internet users was adopted. The relevant part of the Guide reads as follows.

Freedom of expression and information

"You have the right to seek, receive and impart information and ideas of your choice, without interference and regardless of frontiers. This means:

1. you have the freedom to express yourself online and to access information and the opinions and expressions of others. This includes political speech, views on religion, opinions and expressions that are favourably received or regarded as inoffensive, but also those that may offend, shock or disturb others. You should have due regard to the reputation or rights of others, including their right to privacy;

2. restrictions may apply to expressions which incite discrimination, hatred or violence. These restrictions must be lawful, narrowly tailored and executed with court oversight;

...

6. you may choose not to disclose your identity online, for instance by using a pseudonym. However, you should be aware that measures can be taken, by national authorities, which might lead to your identity being revealed."

B. Other international documents

48. In his report of 16 May 2011 (A/HRC/17/27) to the Human Rights Council, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression stated the following.

"25. As such, legitimate types of information which may be restricted include child pornography (to protect the rights of children), hate speech (to protect the rights of affected communities), defamation (to protect the rights and reputation of others against unwarranted attacks), direct and public incitement to commit genocide (to protect the rights of others), and advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (to protect the rights of others, such as the right to life).

...

27. In addition, the Special Rapporteur emphasizes that due to the unique characteristics of the Internet, regulations or restrictions which may be deemed legitimate and proportionate for traditional media are often not so with regard to the Internet. For example, in cases of defamation of individuals' reputation, given the ability of the individual concerned to exercise his/her right of reply instantly to restore the harm caused, the types of sanctions that are applied to offline defamation may be unnecessary or disproportionate. ...

...

43. The Special Rapporteur believes that censorship measures should never be delegated to a private entity, and that no one should be held liable for content on the Internet of which they are not the author. Indeed, no State should use or force intermediaries to undertake censorship on its behalf ...

...

74. **Intermediaries play a fundamental role in enabling Internet users to enjoy their right to freedom of expression and access to information. Given their unprecedented influence over how and what is circulated on the Internet, States have increasingly sought to exert control over them and to hold them legally liable for failing to prevent access to content deemed to be illegal.**"

49. A Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE (Organization for Security and

Co-operation in Europe) Representative on Freedom of the Media and the OAS (Organization of American States) Special Rapporteur on Freedom of Expression, adopted on 21 December 2005, stated the following:

> "No one should be liable for content on the Internet of which they are not the author, unless they have either adopted that content as their own or refused to obey a court order to remove that content."

IV. RELEVANT EUROPEAN UNION AND COMPARATIVE LAW MATERIAL

A. European Union instruments and case-law

1. Directive 2000/31/EC

50. The relevant parts of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) provide as follows.

> "(9) The free movement of information society services can in many cases be a specific reflection in Community law of a more general principle, namely freedom of expression as enshrined in Article 10(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, which has been ratified by all the Member States; for this reason, directives covering the supply of information society services must ensure that this activity may be engaged in freely in the light of that Article, subject only to the restrictions laid down in paragraph 2 of that Article and in Article 46(1) of the Treaty; this Directive is not intended to affect national fundamental rules and principles relating to freedom of expression.
>
> ...
>
> (42) The exemptions from liability established in this Directive cover only cases where the activity of the information society service provider is limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient; this activity is of a mere technical, automatic and passive nature, which implies that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored.
>
> (43) A service provider can benefit from the exemptions for 'mere conduit' and for 'caching' when he is in no way involved with the information transmitted; this requires among other things that he does not modify the information that he transmits; this requirement does not cover manipulations of a technical nature which take place in the course of the transmission as they do not alter the integrity of the information contained in the transmission.
>
> (44) A service provider who deliberately collaborates with one of the recipients of his service in order to undertake illegal acts goes beyond the activities of 'mere conduit'

or 'caching' and as a result cannot benefit from the liability exemptions established for these activities.

(45) The limitations of the liability of intermediary service providers established in this Directive do not affect the possibility of injunctions of different kinds; such injunctions can in particular consist of orders by courts or administrative authorities requiring the termination or prevention of any infringement, including the removal of illegal information or the disabling of access to it.

(46) In order to benefit from a limitation of liability, the provider of an information society service, consisting of the storage of information, upon obtaining actual knowledge or awareness of illegal activities has to act expeditiously to remove or to disable access to the information concerned; the removal or disabling of access has to be undertaken in the observance of the principle of freedom of expression and of procedures established for this purpose at national level; this Directive does not affect Member States' possibility of establishing specific requirements which must be fulfilled expeditiously prior to the removal or disabling of information.

(47) Member States are prevented from imposing a monitoring obligation on service providers only with respect to obligations of a general nature; this does not concern monitoring obligations in a specific case and, in particular, does not affect orders by national authorities in accordance with national legislation.

(48) This Directive does not affect the possibility for Member States of requiring service providers, who host information provided by recipients of their service, to apply duties of care, which can reasonably be expected from them and which are specified by national law, in order to detect and prevent certain types of illegal activities.

...

Article 1

Objective and scope

1. This Directive seeks to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between the Member States.

...

Article 2

Definitions

For the purpose of this Directive, the following terms shall bear the following meanings:

(a) 'information society services': services within the meaning of Article 1(2) of Directive 98/34/EC as amended by Directive 98/48/EC;

(b) 'service provider': any natural or legal person providing an information society service;

(c) 'established service provider': a service provider who effectively pursues an economic activity using a fixed establishment for an indefinite period. The presence and use of the technical means and technologies required to provide the service do not, in themselves, constitute an establishment of the provider;

...

Section 4: Liability of intermediary service providers

Article 12

'Mere conduit'

1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider:

(a) does not initiate the transmission;

(b) does not select the receiver of the transmission; and

(c) does not select or modify the information contained in the transmission.

2. The acts of transmission and of provision of access referred to in paragraph 1 include the automatic, intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.

Article 13

'Caching'

1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request, on condition that:

(a) the provider does not modify the information;

(b) the provider complies with conditions on access to the information;

(c) the provider complies with rules regarding the updating of the information, specified in a manner widely recognised and used by industry;

(d) the provider does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and

(e) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

2. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.

Article 14

Hosting

1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or

(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

2. Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider.

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information.

Article 15

No general obligation to monitor

1. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.

2. Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements."

2. Directive 98/34/EC as amended by Directive 98/48/EC

51. Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in

the field of technical standards and regulations and of rules on Information Society services, as amended by Directive 98/48/EC, provides as follows:

Article 1

"For the purposes of this Directive, the following meanings shall apply:

...

2. 'service', any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

For the purposes of this definition:

– 'at a distance' means that the service is provided without the parties being simultaneously present,

– 'by electronic means' means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means,

– 'at the individual request of a recipient of services' means that the service is provided through the transmission of data on individual request.

An indicative list of services not covered by this definition is set out in Annex V.

This Directive shall not apply to:

– radio broadcasting services,

– television broadcasting services covered by point (a) of Article 1 of Directive 89/552/EEC."

3. Case-law of the CJEU

52. In a judgment of 23 March 2010 (Joined Cases C-236/08 to C-238/08 *Google France SARL and Google Inc.*), the CJEU considered that, in order to establish whether the liability of a referencing service provider could be limited under Article 14 of the Directive on electronic commerce, it was necessary to examine whether the role played by that service provider was neutral, in the sense that its conduct was merely technical, automatic and passive, pointing to a lack of knowledge of or control over the data which it stored. Article 14 of the Directive on electronic commerce had to be interpreted as meaning that the rule laid down therein applied to an Internet referencing service provider in the event that that service provider had not played an active role of such a kind as to give it knowledge of or control over the data stored. If it had not played such a role, that service provider could not be held liable for the data which it had stored at the

request of an advertiser, unless, having obtained knowledge of the unlawful nature of those data or of that advertiser's activities, it had failed to act expeditiously to remove or to disable access to the data concerned.

53. In a judgment of 12 July 2011 (Case C-324/09, *L'Oréal SA and Others*), the CJEU ruled that Article 14 § 1 of the Directive on electronic commerce was to be interpreted as applying to the operator of an online marketplace where that operator had not played an active role allowing it to have knowledge of or control over the data stored. The operator played such a role when it provided assistance which entailed, in particular, optimising the presentation of the offers for sale in question or promoting them. Where the operator of the online marketplace had not played such an active role and the service provided fell, as a consequence, within the scope of Article 14 § 1 of the Directive on electronic commerce, the operator none the less could not, in a case which could result in an order to pay damages, rely on the exemption from liability provided for under that Article if it had been aware of facts or circumstances on the basis of which a diligent economic operator should have realised that the offers for sale in question had been unlawful and, in the event of it being so aware, had failed to act expeditiously in accordance with Article 14 § 1 (b) of the Directive on electronic commerce.

54. In a judgment of 24 November 2011 (Case C-70/10, *Scarlet Extended SA*), the CJEU ruled that an injunction could not be made against an Internet service provider requiring it to install a system for filtering all electronic communications passing via its services, in particular those involving the use of peer-to-peer software, which applied indiscriminately to all its customers, as a preventive measure, exclusively at its expense and for an unlimited period, and which was capable of identifying on that provider's network the movement of electronic files containing a musical, cinematographic or audio-visual work in respect of which the applicant claimed to hold intellectual property rights, with a view to blocking the transfer of files the sharing of which would infringe copyright.

55. In a judgment of 16 February 2012 (Case C-360/10, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM)*) the CJEU held that the Directive on electronic commerce and Directives 2000/31/EC, 2001/29/EC and 2004/48/EC precluded a national court from issuing an injunction against a hosting service provider requiring it to install a system for filtering information stored on its servers by its service users, which applied indiscriminately to all those users, as a preventive measure, exclusively at its expense and for an unlimited period, and which was capable of identifying electronic files containing musical, cinematographic or audio-visual work in respect of which the applicant for the injunction

claimed to hold intellectual property rights, with a view to preventing those works from being made available to the public in breach of copyright.

56. In a judgment of 13 May 2014 (Case C-131/12, *Google Spain SL and Google Inc.*), the CJEU was called upon to interpret Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. It found that the activity of an Internet search engine was to be classified as "processing of personal data" within the meaning of Directive 95/46/EC and held that such processing of personal data, carried out by the operator of a search engine, was liable to affect significantly the fundamental rights to privacy and to the protection of personal data (guaranteed under Articles 7 and 8 of the Charter of Fundamental Rights of the European Union) when the search by means of that engine was carried out on the basis of an individual's name, since that processing enabled any Internet user to obtain through the list of results a structured overview of the information relating to that individual that could be found on the Internet and thereby to establish a more or less detailed profile of him or her. Furthermore, the effect of the interference with the rights of the data subject was heightened on account of the important role played by the Internet and search engines in modern society, which rendered the information contained in such a list of results ubiquitous. In the light of the potential seriousness of that interference, it could not be justified merely by the economic interest of the operator. The CJEU considered that a fair balance should be sought between the legitimate interest of Internet users in having access to the information and the data subject's fundamental rights. The data subject's fundamental rights, as a general rule, overrode the interest of Internet users, but that balance might, however, depend on the nature of the information in question and its sensitivity for the data subject's private life and on the interest of the public in having that information. The CJEU held that in certain cases the operator of a search engine was obliged to remove from the list of results displayed following a search made on the basis of a person's name links to web pages, published by third parties and containing information relating to that person, even when its publication in itself on the web pages in question was lawful. That was so in particular where the data appeared to be inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes for which they had been processed and in the light of the time that had elapsed.

57. In a judgment of 11 September 2014 (Case C-291/13, *Sotiris Papasavvas*), the CJEU found that, since a newspaper publishing company which posted an online version of a newspaper on its website had, in principle, knowledge of the information which it posted and exercised

control over that information, it could not be considered to be an "intermediary service provider" within the meaning of Articles 12 to 14 of Directive 2000/31/EC, whether or not access to that website was free of charge. Thus, it held that the limitations of civil liability specified in Articles 12 to 14 of Directive 2000/31/EC did not apply to the case of a newspaper publishing company which operated a website on which the online version of a newspaper was posted, that company being, moreover, remunerated by income generated by commercial advertisements posted on the website, since it had knowledge of the information posted and exercised control over that information, whether or not access to the website was free of charge.

B. Comparative law material

58. From the information available to the Court, it would appear that in a number of the member States of the Council of Europe – which are also member States of the European Union – the Directive on electronic commerce, as transposed into national law, constitutes a primary source of law in the area in question. It would also appear that the greater the involvement of the operator in the third-party content before online publication – whether through prior censoring, editing, selection of recipients, requesting comments on a predefined subject or the adoption of content as the operator's own – the greater the likelihood that the operator will be held liable for that content. Some countries have enacted certain further regulations specifically concerning the take-down procedures relating to allegedly unlawful content on the Internet, and provisions concerning distribution of liability in this context.

THE LAW

ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

59. The applicant company complained that holding it liable for the comments posted by the readers of its Internet news portal infringed its freedom of expression as provided for in Article 10 of the Convention, which reads as follows.

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed

by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

60. The Government contested that argument.

A. The Chamber judgment

61. In its judgment of 10 October 2013, the Chamber noted at the outset that the parties' views diverged as to the applicant company's role in the present case. According to the Government, the applicant company was to be considered the discloser of the defamatory comments, whereas the applicant company was of the opinion that its freedom to impart information created and published by third parties was at stake, and that the applicant company itself was not a publisher of the third-party comments. The Chamber did not proceed to determine the exact role to be attributed to the applicant company's activities and noted that it was not, in substance, in dispute between the parties that the domestic courts' decisions in respect of the applicant company constituted an interference with its freedom of expression guaranteed under Article 10 of the Convention.

62. As regards the lawfulness of the interference, the Chamber rejected the applicant company's argument that the interference with its freedom of expression was not "prescribed by law". The Chamber observed that the domestic courts had found that the applicant company's activities did not fall within the scope of the Directive on electronic commerce and the Information Society Services Act. It considered that it was not its task to take the place of the domestic courts and that it was primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation. The Chamber was furthermore satisfied that the relevant provisions of the civil law – although they were quite general and lacked detail in comparison with, for example, the Information Society Services Act – along with the relevant case-law, made it clear that a media publisher was liable for any defamatory statements made in its publication. The Chamber had regard to the fact that the applicant company was a professional publisher which operated one of the largest news portals in Estonia, and also that a degree of notoriety had been attributable to comments posted in its commenting area. Against that background, the Chamber considered that the applicant company had been in a position to assess the risks related to its activities and that it must have been able to foresee, to a reasonable degree, the consequences which these could entail.

63. The Chamber further found that the restriction of the applicant company's freedom of expression had pursued the legitimate aim of

protecting the reputation and rights of others. In the Chamber's view, the fact that the actual authors of the comments were also in principle liable did not remove the legitimate aim of holding the applicant company liable for any damage to the reputation and rights of others.

64. As regards the proportionality of the interference, the Chamber noted that there was no dispute that the comments in question had been of a defamatory nature. In assessing the proportionality of the interference with the applicant company's freedom of expression, the Chamber had regard to the following elements. It examined firstly the context of the comments, secondly, the measures applied by the applicant company in order to prevent or remove defamatory comments, thirdly, the liability of the actual authors of the comments as an alternative to the applicant company's liability, and, fourthly, the consequences of the domestic proceedings for the applicant company.

65. In particular, the Chamber considered that the news article published by the applicant company that had given rise to the defamatory comments had concerned a matter of public interest and the applicant company could have foreseen the negative reactions and exercised a degree of caution in order to avoid being held liable for damaging the reputation of others. However, the prior automatic filtering and notice-and-take-down system used by the applicant company had not ensured sufficient protection for the rights of third parties. Moreover, publishing news articles and making readers' comments on them public had been part of the applicant company's professional activities and its advertising revenue depended on the number of readers and comments. The applicant company had been able to exercise a substantial degree of control over readers' comments and it had been in a position to predict the nature of the comments a particular article was liable to prompt and to take technical or manual measures to prevent defamatory statements from being made public. Furthermore, there had been no realistic opportunity of bringing a civil claim against the actual authors of the comments as their identity could not easily be established. In any event, the Chamber was not convinced that measures allowing an injured party to bring a claim only against the authors of defamatory comments would have guaranteed effective protection of the injured party's right to respect for his or her private life. It had been the applicant company's choice to allow comments by non-registered users, and by doing so it had to be considered to have assumed a certain responsibility for such comments. For all the above reasons, and considering the moderate amount of damages the applicant company had been ordered to pay, the restriction on its freedom of expression was considered to have been justified and proportionate. There had accordingly been no violation of Article 10 of the Convention.

B. The parties' submissions to the Grand Chamber

1. The applicant company

(a) General remarks

66. The applicant company argued that in today's world, Internet media content was increasingly created by the users themselves. User-generated content was of high importance – comments on news stories and articles often raised serious debates in society and even informed journalists of issues that were not publicly known, thereby contributing to the initiation of journalistic investigations. The possibility for "everyone" to contribute to public debate advanced democracy and fulfilled the purposes of freedom of expression in the best possible way. It was a great challenge in this setting to hold those who infringed the rights of others accountable while avoiding censorship.

67. As regards user-generated content, the applicant company was of the opinion that it was sufficient for a host to expeditiously remove third-party content as soon as it became aware of its illegal nature. If this was deemed insufficient by the Court, anonymous public speech would be prohibited or there would be arbitrary restrictions on commenters' freedom of communication by the intermediary, which would be impelled to err on the side of caution to avoid possible subsequent liability.

(b) Delfi's role

68. The applicant company called on the Grand Chamber to look at the case as a whole, including the question whether the applicant company was to be characterised as a traditional publisher or an intermediary. A publisher was liable for all content published by it regardless of the authorship of the particular content. However, the applicant company insisted that it should be regarded as an intermediary and it had as such been entitled to follow the specific and foreseeable law limiting the obligation to monitor third-party comments. It argued that intermediaries were not best suited to decide upon the legality of user-generated content. This was especially so in respect of defamatory content since the victim alone could assess what caused damage to his reputation.

(c) Lawfulness

69. The applicant company argued that the interference with its freedom of expression – including its right to store information and to enable users to impart their opinions – was not prescribed by law. It submitted that there was no legislation or case-law stating that an intermediary was to be

considered a publisher of content which it was not aware of. On the contrary, the applicable law expressly prohibited the imposition of liability on service providers for third-party content. In this connection, the applicant company referred to the Directive on electronic commerce, the Estonian Information Society Services Act and the Council of Europe Declaration on freedom of communication on the Internet. The Directive provided for limited and notice-based liability with take-down procedures for illegal content. Service providers were exempted from liability where, upon obtaining actual knowledge of illegal activities, they acted expeditiously to remove or disable access to the information concerned. Such removal or disabling of access had to be undertaken in the observance of the principle of freedom of expression and of procedures established for this purpose at national level (Recital 46 of the Preamble to the Directive). The applicant company argued that this law was indisputably formulated with sufficient precision to enable a citizen to regulate his conduct. According to the applicant company, its behaviour had been in full compliance with the applicable law as it had removed the defamatory comments the same day it had been notified by the original plaintiff.

70. The applicant company further argued that even the existing tort law did not classify disseminators (postal workers, libraries, bookstores and others) as publishers. Thus, it remained entirely unclear how the existing tort law had been applied to a "novel area related to new technologies" as held in the Chamber judgment, that is, to an online news portal operator providing a service enabling users to interact with journalists and each other and to contribute valuable ideas to the discussion of matters of public interest. There was no law imposing an obligation on the applicant company to proactively monitor user comments.

(d) Legitimate aim

71. The applicant company did not dispute that the interference in question had a legitimate aim.

(e) Necessary in a democratic society

72. According to the applicant company, the interference was not necessary in a democratic society. It argued that as a result of the Chamber judgment it had two choices. Firstly, it could employ an army of highly trained moderators to patrol (in real time) each message board (for each news article) to screen any message that could be labelled defamatory (or that could infringe intellectual property rights, *inter alia*); at the end of the day, these moderators would, just in case, remove any sensitive comments and all discussions would be moderated so that they were limited to the least

controversial issues. Otherwise, it could simply avoid such a massive risk and shut down these fora altogether. Either way, the technological capability to provide ordinary readers with an opportunity to comment freely on daily news and assume responsibility independently for their own comments would be abandoned.

73. The applicant company argued that the Supreme Court's judgment had had a "chilling effect" on freedom of expression and that it had restricted the applicant company's freedom to impart information. It amounted to the establishment of an obligation to censor private individuals.

74. In support of its argument that the interference was not necessary in a democratic society, the applicant company relied on the following factors.

75. Firstly, it argued that the comments were reactions from members of the public to an event caused by the Saaremaa Shipping Company and not to the article as such. Furthermore, the article was a balanced and neutral one. It addressed an issue of great importance to the residents of the biggest island of Estonia affecting their everyday lives. The readers' negative reactions had not been caused by the article but by the shipping company.

76. Secondly, the applicant company had taken sufficient measures to prevent or remove defamatory comments; in the present case, the comments in question had been removed on the same day that the applicant company had been notified of them.

77. Thirdly, the applicant company argued that the actual authors of the comments should bear responsibility for their contents. It disagreed with the Chamber's finding that it was difficult to establish the identity of the authors of the comments and contended that the authors' identities could be established in the "pre-trial taking of evidence" procedure under Article 244 of the Code of Civil Procedure. Once the names and addresses of the authors were established, a claim against them could be brought without any difficulties.

78. Fourthly, the applicant company insisted that there was no pressing social need for a strict liability standard for service providers. It argued that there was a European consensus that no service provider should be liable for content of which it was not the author. Accordingly, the margin of appreciation afforded to the Contracting States in this respect was necessarily a narrow one. Furthermore, it considered that the modest sum it had been ordered to pay in compensation for non-pecuniary damage did not justify the interference. It also emphasised that if the applicant company enjoyed limited liability the original plaintiff would not have been left without a remedy – he could have sued the actual authors of the comments. The applicant company objected to the establishment of private censorship and contended that it was sufficient to have a two-pronged system for the

protection of the rights of third parties: a notice-and-take-down system and the possibility of bringing a claim against the authors of defamatory comments. There was no convincingly established "pressing social need" for the liability of Internet service providers.

79. The applicant company also emphasised the importance of anonymity for free speech on the Internet; this encouraged the full involvement of all, including marginalised groups, political dissidents and whistle-blowers, and allowed individuals to be safe from reprisals.

80. Lastly, the applicant company contended that the domestic courts had clearly misinterpreted European Union (EU) law. It submitted that the Chamber judgment had created a collision of obligations and legal uncertainty since adhering to EU law on the issue of liability for host service providers would render the State liable under the Convention, whereas adhering to the test set out in the judgment would not be in conformity with EU law.

2. The Government

(a) General remarks

81. The Government made the following remarks in respect of the scope of the case. Firstly, according to the Court's case-law it was for the domestic courts to decide on the domestically applicable law and interpret it. Furthermore, interpretation of EU law was the task of the CJEU. The domestic courts, in reasoned decisions, had found that the Obligations Act, rather than the Directive on electronic commerce or the Information Society Services Act, was applicable. The Grand Chamber should also proceed from this presumption and the applicant company's allegations regarding the applicability of EU law were inadmissible. Secondly, the Government stressed that there existed a number of different types of Internet portals and the issue of their operators' liability could not be generalised. The present case was limited to the activities of the Delfi portal at the material time. In that connection the Government pointed out that Delfi had actively invited readers to comment on the articles it had chosen itself; it had published anonymous comments posted on those articles and in the same section; and the comments could be amended or deleted only by Delfi. The applicant company's liability should be assessed in that specific context.

82. The Government emphasised that there was no dispute that the comments in question had been defamatory.

83. The Government noted that, despite the applicant company's allegations to that effect, it had not been forced to disable anonymous comments or to change its business model. On the contrary, Delfi remained

the largest Internet portal in Estonia; it was still possible to post anonymous comments on the portal and the number of comments had risen from 190,000 comments a month in 2009 to 300,000 in 2013. According to an article published on 26 September 2013, Delfi deleted 20,000 to 30,000 comments monthly (7-10% of all comments). Postimees, the second-largest portal, deleted up to 7% of a total of 120,000 comments. Both portals had five employees who dealt with taking down insulting comments. Since December 2013 Delfi had used a two-tier comments section where registered comments and anonymous comments were shown separately.

(b) Lawfulness

84. The Government insisted that the interference with the applicant company's rights had been "prescribed by law". They referred to the domestic legislation and case-law summarised in paragraphs 32 to 36, 38 and 39 of the Chamber judgment, as well as the Court's relevant case-law as summarised in the Chamber judgment. The Government also pointed out that there was no Estonian case-law on the basis of which Delfi – which encouraged the posting of comments on the articles selected and published by it – could have presumed that the owner of an Internet portal as a new media publication was not liable for the damage caused by comments posted on its articles, which formed an integral part of the news and which only Delfi could administer. Further, by the time the domestic judgments had been handed down in *Delfi*, it was more than clear that Internet media had a wide influence over the public and that, in order to protect the private life of others, liability rules had to apply to new media as well.

85. The Government reiterated that the applicant company's references to EU law and the Information Society Services Act should be disregarded. The Grand Chamber could only assess whether the effects of the interpretation of the Obligations Act were compatible with Article 10 § 2 of the Convention and could not assess the legislation the domestic courts had found not to be applicable. They also pointed out that the domestic courts had paid sufficient attention to the question whether the applicant company might be regarded as a caching or hosting service provider. However, they had found this not to be the case. In particular, in the event of hosting, the service provider merely provided a data storage service, while the stored data and their insertion, amendment, removal and content remained under the control of the service users. In Delfi's comments section, however, commenters lost control of their comments as soon as they had entered them, and they could not change or delete them. Having regard also to the other aspects of the case – Delfi chose the articles and their titles; Delfi invited readers to comment and set the Rules on posting comments (including that

the comments had to be related to the article); the amount of advertising revenue Delfi received increased the more comments were posted; Delfi also selectively monitored the comments – the domestic courts had found that Delfi had not acted only as a technical intermediary service provider and could not be classified either as a cache or as a host. The Government also emphasised that the CJEU had never adjudicated on a case similar to the Delfi case. In any event, even if the CJEU's case-law, such as *L'Oréal SA and Others* (cited above), was of relevance, it could be concluded that the role played by Delfi was an active one and it could not be granted the exemptions from liability provided in the Directive on electronic commerce.

(c) Legitimate aim

86. The Government submitted that the interference with the applicant company's rights under Article 10 had the legitimate aim of protecting the honour of others.

(d) Necessary in a democratic society

87. As regards the question whether the interference was necessary in a democratic society, the Government emphasised at the outset the importance of the balance between Articles 10 and 8 of the Convention.

88. The Government referred extensively to the relevant reasoning of the Chamber judgment. In addition, they emphasised the following.

89. Firstly, as regards the context of the comments, the Government noted that the domestic courts had attached importance to the fact that the selection and publication of the news articles and the publication of readers' comments on these articles in the same section had been part of the applicant company's professional activity as a discloser of information. Delfi invited readers to comment on its articles – often giving the articles provocative headlines and showing the number of comments on the main page immediately after the title of an article in bold red, so that commenting on an article would be more enticing – which in turn brought in advertising revenue.

90. Secondly, in respect of the measures applied by the applicant company, the Government stressed the importance of ensuring the protection of third parties in relation to the Internet, which had become an extensive medium available to the majority of the population and used on a daily basis. The Government added that the applicant company's responsibility for the comments had also been obvious as the actual writers of comments could not modify or delete their comments once they were posted on the Delfi news portal – only the applicant company had the technical means to do this. The Government also pointed out that

any information communicated via the Internet spread so quickly that measures taken weeks or even days later to protect a person's honour were no longer sufficient because the offensive comments had already reached the general public and done the damage. The Government further argued that the biggest international news portals did not allow anonymous (that is, unregistered) comments and referred to an opinion that there was a trend away from anonymity. At the same time, anonymous comments tended to be more insulting than the comments by persons who had registered, and harsh comments attracted more readers. The Government argued that Delfi had been notorious for exactly this reason.

91. Thirdly, as regards the liability of the actual authors, the Government submitted that in civil proceedings – a remedy which was preferable to criminal remedies in defamation cases – investigative measures such as surveillance procedures were not accessible. In respect of the procedure for "pre-trial taking of evidence", the Government argued that this was not a reasonable alternative in the case of anonymous comments for the following two reasons: (a) the relevant Internet Protocol (IP) addresses could be not always established, for example if the user data or the comment had been deleted or an anonymous proxy had been used; and (b) even if the computers used for posting the comments could be identified, it could still prove impossible to identify the persons who had posted them, for example in cases where a public computer, a Wi-Fi hotspot, a dynamic IP address or a server in a foreign country had been used, or for other technical reasons.

92. Fourthly, as regards the consequences of the domestic proceedings for the applicant company, the Government noted that Delfi had not needed to change its business model or disallow anonymous comments. In fact, the total number of comments – the majority of which were anonymous – had increased, while Delfi now employed five moderators. The Government also pointed out that the finding of liability was not aimed at obtaining huge or punitive awards of compensation. Indeed, in Delfi's case the compensation it had been obliged to pay for non-pecuniary damage was negligible (EUR 320), and in the subsequent case-law (see paragraph 43 above) the courts had held that finding a violation or deleting a comment could be a sufficient remedy. The Government concluded that the applicant company's civil liability had not had a "chilling effect" on the freedom of expression, but was justified and proportionate.

93. Lastly, referring to the legislation and practice of several European countries, the Government contended that there was no European consensus on or trend towards excluding the liability of an Internet portal owner which acted as a content service provider and the discloser of anonymous comments on its own articles.

C. The third-party interveners' submissions

1. The Helsinki Foundation for Human Rights

94. The Helsinki Foundation for Human Rights in Warsaw emphasised the differences between the Internet and traditional media. It noted that online services like Delfi acted simultaneously in two roles: as content providers with regard to their own news, and as host providers with regard to third-party comments. It submitted that moderation of user-generated content or the power to remove access to it should not be regarded as having effective editorial control. Intermediary service providers should not be treated as traditional media and should not be subject to the same liability regime.

95. The Helsinki Foundation argued that authors should be accountable for their defamatory comments and the State should provide a regulatory framework making it possible to identify and prosecute online offenders. At the same time, it also contended that the possibility of publishing anonymously on the Internet should be regarded as a value.

2. Article 19

96. Article 19 argued that one of the most innovative features of the Internet was the ease with which it allowed any person to express his or her views to the entire world without seeking the prior approval of publishers. Comment platforms enabled and promoted public debate in its purest form and this had very little to do with the provision of news. As a matter of fact and form, comments sections on news websites were better understood as newspapers appropriating the private discussion model that was native to the Internet rather than the other way round. Article 19 argued that making websites responsible for comments made by users would impose an unacceptable burden on websites.

97. Article 19 contended that the Directive on electronic commerce was meant to shield websites from liability for their users' comments, regardless of their own content. Article 19 insisted that, while the normal liability rules should continue to apply to online news sites for the articles they published, they should be regarded as hosts – rather than publishers – for the purposes of the comments section on their website. As hosts, online news sites should in principle be immune from liability for third-party content in circumstances where they had not been involved in directly modifying the content in issue. They should not be held liable when they took all reasonable steps to remove content upon being notified, and they should not automatically be held liable simply because they decided not to remove a comment reported to them.

3. Access

98. According to Access, anonymity and pseudonymity supported the fundamental rights of privacy and freedom of expression. A regulatory prohibition on anonymous use of the Internet would constitute an interference with the rights to privacy and freedom of expression protected under Articles 8 and 10 of the Convention, and blanket restrictions on anonymous and pseudonymous expression would impair the very essence of these rights. Access referred to the long-standing case-law of several countries protecting the right to anonymous communication, both on and offline.

99. Furthermore, Access pointed out that services designed to provide enhanced confidentiality and anonymity while using the Internet had become more popular in the wake of revelations of mass surveillance online. It further argued that restricting Internet users to identified expression would harm the Internet economy, and referred to research which had concluded that the most important contributors online were those using pseudonyms.

100. As regards real-name policy, evidence from China showed that such a measure had caused a dramatic drop in the number of comments posted. Experience in South Korea had demonstrated that real-name policy failed to improve meaningfully comments, whereas it was discriminatory against domestic Internet companies, as the users had sought alternative, international platforms that still allowed anonymous and pseudonymous comments.

4. Media Legal Defence Initiative

101. Media Legal Defence Initiative (MLDI) made its submissions on behalf of twenty-eight non-governmental and media organisations and companies. It noted that the vast majority of online media outlets allowed reader comments. Through the comments facility, readers could debate the news amongst themselves as well as with journalists. This transformed the media from a one-way flow of communication into a participatory form of speech which recognised the voice of the reader and allowed different points of view to be aired.

102. MLDI noted that the boundaries between access and content were now increasingly blurred and "intermediaries" included enhanced search services, online marketplaces, web 2.0 applications and social networking sites. From the users' perspective, they all facilitated access to and use of content and were crucial to the realisation of the right to freedom of expression.

103. MLDI contended that it was the States' task to ensure a regulatory framework that protected and promoted freedom of expression whilst

also guarding other rights and interests. It provided a detailed overview of the regulatory framework for intermediary liability in the United States of America and in the European Union. It noted that approaches in these jurisdictions were distinct, but nevertheless similar in that it was acknowledged that some level of protection for intermediaries was vital and that there was no requirement that intermediaries should monitor user content. It also noted that in some member States notice-and-take-down procedures had resulted in excessive liability on intermediaries and the taking down of legitimate content.

104. MLDI also elaborated on the emerging good practices in the regulation of user-generated content by online media. It pointed out that the majority of publications in North America and Europe did not screen or monitor comments before they were posted. They did, however, engage in some kind of post-publication moderation. Many online media outlets also ran filtering software and had mechanisms in place to block users who consistently broke the rules. The majority of online media, including leading European news outlets, required user registration but users were not required to disclose their real names.

5. EDiMA, CCIA Europe and EuroISPA

105. The European Digital Media Association (EDiMA), the Computer & Communications Industry Association (CCIA Europe) and EuroISPA, a pan-European association of European Internet Services Providers Associations, made joint submissions as third parties.

106. The third-party interveners argued that there was an established balance struck to date in legislation, international agreements and recommendations according to which, firstly, host service providers were exempt from liability for content in the absence of "actual knowledge" and, secondly, States were prohibited from requiring host providers to carry out general monitoring of content.

107. They noted that, while some information available online came from traditional publishing sources such as newspapers, and was rightly regulated by the law applicable to publishers, a large amount of online content came instead from individual speakers who could state their views unmediated by traditional editorial institutions. Comment facilities allowed for a right of reply and were thus fundamentally different from traditional publications, where no such right existed.

108. The third-party interveners argued that the technology and operating processes for an online news discussion forum like Delfi were technologically indistinguishable from hosting services such as social media/networking platforms, blogs/microblogs and others. Content composed

and uploaded by users was automatically made publicly visible without human intervention. For many hosts considerations of scale made proactive human review of all user content effectively impossible. For small websites and start-ups, content control was likely to be particularly challenging and could be so costly as to be prohibitive.

109. The third-party interveners argued that established law in the European Union and other countries envisaged the notice-and-take-down system as a legal and practical framework for Internet content hosting. This balance of responsibilities between users and hosts allowed platforms to identify and remove defamatory or other unlawful speech, whilst at the same time enabling robust discussion on controversial topics of public debate; it made the operation of speech-hosting platforms practicable on a large scale.

D. The Court's assessment

1. Preliminary remarks and the scope of the Court's assessment

110. The Court notes at the outset that user-generated expressive activity on the Internet provides an unprecedented platform for the exercise of freedom of expression. That is undisputed and has been recognised by the Court on previous occasions (see *Ahmet Yıldırım v. Turkey*, no. 3111/10, § 48, ECHR 2012, and *Times Newspapers Ltd (nos. 1 and 2) v. the United Kingdom*, nos. 3002/03 and 23676/03, § 27, ECHR 2009). However, alongside these benefits, certain dangers may also arise. Defamatory and other types of clearly unlawful speech, including hate speech and speech inciting violence, can be disseminated like never before, worldwide, in a matter of seconds, and sometimes remain persistently available online. These two conflicting realities lie at the heart of this case. Bearing in mind the need to protect the values underlying the Convention, and considering that the rights under Articles 10 and 8 of the Convention deserve equal respect, a balance must be struck that retains the essence of both rights. Thus, while the Court acknowledges that important benefits can be derived from the Internet in the exercise of freedom of expression, it is also mindful that the possibility of imposing liability for defamatory or other types of unlawful speech must, in principle, be retained, constituting an effective remedy for violations of personality rights.

111. On this basis, and in particular considering that this is the first case in which the Court has been called upon to examine a complaint of this type in an evolving field of technological innovation, the Court considers it necessary to delineate the scope of its inquiry in the light of the facts of the present case.

112. Firstly, the Court observes that the Supreme Court recognised (see paragraph 14 of its judgment of 10 June 2009, set out in paragraph 31

above) that "[p]ublishing of news and comments on an Internet portal is also a journalistic activity. At the same time, because of the nature of Internet media, it cannot reasonably be required of a portal operator to edit comments before publishing them in the same manner as applies for a printed media publication. While the publisher [of a printed media publication] is, through editing, the initiator of the publication of a comment, on the Internet portal the initiator of publication is the author of the comment, who makes it accessible to the general public through the portal. Therefore, the portal operator is not the person to whom information is disclosed. Because of [their] economic interest in the publication of comments, both a publisher of printed media and an Internet portal operator are publishers/disclosers as entrepreneurs."

113. The Court sees no reason to call into question the above distinction made by the Supreme Court. On the contrary, the starting-point of the Supreme Court's reflections, that is, the recognition of differences between a portal operator and a traditional publisher, is in line with the international instruments in this field, which manifest a certain development in favour of distinguishing between the legal principles regulating the activities of the traditional print and audio-visual media, on the one hand and Internet-based media operations, on the other. In the recent Recommendation of the Committee of Ministers to the member States of the Council of Europe on a new notion of media, this is termed a "differentiated and graduated approach [that] requires that each actor whose services are identified as media or as an intermediary or auxiliary activity benefit from both the appropriate form (differentiated) and the appropriate level (graduated) of protection and that responsibility also be delimited in conformity with Article 10 of the European Convention on Human Rights and other relevant standards developed by the Council of Europe" (see paragraph 7 of the Appendix to Recommendation CM/Rec(2011)7, quoted in paragraph 46 above). Therefore, the Court considers that because of the particular nature of the Internet, the "duties and responsibilities" that are to be conferred on an Internet news portal for the purposes of Article 10 may differ to some degree from those of a traditional publisher as regards third-party content.

114. Secondly, the Court observes that the Supreme Court of Estonia found that the "legal assessment by the courts of the twenty comments of a derogatory nature [was] substantiated. The courts [had] correctly found that those comments [were] defamatory since they [were] of a vulgar nature, degrade[d] human dignity and contain[ed] threats" (see paragraph 15 of the judgment, set out in paragraph 31 above). Further, in paragraph 16 of its judgment, the Supreme Court reiterated that the comments degraded "human dignity" and were "clearly unlawful". The Court notes that this

characterisation and analysis of the unlawful nature of the comments in question (see paragraph 18 above) is obviously based on the fact that the majority of the comments are, viewed on their face, tantamount to an incitement to hatred or to violence against L.

115. Consequently, the Court considers that the case concerns the "duties and responsibilities" of Internet news portals, under Article 10 § 2 of the Convention, when they provide for economic purposes a platform for user-generated comments on previously published content and some users – whether identified or anonymous – engage in clearly unlawful speech, which infringes the personality rights of others and amounts to hate speech and incitement to violence against them. The Court emphasises that the present case relates to a large professionally managed Internet news portal run on a commercial basis which published news articles of its own and invited its readers to comment on them.

116. Accordingly, the case does not concern other fora on the Internet where third-party comments can be disseminated, for example an Internet discussion forum or a bulletin board where users can freely set out their ideas on any topic without the discussion being channelled by any input from the forum's manager; or a social media platform where the platform provider does not offer any content and where the content provider may be a private person running the website or blog as a hobby.

117. Furthermore, the Court notes that the applicant company's news portal was one of the biggest Internet media publications in the country; it had a wide readership and there was a known public concern regarding the controversial nature of the comments it attracted (see paragraph 15 above). Moreover, as outlined above, the impugned comments in the present case, as assessed by the Supreme Court, mainly constituted hate speech and speech that directly advocated acts of violence. Thus, the establishment of their unlawful nature did not require any linguistic or legal analysis since the remarks were on their face manifestly unlawful. It is against this background that the Court will proceed to examine the applicant company's complaint.

2. Existence of an interference

118. The Court notes that it was not in dispute between the parties that the applicant company's freedom of expression guaranteed under Article 10 of the Convention had been interfered with by the domestic courts' decisions. The Court sees no reason to hold otherwise.

119. Such an interference with the applicant company's right to freedom of expression must be "prescribed by law", have one or more legitimate aims in the light of paragraph 2 of Article 10, and be "necessary in a democratic society".

3. Lawfulness

120. The Court reiterates that the expression "prescribed by law" in the second paragraph of Article 10 not only requires that the impugned measure should have a legal basis in domestic law, but also refers to the quality of the law in question, which should be accessible to the person concerned and foreseeable as to its effects (see, among other authorities, *VgT Verein gegen Tierfabriken v. Switzerland*, no. 24699/94, § 52, ECHR 2001-VI; *Rotaru v. Romania* [GC], no. 28341/95, § 52, ECHR 2000-V; *Gawęda v. Poland*, no. 26229/95, § 39, ECHR 2002-II; and *Maestri v. Italy* [GC], no. 39748/98, § 30, ECHR 2004-I). However, it is primarily for the national authorities, notably the courts, to interpret and apply domestic law (see *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, § 140, ECHR 2012; *Kruslin v. France*, 24 April 1990, § 29, Series A no. 176-A; and *Kopp v. Switzerland*, 25 March 1998, § 59, *Reports of Judgments and Decisions* 1998-II).

121. One of the requirements flowing from the expression "prescribed by law" is foreseeability. Thus, a norm cannot be regarded as a "law" within the meaning of Article 10 § 2 unless it is formulated with sufficient precision to enable the citizen to regulate his conduct; he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty. Whilst certainty is desirable, it may bring in its train excessive rigidity, and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague, and whose interpretation and application are questions of practice (see, for example, *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 41, ECHR 2007-IV, and *Centro Europa 7 S.r.l. and Di Stefano*, cited above, § 141).

122. The level of precision required of domestic legislation – which cannot provide for every eventuality – depends to a considerable degree on the content of the law in question, the field it is designed to cover and the number and status of those to whom it is addressed (ibid., § 142). The Court has found that persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation, can on this account be expected to take special care in assessing the risks that such activity entails (see *Lindon, Otchakovsky-Laurens and July*, cited above, § 41, with further references to *Cantoni v. France*, 15 November 1996, § 35, *Reports* 1996-V, and *Chauvy and Others v. France*, no. 64915/01, §§ 43-45, ECHR 2004-VI).

123. In the present case the parties' opinions differed as to whether the interference with the applicant company's freedom of expression was "prescribed by law". The applicant company argued that there was no domestic law according to which an intermediary was to be taken as a professional publisher of comments posted on its website by third parties regardless of whether it was aware of their specific content. On the contrary, the applicant company relied on the domestic and European legislation on Internet service providers and argued that it expressly prohibited the imposition of liability on service providers for third-party content.

124. The Government referred to the relevant provisions of the civil law and domestic case-law to the effect that media publishers were liable for their publications along with the authors. They added that there was no case-law on the basis of which the applicant company could have presumed that the owner of an Internet news portal as a new media publication was not liable for the comments posted on its articles. In their view the Court should proceed from the facts as established and the law as applied and interpreted by the domestic courts and not take account of the applicant company's references to EU law. In any event, the EU law referred to by the applicant company actually supported the domestic courts' interpretations and conclusions.

125. The Court observes that the difference in the parties' opinions as regards the law to be applied stems from their diverging views on the issue of how the applicant company is to be classified. According to the applicant company, it should be classified as an intermediary as regards the third-party comments, whereas the Government argued that the applicant company was to be seen as a media publisher, including with regard to such comments.

126. The Court observes (see paragraphs 112-13 above) that the Supreme Court recognised the differences between the roles of a publisher of printed media, on the one hand, and an Internet portal operator engaged in media publications for an economic purpose, on the other. However, the Supreme Court found that because of their "economic interest in the publication of comments, both a publisher of printed media and an Internet portal operator [were] publishers/disclosers" for the purposes of section 1047 of the Obligations Act (see paragraph 14 of the judgment, set out in paragraph 31 above).

127. The Court considers that, in substance, the applicant company argues that the domestic courts erred in applying the general provisions of the Obligations Act to the facts of the case as they should have relied upon the domestic and European legislation on Internet service providers. Like the Chamber, the Grand Chamber reiterates in this context that it is

not its task to take the place of the domestic courts. It is primarily for the national authorities, notably the courts, to interpret and apply domestic law (see, among others, *Centro Europa 7 S.r.l. and Di Stefano*, cited above, § 140, and *Rekvényi v. Hungary* [GC], no. 25390/94, § 35, ECHR 1999-III). The Court also reiterates that it is not for it to express a view on the appropriateness of methods chosen by the legislature of a respondent State to regulate a given field. Its task is confined to determining whether the methods adopted and the effects they entail are in conformity with the Convention (see *Gorzelik and Others v. Poland* [GC], no. 44158/98, § 67, ECHR 2004-I). Thus, the Court confines itself to examining whether the Supreme Court's application of the general provisions of the Obligations Act to the applicant company's situation was foreseeable for the purposes of Article 10 § 2 of the Convention.

128. Pursuant to the relevant provisions of the Constitution, the Civil Code (General Principles) Act and the Obligations Act (see paragraphs 33-38 above), as interpreted and applied by the domestic courts, the applicant company was considered a publisher and deemed liable for the publication of the clearly unlawful comments. The domestic courts chose to apply these norms, having found that the special regulation contained in the Information Society Services Act transposing the Directive on electronic commerce into Estonian law did not apply to the present case since the latter related to activities of a merely technical, automatic and passive nature, unlike the applicant company's activities, and that the objective pursued by the applicant company was not merely the provision of an intermediary service (see paragraph 13 of the Supreme Court's judgment, set out in paragraph 31 above). In this particular context the Court takes into account the fact that some countries have recognised that the importance and the complexity of the subject matter, involving the need to ensure proper balancing of different interests and fundamental rights, call for the enactment of specific regulations for situations such as that pertaining in the present case (see paragraph 58 above). Such action is in line with the "differentiated and graduated approach" to the regulation of new media recommended by the Council of Europe (see paragraph 46 above) and has found support in the Court's case-law (see, *mutatis mutandis*, *Editorial Board of* Pravoye Delo *and Shtekel v. Ukraine*, no. 33014/05, §§ 63-64, ECHR 2011). However, although various legislative approaches are possible in legislation to take account of the nature of new media, the Court is satisfied on the facts of this case that the provisions of the Constitution, the Civil Code (General Principles) Act and the Obligations Act, along with the relevant case-law, made it foreseeable that a media publisher running an Internet news portal for an economic purpose could, in principle, be held liable under domestic

law for the uploading of clearly unlawful comments, of the type in issue in the present case, on its news portal.

129. The Court accordingly finds that, as a professional publisher, the applicant company should have been familiar with the legislation and case-law, and could also have sought legal advice. The Court observes in this context that the Delfi news portal is one of the largest in Estonia. Public concern had already been expressed before the publication of the comments in the present case and the Minister of Justice had noted that victims of insults could bring a suit against Delfi and claim damages (see paragraph 15 above). Thus, the Court considers that the applicant company was in a position to assess the risks related to its activities and that it must have been able to foresee, to a reasonable degree, the consequences which these could entail. It therefore concludes that the interference in issue was "prescribed by law" within the meaning of the second paragraph of Article 10 of the Convention.

4. Legitimate aim

130. The parties before the Grand Chamber did not dispute that the restriction of the applicant company's freedom of expression had pursued the legitimate aim of protecting the reputation and rights of others. The Court sees no reason to hold otherwise.

5. Necessary in a democratic society

(a) General principles

131. The fundamental principles concerning the question whether an interference with freedom of expression is "necessary in a democratic society" are well established in the Court's case-law (see, among other authorities, *Hertel v. Switzerland*, 25 August 1998, § 46, *Reports* 1998-VI; *Steel and Morris v. the United Kingdom*, no. 68416/01, § 87, ECHR 2005-II; *Mouvement raëlien suisse v. Switzerland* [GC], no. 16354/06, § 48, ECHR 2012; and *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 100, ECHR 2013) and have been summarised as follows.

> "(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'. As set forth in Article 10, this freedom is subject to exceptions, which ... must, however, be construed strictly, and the need for any restrictions must be established convincingly ...

(ii) The adjective 'necessary', within the meaning of Article 10 § 2, implies the existence of a 'pressing social need'. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a 'restriction' is reconcilable with freedom of expression as protected by Article 10.

(iii) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient' ... In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts ..."

132. Furthermore, the Court has emphasised the essential function the press fulfils in a democratic society. Although the press must not overstep certain bounds, particularly as regards the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest (see *Jersild v. Denmark*, 23 September 1994, § 31, Series A no. 298; *De Haes and Gijsels v. Belgium*, 24 February 1997, § 37, *Reports* 1997-I; and Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, § 58, ECHR 1999-III). Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see *Prager and Oberschlick v. Austria*, 26 April 1995, § 38, Series A no. 313, and Bladet Tromsø *and Stensaas*, cited above, § 59). The limits of permissible criticism are narrower in relation to a private citizen than in relation to politicians or governments (see, for example, *Castells v. Spain*, 23 April 1992, § 46, Series A no. 236; *Incal v. Turkey*, 9 June 1998, § 54, *Reports* 1998-IV; and *Tammer v. Estonia*, no. 41205/98, § 62, ECHR 2001-I).

133. Moreover, the Court has previously held that in the light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general (see *Ahmet Yıldırım*, cited above, § 48, and *Times Newspapers Ltd*, cited above, § 27). At the same time, the risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human

rights and freedoms, particularly the right to respect for private life, is certainly higher than that posed by the press (see *Editorial Board of* Pravoye Delo *and Shtekel*, cited above, § 63).

134. In considering the "duties and responsibilities" of a journalist, the potential impact of the medium concerned is an important factor and it is commonly acknowledged that the audio-visual media often have a much more immediate and powerful effect than the print media (see *Purcell and Others v. Ireland*, no. 15404/89, Commission decision of 16 April 1991, Decisions and Reports 70, p. 262). The methods of objective and balanced reporting may vary considerably, depending among other things on the media in question (see *Jersild*, cited above, § 31).

135. The Court has held that the "punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so" (see *Jersild*, cited above, § 35; *Thoma v. Luxembourg*, no. 38432/97, § 62, ECHR 2001-III; and, *mutatis mutandis*, *Verlagsgruppe News GmbH v. Austria*, no. 76918/01, § 31, 14 December 2006, and *Print Zeitungsverlag GmbH v. Austria*, no. 26547/07, § 39, 10 October 2013).

136. Moreover, the Court has held that speech that is incompatible with the values proclaimed and guaranteed by the Convention is not protected by Article 10 by virtue of Article 17 of the Convention. The examples of such speech examined by the Court have included statements denying the Holocaust, justifying a pro-Nazi policy, linking all Muslims with a grave act of terrorism, or portraying the Jews as the source of evil in Russia (see *Lehideux and Isorni v. France*, 23 September 1998, §§ 47 and 53, *Reports* 1998-VII; *Garaudy v. France* (dec.), no. 65831/01, ECHR 2003-IX; *Norwood v. the United Kingdom* (dec.), no. 23131/03, ECHR 2004-XI; *Witzsch v. Germany* (dec.), no. 7485/03, 13 December 2005; and *Pavel Ivanov v. Russia* (dec.), no. 35222/04, 20 February 2007).

137. The Court further reiterates that the right to protection of reputation is a right which is protected by Article 8 of the Convention as part of the right to respect for private life (see *Chauvy and Others*, cited above, § 70; *Pfeifer v. Austria*, no. 12556/03, § 35, 15 November 2007; and *Polanco Torres and Movilla Polanco v. Spain*, no. 34147/06, § 40, 21 September 2010). In order for Article 8 to come into play, however, an attack on a person's reputation must attain a certain level of seriousness and be made in a manner causing prejudice to personal enjoyment of the right to respect for private life (see *A. v. Norway*, no. 28070/06, § 64, 9 April 2009,

and *Axel Springer AG v. Germany* [GC], no. 39954/08, § 83, 7 February 2012).

138. When examining whether there is a need for an interference with freedom of expression in a democratic society in the interests of the "protection of the reputation or rights of others", the Court may be required to ascertain whether the domestic authorities have struck a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other in certain cases, namely, on the one hand, freedom of expression protected by Article 10, and, on the other, the right to respect for private life enshrined in Article 8 (see *Hachette Filipacchi Associés v. France*, no. 71111/01, § 43, 14 June 2007; *MGN Limited v. the United Kingdom*, no. 39401/04, § 142, 18 January 2011; and *Axel Springer AG*, cited above, § 84).

139. The Court has found that, as a matter of principle, the rights guaranteed under Articles 8 and 10 deserve equal respect, and the outcome of an application should not, in principle, vary according to whether it has been lodged with the Court under Article 10 of the Convention by the publisher of an offending article or under Article 8 of the Convention by the person who was the subject of that article. Accordingly, the margin of appreciation should in principle be the same in both cases (see *Axel Springer AG*, cited above, § 87, and *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 106, ECHR 2012, with further references to *Hachette Filipacchi Associés (*ICI PARIS*)*, no. 12268/03, § 41, 23 July 2009; *Timciuc v. Romania* (dec.), no. 28999/03, § 144, 12 October 2010; and *Mosley v. the United Kingdom*, no. 48009/08, § 111, 10 May 2011). Where the balancing exercise between those two rights has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts (see *Axel Springer AG*, cited above, § 88, and *Von Hannover*, cited above, § 107, with further references to *MGN Limited*, cited above, §§ 150 and 155, and *Palomo Sánchez and Others v. Spain* [GC], nos. 28955/06, 28957/06, 28959/06 and 28964/06, § 57, ECHR 2011). In other words, there will usually be a wide margin afforded by the Court if the State is required to strike a balance between competing private interests or competing Convention rights (see *Evans v. the United Kingdom* [GC], no. 6339/05, § 77, ECHR 2007-I; *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, § 113, ECHR 1999-III; and *Ashby Donald and Others v. France*, no. 36769/08, § 40, 10 January 2013).

(b) Application of the above principles to the present case

(i) Elements in the assessment of proportionality

140. The Court notes that it is not disputed that the comments posted by readers in reaction to the news article published in the comments section on the applicant company's Internet news portal were of a clearly unlawful nature. Indeed, the applicant company removed the comments once it was notified by the injured party, and described them as "infringing" and "illicit" before the Chamber (see paragraph 84 of the Chamber judgment). Moreover, the Court is of the view that the majority of the impugned comments amounted to hate speech or incitements to violence and as such did not enjoy the protection of Article 10 (see paragraph 136 above). Thus, the freedom of expression of the authors of the comments is not in issue in the present case. Rather, the question before the Court is whether the domestic courts' decisions, holding the applicant company liable for these comments posted by third parties, were in breach of its freedom to impart information as guaranteed by Article 10 of the Convention.

141. The Court observes that, although the applicant company immediately removed the comments in question from its website upon notification by L.'s lawyers (see paragraphs 18-19 above), the Supreme Court held the applicant company liable on the basis of the Obligations Act as it should have prevented the publication of comments with clearly unlawful contents. It then referred to section 1047(3) of the Obligations Act, according to which disclosure of information or other matters is not deemed to be unlawful if the person who discloses the information or other matters or the person to whom such matters are disclosed has a legitimate interest in the disclosure, and if the person who discloses the information has verified the information or other matters with a thoroughness which corresponds to the "gravity of the potential violation". The Supreme Court thus held that, after the disclosure, the applicant company had failed to remove the comments – the unlawful content of which it should have been aware of – from the portal on its own initiative. The inactivity of the applicant company was thus deemed unlawful as it had not "proved the absence of culpability" under section 1050(1) of the Obligations Act (see paragraph 16 of the Supreme Court judgment, set out in paragraph 31 above).

142. In the light of the Supreme Court's reasoning, the Court must, according to its consistent case-law, examine whether the domestic courts' finding of liability on the part of the applicant company was based on relevant and sufficient grounds in the particular circumstances of the case (see paragraph 131 above). The Court observes that, in order to resolve

the question whether the domestic courts' decisions holding the applicant company liable for the comments posted by third parties were in breach of its freedom of expression, the Chamber identified the following aspects as relevant for its analysis: the context of the comments, the measures applied by the applicant company in order to prevent or remove defamatory comments, the liability of the actual authors of the comments as an alternative to the applicant company's liability, and the consequences of the domestic proceedings for the applicant company (see paragraphs 85 et seq. of the Chamber judgment).

143. The Court agrees that these aspects are relevant for the concrete assessment of the proportionality of the interference in issue within the scope of the Court's examination of the present case (see paragraphs 112-17 above).

(ii) Context of the comments

144. As regards the context of the comments, the Court accepts that the news article about the ferry company, published on the Delfi news portal, was a balanced one, contained no offensive language and gave rise to no arguments regarding unlawful statements in the domestic proceedings. The Court is aware that even such a balanced article on a seemingly neutral topic may provoke fierce discussions on the Internet. Furthermore, it attaches particular weight, in this context, to the nature of the Delfi news portal. It reiterates that Delfi was a professionally managed Internet news portal run on a commercial basis which sought to attract a large number of comments on news articles published by it. The Court observes that the Supreme Court explicitly referred to the fact that the applicant company had integrated the comments section into its news portal, inviting visitors to the website to complement the news with their own judgments and opinions (comments). According to the findings of the Supreme Court, in the comments section, the applicant company actively called for comments on the news items appearing on the portal. The number of visits to the applicant company's portal depended on the number of comments; the revenue earned from advertisements published on the portal, in turn, depended on the number of visits. Thus, the Supreme Court concluded that the applicant company had an economic interest in the posting of comments. In the view of the Supreme Court, the fact that the applicant company was not the author of the comments did not mean that it had no control over the comments section (see paragraph 13 of the judgment, set out in paragraph 31 above).

145. The Court also notes in this regard that the Rules on posting comments on the Delfi website stated that the applicant company prohibited the posting of comments that were without substance and/or off topic, were

contrary to good practice, contained threats, insults, obscene expressions or vulgarities, or incited hostility, violence or illegal activities. Such comments could be removed and their authors' ability to post comments could be restricted. Furthermore, the actual authors of the comments could not modify or delete their comments once they were posted on the applicant company's news portal – only the applicant company had the technical means to do this. In the light of the above and the Supreme Court's reasoning, the Court agrees with the Chamber's finding that the applicant company must be considered to have exercised a substantial degree of control over the comments published on its portal.

146. In sum, the Court considers that it was sufficiently established by the Supreme Court that the applicant company's involvement in making public the comments on its news articles on the Delfi news portal went beyond that of a passive, purely technical service provider. The Court therefore finds that the Supreme Court based its reasoning on this issue on grounds that were relevant for the purposes of Article 10 of the Convention.

(iii) Liability of the authors of the comments

147. In connection with the question whether the liability of the actual authors of the comments could serve as a sensible alternative to the liability of the Internet news portal in a case like the present one, the Court is mindful of the interest of Internet users in not disclosing their identity. Anonymity has long been a means of avoiding reprisals or unwanted attention. As such, it is capable of promoting the free flow of ideas and information in an important manner, including, notably, on the Internet. At the same time, the Court does not lose sight of the ease, scope and speed of the dissemination of information on the Internet, and the persistence of the information once disclosed, which may considerably aggravate the effects of unlawful speech on the Internet compared to traditional media. It also refers in this connection to a recent judgment of the Court of Justice of the European Union in *Google Spain SL and Google Inc.* (cited above), in which that court, albeit in a different context, dealt with the problem of the availability on the Internet of information seriously interfering with a person's private life over an extended period of time, and found that the individual's fundamental rights, as a rule, overrode the economic interests of the operator of a search engine and the interests of other Internet users (see paragraph 56 above).

148. The Court observes that different degrees of anonymity are possible on the Internet. An Internet user may be anonymous to the wider public while being identifiable by a service provider through an account or contact data that may be either unverified or subject to some kind of

verification – ranging from limited verification (for example, through activation of an account via an e-mail address or a social network account) to secure authentication, be it by the use of national electronic identity cards or online banking authentication data allowing rather more secure identification of the user. A service provider may also allow an extensive degree of anonymity for its users, in which case the users are not required to identify themselves at all and they may only be traceable – to a limited extent – through the information retained by Internet access providers. The release of such information would usually require an injunction by the investigative or judicial authorities and would be subject to restrictive conditions. It may nevertheless be required in some cases in order to identify and prosecute perpetrators.

149. Thus, in the judgment in *K.U. v. Finland*, concerning an offence of "malicious misrepresentation" of a sexual nature against a minor, the Court found that "[a]lthough freedom of expression and confidentiality of communications are primary considerations and users of telecommunications and Internet services must have a guarantee that their own privacy and freedom of expression will be respected, such guarantee cannot be absolute and must yield on occasion to other legitimate imperatives, such as the prevention of disorder or crime or the protection of the rights and freedoms of others" (see *K.U. v. Finland*, no. 2872/02, § 49, ECHR 2008). The Court in that case rejected the Government's argument that the applicant had had the possibility of obtaining damages from the service provider, finding that this was not sufficient in the circumstances of the case. It held that there had to be a remedy enabling the actual offender to be identified and brought to justice, whereas at the relevant time the regulatory framework of the respondent State had not provided for the possibility of ordering the Internet service provider to divulge the information required for that purpose (ibid., §§ 47 and 49). Although *K.U. v. Finland* concerned a breach classified as a criminal offence under the domestic law and involved a more sweeping intrusion into the victim's private life than the present case, it is evident from the Court's reasoning that anonymity on the Internet, while an important factor, must be balanced against other rights and interests.

150. As regards the establishment of the identity of the authors of the comments in civil proceedings, the Court notes that the parties' positions differed as to its feasibility. On the basis of the information provided by the parties, the Court observes that the Estonian courts, in the "pre-trial taking of evidence" procedure under Articles 244 et seq. of the Code of Civil Procedure (see paragraph 40 above), have granted requests by defamed persons for the disclosure by online newspapers or news portals of the IP addresses of authors who had posted allegedly defamatory comments and

for the disclosure by Internet access providers of the names and addresses of the subscribers to whom the IP addresses in question had been assigned. The examples provided by the Government show mixed results: in some cases it had proved possible to establish the computer from which the comments had been made, while in other cases, for various technical reasons, this had proved impossible.

151. According to the Supreme Court's judgment in the present case, the injured person had the choice of bringing a claim against the applicant company or the authors of the comments. The Court considers that the uncertain effectiveness of measures allowing the identity of the authors of the comments to be established, coupled with the lack of instruments put in place by the applicant company for the same purpose with a view to making it possible for a victim of hate speech to bring a claim effectively against the authors of the comments, are factors that support a finding that the Supreme Court based its judgment on relevant and sufficient grounds. The Court also refers, in this context, to the judgment in *Krone Verlag GmbH & Co. KG v. Austria (no. 4)* (no. 72331/01, § 32, 9 November 2006) in which it found that shifting the risk of the defamed person obtaining redress in defamation proceedings to the media company, which was usually in a better financial position than the defamer, was not as such a disproportionate interference with the media company's right to freedom of expression.

(iv) Measures taken by the applicant company

152. The Court notes that the applicant company highlighted the number of comments on each article on its website, and therefore the articles with the most lively exchanges must have been easily identifiable for the editors of the news portal. The article in issue in the present case attracted 185 comments, apparently well above average. The comments in question were removed by the applicant company some six weeks after they were uploaded on the website, upon notification by the injured person's lawyers to the applicant company (see paragraphs 17-19 above).

153. The Court observes that the Supreme Court stated in its judgment that "[o]n account of the obligation arising from law to avoid causing harm, the [applicant company] should have prevented the publication of comments with clearly unlawful contents". However, it also held that "[a]fter the disclosure, the [applicant company had] failed to remove the comments – the unlawful content of which it should have been aware of – from the portal on its own initiative" (see paragraph 16 of the judgment, set out in paragraph 31 above). Therefore, the Supreme Court did not explicitly determine whether the applicant company was under an obligation to prevent the uploading of the comments to the website or whether it would

have sufficed under domestic law for the applicant company to have removed the offending comments without delay after publication to escape liability under the Obligations Act. The Court considers that, when assessing the grounds upon which the Supreme Court relied in its judgment entailing an interference with the applicant company's Convention rights, there is nothing to suggest that the national court intended to restrict its rights to a greater extent than that required to achieve the aim pursued. On this basis, and having regard to the freedom to impart information as enshrined in Article 10, the Court will thus proceed on the assumption that the Supreme Court's judgment must be understood to mean that had the applicant company removed the comments without delay after publication, this would have sufficed for it to escape liability under domestic law. Consequently, and taking account of the above findings (see paragraph 145) to the effect that the applicant company must be considered to have exercised a substantial degree of control over the comments published on its portal, the Court does not consider that the imposition on the applicant company of an obligation to remove from its website, without delay after publication, comments that amounted to hate speech and incitements to violence, and were thus clearly unlawful on their face, amounted, in principle, to a disproportionate interference with its freedom of expression.

154. The pertinent issue in the present case is whether the national court's findings that liability was justified, as the applicant company had not removed the comments without delay after publication, were based on relevant and sufficient grounds. With this in mind, account must first be taken of whether the applicant company had put in place mechanisms that were capable of filtering comments amounting to hate speech or speech entailing an incitement to violence.

155. The Court notes that the applicant company took certain measures in this regard. There was a disclaimer on the Delfi news portal stating that the writers of the comments – and not the applicant company – were accountable for them, and that the posting of comments that were contrary to good practice or contained threats, insults, obscene expressions or vulgarities, or incited hostility, violence or illegal activities, was prohibited. Furthermore, the portal had an automatic system of deletion of comments based on stems of certain vulgar words and it had a notice-and-take-down system in place, whereby anyone could notify it of an inappropriate comment by simply clicking on a button designated for that purpose to bring it to the attention of the portal administrators. In addition, on some occasions the administrators removed inappropriate comments on their own initiative.

156. Thus, the Court notes that the applicant company cannot be said to have wholly neglected its duty to avoid causing harm to third parties.

Nevertheless, and more importantly, the automatic word-based filter used by the applicant company failed to filter out odious hate speech and speech inciting violence posted by readers and thus limited its ability to expeditiously remove the offending comments. The Court reiterates that the majority of the words and expressions in question did not include sophisticated metaphors or contain hidden meanings or subtle threats. They were manifest expressions of hatred and blatant threats to the physical integrity of L. Thus, even if the automatic word-based filter may have been useful in some instances, the facts of the present case demonstrate that it was insufficient for detecting comments whose content did not constitute protected speech under Article 10 of the Convention (see paragraph 136 above). The Court notes that as a consequence of this failure of the filtering mechanism these clearly unlawful comments remained online for six weeks (see paragraphs 18-19 above).

157. The Court observes in this connection that on some occasions the portal administrators did remove inappropriate comments on their own initiative and that, apparently some time after the events of the present case, the applicant company set up a dedicated team of moderators. Having regard to the fact that there are ample opportunities for anyone to make his or her voice heard on the Internet, the Court considers that a large news portal's obligation to take effective measures to limit the dissemination of hate speech and speech inciting violence – the issue in the present case – can by no means be equated to "private censorship". While acknowledging the "important role" played by the Internet "in enhancing the public's access to news and facilitating the dissemination of information in general" (see *Ahmet Yıldırım*, cited above, § 48, and *Times Newspapers Ltd*, cited above, § 27), the Court reiterates that it is also mindful of the risk of harm posed by content and communications on the Internet (see *Editorial Board of* Pravoye Delo *and Shtekel*, cited above, § 63; see also *Mosley*, cited above, § 130).

158. Moreover, depending on the circumstances, there may be no identifiable individual victim, for example in some cases of hate speech directed against a group of persons or speech directly inciting violence of the type manifested in several of the comments in the present case. In cases where an individual victim exists, he or she may be prevented from notifying an Internet service provider of the alleged violation of his or her rights. The Court attaches weight to the consideration that the ability of a potential victim of hate speech to continuously monitor the Internet is more limited than the ability of a large commercial Internet news portal to prevent or rapidly remove such comments.

159. Lastly, the Court observes that the applicant company has argued (see paragraph 78 above) that the Court should have due regard to the notice-

and-take-down system that it had introduced. If accompanied by effective procedures allowing for rapid response, this system can in the Court's view function in many cases as an appropriate tool for balancing the rights and interests of all those involved. However, in cases such as the present one, where third-party user comments are in the form of hate speech and direct threats to the physical integrity of individuals, as understood in the Court's case-law (see paragraph 136 above), the Court considers, as stated above (see paragraph 153), that the rights and interests of others and of society as a whole may entitle Contracting States to impose liability on Internet news portals, without contravening Article 10 of the Convention, if they fail to take measures to remove clearly unlawful comments without delay, even without notice from the alleged victim or from third parties.

(v) Consequences for the applicant company

160. Finally, turning to the question of consequences of the domestic proceedings for the applicant company, the Court notes that it was obliged to pay the injured person the equivalent of EUR 320 in compensation for non-pecuniary damage. It agrees with the finding of the Chamber that this sum, also taking into account the fact that the applicant company was a professional operator of one of the largest Internet news portals in Estonia, can by no means be considered disproportionate to the breach established by the domestic courts (see paragraph 93 of the Chamber judgment). The Court notes in this connection that it has also had regard to the post-*Delfi* domestic case-law on the liability of the operators of Internet news portals (see paragraph 43 above). It observes that in these cases the lower courts have followed the Supreme Court's judgment in *Delfi* but no awards have been made for non-pecuniary damage. In other words, the tangible result for the operators in post-*Delfi* cases has been that they have taken down the offending comments but have not been ordered to pay compensation for non-pecuniary damage.

161. The Court also observes that it does not appear that the applicant company had to change its business model as a result of the domestic proceedings. According to the information available, the Delfi news portal has continued to be one of Estonia's largest Internet publications and by far the most popular for posting comments, the number of which has continued to increase. Anonymous comments – now existing alongside the possibility of posting registered comments, which are displayed to readers first – are still predominant and the applicant company has set up a team of moderators carrying out follow-up moderation of comments posted on the portal (see paragraphs 32 and 83 above). In these circumstances, the

Court cannot conclude that the interference with the applicant company's freedom of expression was disproportionate on that account either.

(vi) Conclusion

162. Based on the concrete assessment of the above aspects, taking into account the reasoning of the Supreme Court in the present case, in particular the extreme nature of the comments in question, the fact that the comments were posted in reaction to an article published by the applicant company on its professionally managed news portal run on a commercial basis, the insufficiency of the measures taken by the applicant company to remove without delay after publication comments amounting to hate speech and speech inciting violence and to ensure a realistic prospect of the authors of such comments being held liable, and the moderate sanction imposed on the applicant company, the Court finds that the domestic courts' imposition of liability on the applicant company was based on relevant and sufficient grounds, having regard to the margin of appreciation afforded to the respondent State. Therefore, the measure did not constitute a disproportionate restriction on the applicant company's right to freedom of expression.

Accordingly, there has been no violation of Article 10 of the Convention.

FOR THESE REASONS, THE COURT

Holds, by fifteen votes to two, that there has been no violation of Article 10 of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 16 June 2015.

Johan Callewaert
Deputy Registrar

Dean Spielmann
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 concurring opinion of Judges Raimondi, Karakaş, De Gaetano and Kjølbro;

(b) concurring opinion of Judge Zupančič;
(c) joint dissenting opinion of Judges Sajó and Tsotsoria.

D.S.
J.C.

JOINT CONCURRING OPINION OF JUDGES RAIMONDI, KARAKAŞ, DE GAETANO AND KJØLBRO

1. We agree that there has been no violation of Article 10 of the Convention. However, we would like to clarify our position as regards two issues: (a) the Court's reading of the Supreme Court's judgment, and (b) the principles underlying the Court's assessment of the complaint.

2. Firstly, the Court's reading of the Supreme Court's judgment (see paragraphs 153-54 of the present judgment) is decisive for the assessment of the case.

3. In reaching its decision the Supreme Court stated, *inter alia*, that it followed from the obligation to avoid causing harm that Delfi "should have prevented the publication of the comments with clearly unlawful content". Furthermore, the Supreme Court held that Delfi, after the disclosure of the comments in question, had "failed to remove the comments – the unlawful content of which it should have been aware of – from the portal on its own initiative". The Supreme Court found that Delfi's "inactivity [was] unlawful", and that Delfi was liable as it had "not proved the absence of culpability" (see the extract quoted in paragraph 31 of the present judgment).

4. There are two possible readings of the Supreme Court's judgment: (a) Delfi was liable as it did not "prevent" the unlawful comments from being published, and its liability was aggravated by the fact that it did not subsequently "remove" the comments; or (b) Delfi did not "prevent" the unlawful comments from being published and, as it did not subsequently "remove" the comments without delay, it was liable for them.

5. The Court has decided to read the Supreme Court's judgment in the second sense, thereby avoiding the difficult question of the possible liability of a news portal for not having "prevented" unlawful user-generated comments from being published. However, had the Court read the Supreme Court's judgment in the first sense, the outcome of the case might have been different.

6. If the Supreme Court's judgment were to be understood in the first sense, it would enshrine an interpretation of domestic legislation that would entail a risk of imposing excessive burdens on a news portal such as Delfi. In fact, in order to avoid liability for comments written by readers of its articles, a news portal would have to prevent such comments from being published (and would also have to remove any such comments that were published). This might, in practice, require an effective monitoring system, be it automatic or manual. In other words, a news portal might have to pre-monitor comments in order to avoid publishing clearly unlawful comments

made by readers. Furthermore, if the liability of a news portal was closely linked to the clearly unlawful nature of the comments, without it being necessary for the plaintiff to prove that the news portal knew or ought to have known that the comments would be or had been published on the portal, the portal would in practice be obliged to act on the assumption that such comments could be made by readers and therefore to take the necessary measures to avoid them being published, which in practice would require pre-monitoring measures to be adopted.

7. Therefore, in our view, finding a news portal liable for not having "prevented" the publication of user-generated comments would in practice imply that the portal would have to pre-monitor each and every user-generated comment in order to avoid liability for any unlawful comments. This could in practice lead to a disproportionate interference with the news portal's freedom of expression as guaranteed by Article 10.

8. Secondly, the Court should have stated more clearly the underlying principles leading it to find no violation of Article 10. Instead, the Court has adopted case-specific reasoning and at the same time has left the relevant principles to be developed more clearly in subsequent case-law.

9. In our view, the Court should have seized the opportunity to state more clearly the principles relevant to the assessment of a case such as the present one.

10. A news portal such as Delfi, which invites readers of articles to write comments that are made public on the portal, will assume "duties and responsibilities" as provided for in domestic legislation. Furthermore, it follows from Article 8 of the Convention that member States have an obligation to protect effectively the reputation and honour of individuals. Therefore, Article 10 of the Convention cannot be interpreted as prohibiting member States from imposing obligations on news portals such as Delfi when they allow readers to write comments that are made public. In fact, member States may in certain circumstances have an obligation to do so in order to protect the honour and reputation of others. Thus, member States may decide that a news portal is to be regarded as the publisher of the comments in question. Furthermore, they may prescribe that news portals may be held liable for clearly unlawful comments, such as insults, threats and hate speech, which are written by users and made public on the portal. However, in exercising their power to do so, member States must comply with their obligations under Article 10 of the Convention. Therefore, domestic legislation should not restrict freedom of expression by imposing excessive burdens on news portals.

11. In our view, member States may hold a news portal, such as Delfi, liable for clearly unlawful comments such as insults, threats and hate speech

by readers of its articles if the portal knew, or ought to have known, that such comments would be or had been published on the portal. Furthermore, member States may hold a news portal liable in such situations if it fails to act promptly when made aware of such comments published on the portal.

12. The assessment of whether the news portal knew or ought to have known that clearly unlawful comments may be or have been published on the portal may take into account all the relevant specific circumstances of the case, including the nature of the comments in question, the context of their publication, the subject matter of the article generating the comments, the nature of the news portal in question, the history of the portal, the number of comments generated by the article, the activity on the portal, and how long the comments have appeared on the portal.

13. Therefore, holding a news portal liable for clearly unlawful comments such as insults, threats and hate speech under such circumstances will in general be compatible with Article 10 of the Convention. Furthermore, member States may also hold a news portal liable if it has failed to take reasonable measures to prevent clearly unlawful comments from being made public on the portal or to remove them once they have been made public.

14. In our view, these underlying principles should have been stated more clearly in the Court's judgment.

15. Having regard to the clearly unlawful nature of the comments in question, as well as the fact that they remained on the news portal for six weeks before they were removed, we do not find it disproportionate for the Supreme Court to find Delfi liable as it had "failed to remove the comments – the unlawful content of which it should have been aware of – from the portal on its own initiative". In fact, not being aware of such clearly unlawful comments for such an extended period of time almost amounts to wilful ignorance, which cannot serve as a basis for avoiding civil liability.

16. Therefore, we did not have any problems voting together with the majority. However, the Court should, in our view, have seized the opportunity to clarify the principles underlying its assessment, irrespective of the sensitive nature of the questions raised by the application.

CONCURRING OPINION OF JUDGE ZUPANČIČ

In general, I agree with the outcome in this case. However, I would like to add a few historical and simply ethical observations.

The substance of the case concerns the protection of personal integrity, that is, of personality rights in Estonia and also, after this case, elsewhere in Europe. For many years personality rights were, so to speak, discriminated against *vis-à-vis* freedom of expression, specifically the freedom of the press. In my concurring opinion in *Von Hannover v. Germany* (no. 59320/00, ECHR 2004-VI), I wrote that "[t]he *Persönlichkeitsrecht* doctrine imparts a higher level of civilised interpersonal deportment", and I believe the facts of the case at hand confirm this finding.

The problem derives from the great dissimilarity between the common law on the one hand and the Continental system of law on the other hand. The notion of privacy in American law, for example, only derived from the seminal article by Warren and Brandeis[1], who happened, because he had been schooled in Germany, to be able to instruct himself about personality rights in German. The notion of privacy as a right to be left alone, especially by the media, was, until that time, more or less unfamiliar to the Anglo-American sphere of law. The article itself addressed precisely the question of abuse by the media. Obviously, at that time there were only printed media but this was sufficient for Justice Brandeis to show his own extreme indignation.

On the other hand, the Continental tradition concerning personality rights goes back to Roman law's *actio iniurirarum*, which protected against bodily injury but also against non-bodily *convicium*, *adtemptata pudicitia* and *infamatio*[2]. Thus, personality rights can be seen as the predecessor and the private-law equivalent of human rights. Protection, for example, against defamation and violations of other personality rights has a long and imperative tradition on the Continent, whereas libel and slander are the weak corresponding rights in Anglo-American law.

According to Jean-Christophe Saint-Paul:

> "*Les droits de la personnalité constituent l'ensemble des prérogatives juridiques portant sur des intérêts moraux (identité, vie privée, honneur) et le corps humain ou les moyens de leur réalisation (correspondances, domicile, image), exercés par des personnes juridiques*

1. Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy", 4(5) *Harvard Law Review* 193-201 (1890). The article is available in its entirety at www.jstor.org/stable/1321160?origin=JSTOR-pdf&seq=1#page_scan_tab_contents (updated on 23 March 2015).

2. See Gert Brüggemeier, Aurelia Colombi Ciacchi, Patrick O'Callaghan (eds.), *Personality Rights in European Torts Law*, Cambridge University Press, Cambridge 2010, p. 18 and note 51.

(physiques ou morales) et qui sont sanctionnés par des actions en justice civiles (cessation du trouble, réparation des préjudices) et pénales.

Au carrefour du droit civil (personnes, contrats, biens), du droit pénal et des droits de l'homme, et aussi des procédures civile et pénale, la matière fait l'objet d'une jurisprudence foisonnante, en droit interne et en droit européen, fondée sur des sources variées nationales (Code civil, Code pénal, Loi informatique et libertés, Loi relative à la liberté de la presse) et internationales (CESDH, PIDCP, DUDH, Charte des droits fondamentaux), qui opère une balance juridictionnelle entre la protection de la personne et d'autres valeurs telles que la liberté d'expression ou les nécessités de la preuve.[3]"

The situation in Germany is as follows:

"The general right of personality has been recognised in the case-law of the *Bundesgerichtshof* since 1954 as a basic right constitutionally guaranteed by Articles 1 and 2 of the Basic Law and at the same time as an 'other right' protected in civil law under Article 823 § 1 of the BGB [*Bundesgesetzbuch* – German Civil Code] (constant case-law since BGHZ [Federal Court of Justice, civil cases] 13, 334, 338 ...). It guarantees as against all the world the protection of human dignity and the right to free development of the personality. Special forms of manifestation of the general right of personality are the right to one's own picture (sections 22 et seq. of the KUG [*Kunsturhebergesetz* – Artistic Copyright Act]) and the right to one's name (Article 12 of the BGB). They guarantee protection of the personality for the sphere regulated by them.[4]"

Thus, it is almost difficult to believe that this private-law parallel to the more explicit constitutional-law and international-law protection of human personality rights has been not only disregarded but often simply overridden by contrary considerations.

Also, in my opinion, it is completely unacceptable that an Internet portal or any other kind of mass media should be permitted to publish any kind of anonymous comments. We seem to have forgotten that "letters to the editor", not so long ago, were double-checked as to the identity of the

3. See Jean-Christophe Saint-Paul (ed.), "Droits de la personnalité", 2013 at http://boutique.lexisnexis.fr/jcshop3/355401/fiche_produit.htm (Updated on 23 March 2015). Translation: "Personality rights are the set of legal prerogatives relating to moral interests (identity, private life, honour) and the human body or the means of realising them (correspondence, home, image); they are exercised by anyone with legal personality (natural persons or legal entities) and are enforced by means of actions in the civil courts (injunctions to desist, claims for damages) and the criminal courts.
This issue, at the crossroads of civil law (persons, contracts, property), criminal law and human rights law and also civil and criminal procedure, has given rise to an extensive body of case-law at domestic and European level, based on various sources of national law (Civil Code, Criminal Code, Data Processing and Civil Liberties Act, Freedom of the Press Act) and international law (European Convention on Human Rights, International Covenant on Civil and Political Rights, Universal Declaration of Human Rights, Charter of Fundamental Rights), involving a judicial balancing exercise between protection of the person and of other values such as freedom of expression or evidentiary needs."

4. See the *Marlene Dietrich Case*, BGH 1 ZR 49/97, at Institute for Transnational Law – Foreign Law Translations, Texas University School of Law, at www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=726 (updated on 23 March 2015).

author before they were ever deemed publishable. The Government argued (see paragraph 90 of the present judgment) that the biggest international news portals did not allow anonymous (that is, unregistered) comments and referred to an opinion that there was a trend away from anonymity. At the same time, anonymous comments tended to be more insulting than the comments by persons who had registered, and harsh comments attracted more readers. The Government argued that Delfi had been notorious for exactly this reason.

On the other hand, in *Print Zeitungverlag GmbH v. Austria* (no. 26547/07, 10 October 2013), a judgment delivered on the same day as the Chamber judgment in *Delfi*, the Court held that an award of damages amounting to 2,000 euros (EUR) for the publication of an anonymous letter in print was – and rightly so! – compatible with its previous case-law[5].

The mass media used to be run according to the obvious principle that the great freedom enjoyed by the press implied a commensurate level of responsibility. To enable technically the publication of extremely aggressive forms of defamation, all this due to crass commercial interest, and then to shrug one's shoulders, maintaining that an Internet provider is not responsible for these attacks on the personality rights of others, is totally unacceptable.

According to the old tradition of the protection of personality rights, which again go back to Roman law, the amount of approximately EUR 300 awarded in compensation in the present case is clearly inadequate as far as damages for the injury to the aggrieved persons are concerned. The mere comparison with the above-mentioned judgment in *Print Zeitungverlag GmbH*, which involved only two aggrieved persons and a printed medium with very limited distribution, demonstrates that a much higher award of damages was called for in the present case.

I do not know why the national courts hesitate in adjudicating these kinds of cases and affording strict protection of personality rights and decent compensation to those who have been subject to these kinds of abusive verbal injuries, but I suspect that our own case-law has something to do with it.

However, the freedom of expression, like all other freedoms, needs to end precisely at the point where somebody else's freedom and personal integrity is negatively affected.

5. See http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-126629 (updated on 24 March 2015).

JOINT DISSENTING OPINION OF JUDGES SAJÓ AND TSOTSORIA

To explain our dissent, we will offer a detailed and traditional analysis of the case, as is common in the Court's practice. There are, however, some broader issues which are more important than our dissatisfaction with this judgment's troubling departure from the prevailing understanding of the case-law. These fundamental concerns will be spelled out first.

I.

Collateral censorship

1. In the present judgment the Court has approved a liability system that imposes a requirement of constructive knowledge on active Internet intermediaries[1] (that is, hosts who provide their own content and open their intermediary services for third parties to comment on that content). We find the potential consequences of this standard troubling. The consequences are easy to foresee. For the sake of preventing defamation of all kinds, and perhaps all "illegal" activities, all comments will have to be monitored from the moment they are posted. As a consequence, active intermediaries and blog operators will have considerable incentives to discontinue offering a comments feature, and the fear of liability may lead to additional self-censorship by operators. This is an invitation to self-censorship at its worst.

2. We regret that the Court did not rely on the prophetic warnings of Professor Jack Balkin[2]. As Professor Balkin has demonstrated, the technological infrastructure behind digital communication is subject to less visible forms of control by private and public regulators, and the Court has just added another such form to this panoply. Governments may not always be directly censoring expression, but by putting pressure and imposing liability on those who control the technological infrastructure (Internet service providers, etc.), they create an environment in which collateral or private-party censorship is the inevitable result. Collateral censorship "occurs when the state holds one private party A liable for the speech of another private party B, and A has the power to block, censor, or otherwise control access to B's speech"[3]. Because A is liable for someone else's speech, A has

1. The term is used in the literature: see Justin Hurwitz, "Trust and Online Interaction", *University of Pennsylvania Law Review*, Vol. 161: 1579.
2. Jack M. Balkin, "Old-School/New-School Speech Regulation", 127 *Harvard Law Review* 2296 (2014).
3. Ibid., p. 2309.

strong incentives to over-censor, to limit access, and to deny B's ability to communicate using the platform that A controls. In effect, the fear of liability causes A to impose prior restraints on B's speech and to stifle even protected speech. "What looks like a problem from the standpoint of free expression ... may look like an opportunity from the standpoint of governments that cannot easily locate anonymous speakers and want to ensure that harmful or illegal speech does not propagate.[4]" These technological tools for reviewing content before it is communicated online lead (among other things) to: deliberate overbreadth; limited procedural protections (the action is taken outside the context of a trial); and shifting of the burden of error costs (the entity in charge of filtering will err on the side of protecting its own liability, rather than protecting freedom of expression).

3. The imposition of liability on intermediaries was a major obstacle to freedom of expression for centuries. It was the printer Harding and his wife who were arrested for the printing of the *Drapier's Letters* and not the anonymous author (Jonathan Swift), who continued to preach undisturbed. It was for this reason that exempting intermediaries from liability became a crucial issue in the making of the first lasting document of European constitutionalism, the Belgian Constitution of 1831[5]. This is the proud human rights tradition of Europe that we are called upon to sustain.

The general context

4. It is argued in the present judgment that the Court is called upon to decide the case at hand, but this is only part of our duty and such an argument is dangerous in its one-sidedness. As the Court summarised matters in *Rantsev v. Cyprus and Russia* (no. 25965/04, § 197, ECHR 2010)[6]:

> "[The Court's] judgments serve not only to decide those cases brought before it but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties (see *Ireland v. the United Kingdom*, 18 January 1978, § 154, Series A no. 25; *Guzzardi v. Italy*, 6 November 1980, § 86,

4. Ibid., p. 2311.

5. See E. Chevalier Huyttens (ed.), *Discussion du Congrès national de Belgique 1830-1831 (Tome premier, 10 novembre-31 décembre 1830)*, Brussels, Société typographique belge Adolphe Wahlen et Cie (1844). See Nothomb's speech, pp. 651-52.
The specific language of the 1831 Constitution was a compromise and did not reflect the principled approach of the liberals who stood for Constitutionalism (writ large), but even this compromise, which we find today reproduced in Article 25 of the Belgian Constitution, states that "When the author is known and resident in Belgium, neither the publisher, the printer nor the distributor can be prosecuted". Back to 1830?

6. Confirmed most recently by the Grand Chamber in *Konstantin Markin v. Russia* [GC], no. 30078/06, § 89, ECHR 2012.

> Series A no. 39; and *Karner v. Austria*, no. 40016/98, § 26, ECHR 2003-IX). Although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States (see *Karner*, cited above, § 26, and *Capital Bank AD v. Bulgaria*, no. 49429/99, §§ 78 to 79, ECHR 2005-XII)."

5. Further, as the Court stated in *Animal Defenders International v. the United Kingdom* ([GC] no. 48876/08, § 108, ECHR 2013):

> "It emerges from that case-law that, in order to determine the proportionality of a general measure, the Court must primarily assess the legislative choices underlying it (see *James and Others* [*v. the United Kingdom*, 21 February 1986], § 36[, Series A no. 98])."

6. The present judgment expressly deals with the general context (see the "Preliminary remarks" section starting at paragraph 110) but without determining "issues on public-policy grounds". The Internet is described as an "unprecedented platform" and while there is reference to benefits, it is described as posing "certain dangers", the advantages being scarcely mentioned. We disagree. The Internet is more than a uniquely dangerous novelty. It is a sphere of robust public discourse with novel opportunities for enhanced democracy. Comments are a crucial part of this new enhanced exchange of ideas among citizens. This has been the Court's understanding so far in its case-law (see *Ashby Donald and Others v. France*, no. 36769/08, § 34, 10 January 2013, and also *Węgrzynowski and Smolczewski v. Poland*, no. 33846/07, § 58, 16 July 2013)[7].

7. It is noteworthy in this context that the thirteen lines of comparative-law analysis in the present judgment do not refer to specific national practices. While there are novel restrictions on posting on the Internet in the recent legislation of a couple of European countries, the Estonian approach is rather unique. In the overwhelming majority of the member States of the Council of Europe, and also in genuine democracies all over the world, the regulatory system (in conformity with the expectations of the rule of law) is based on the concept of actual knowledge. A safe harbour is provided by the rule of notice and action (primarily "notice-and-take-down"). This Court has not been known for developing rights restrictions which go against the prevailing standards of the member States, except in a few cases where a

7. While the passage from *Editorial Board of* Pravoye Delo *and Shtekel* (*v. Ukraine*, no. 33014/05, §§ 63-64, ECHR 2011) quoted in the judgment (see paragraph 128) seems to take a neutral position on the balance between the good and bad sides of the Internet, it is important to note that in that judgment the negative aspects did not prevail and the "risk of harm" argument was followed by a "nevertheless", opting in favour of Internet freedoms.

narrow majority found that deeply held moral traditions justified such an exception.

Consequences

8. The Court has endorsed the standard of the Estonian Supreme Court, namely that active intermediaries must remove comments "without delay" after publication (see paragraph 153 of the present judgment), and not upon notice or on other grounds linked to actual knowledge. Active intermediaries are therefore invited to exercise prior restraint. Moreover, member States will be forced to introduce a similar approach because otherwise, according to the logic of the present judgment, there is no proper protection for the rights of those who feel defamed by comments. To avoid trouble, for active intermediaries the safe harbour will simply be to disable comments[8].

9. The Court is aware of the unhappy consequences of adopting a standard that can be satisfied only by constant monitoring of all comments (and implicitly, all user-generated content). For the Court, "the case does not concern other fora on the Internet ... or a social media platform ... where the content provider may be a private person running the website or blog as a hobby" (see paragraph 116 of the present judgment). It is hard to imagine how this "damage control" will help. Freedom of expression cannot be a matter of a hobby.

II.

Delfi's role as active intermediary

10. Turning to the specific case, we find that the Estonian Supreme Court did not provide relevant and sufficient reasons for the very intense interference with the applicant company's rights and did not apply an appropriate balancing exercise. This amounts to a violation of the Convention.

11. This case is about interference with the freedom of expression of Delfi as an *active* intermediary. Delfi published an article on the destruction of ice roads by a public service ferry company on its news portal and it enabled comments on the article. It is undisputed that there was nothing

8. Social media operators have already institutionalised over-censorship by allowing a policy of banning sites and posts which have been "reported", without conducting a serious investigation into the matter. The policy adopted by Facebook is another victory for the troll mentality. Note that Facebook requires (all) user-imposed censorship to take place in a legal environment that grants service providers immunity under section 230 (a) of the Communications Decency Act. Imagine what will happen where there is no immunity.

illegal in the article. It was accepted by the national courts, and we could not agree more, that Delfi was engaged in journalistic activities and that the opening up of a comments section formed part of the news portal. However, the news portal was not the author of the unedited comments. Furthermore, at least in the Chamber's view (see paragraph 86 of its judgment), the debate concerned a matter of "a certain degree" of public interest. We believe that the article dealt with a matter of public interest and that the comments, even the impugned ones, were part of the debate even though they may have been excessive or impermissible. Delfi was held liable under the Civil Code of Estonia for defamation originating from comments posted in the comments section of the article. This concerned twenty comments.

The nature of the comments

12. Throughout the whole judgment the description or characterisation of the comments varies and remains non-specific. The Supreme Court of Estonia has its own interpretation: it refers to "insult in order to degrade" and "degrade human dignity and ridicule a person" and finds Delfi liable for disrespecting the honour and good name of the person concerned. According to paragraph 117 of the present judgment, "the impugned comments ... *mainly* constituted hate speech and speech that directly advocated acts of violence"[9] (see also paragraph 140). However, according to paragraph 130 ("the legitimate aim of protecting the reputation and rights of others"), the offence in issue concerned the reputation and unspecified rights of others. It is not clear to which comments the Court is referring. Does the comment "a good man lives a long time, a shitty man a day or two" (comment no. 9 – see paragraph 18 of the judgment) amount to advocating violence[10]?

9. "Hate speech" remains undefined. "There is no universally accepted definition of 'hate speech'. The term encompasses a wide array of hateful messages, ranging from offensive, derogatory, abusive and negative stereotyping remarks and comments, to intimidating, inflammatory speech inciting violence against specific individuals and groups. Only the most egregious forms of hate speech, namely those constituting incitement to discrimination, hostility and violence, are generally considered unlawful" (Report of the Special Rapporteur on minority issues, Rita Izsák (A/HRC/28/64), Human Rights Council, Twenty-eighth session).
See more at: www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15716&LangID=E#sthash.XYM1WUqO.dpuf
The lack of an identifiable concept in twenty very different comments makes the application of the judgment unforeseeable.

10. The Court has rather clear requirements as to what amounts to an impermissible call for violence (see *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 62, ECHR 1999-IV; *Dağtekin v. Turkey*, no. 36215/97, 13 January 2005; *Erbakan v. Turkey*, no. 59405/00, § 56, 6 July 2006; *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 56-58, ECHR 2007-IV; *Otegi Mondragon v. Spain*, no. 2034/07, § 54, ECHR 2011; and *Vejdeland and Others v. Sweden*, no. 1813/07, § 55, 9 February 2012).

13. It is unfortunate that the characterisation of the comments remains murky. What is really troubling here is never spelled out: that some of the comments are racist. Comment no. 2 is a recital of anti-Semitic stereotypes ending with a reference to the annihilation by fire of the addressee as a Jew.

14. We are not going to discuss here to what extent some of the references satisfy the strict requirements of incitement to violence, given the nature of the Internet. Does a call for violence or a wish to see someone killed have the same effect on the Internet as a similar statement made in a face-to-face encounter in a situation like the present one? This is not a call to arms by an extremist group. The answer has to be established by means of a proper judicial process. No criminal action against the commenters was taken, notwithstanding the reference to lynching[11]. The question of the extent to which such comments amount to a real threat would have deserved proper analysis. However, the judgment simply accepts the findings of the Supreme Court, which says only that the illegality of the comments is manifest (and then, like the judgment, characterises them in different ways).

15. We will also refrain from an analysis of the impact of the hateful messages regarding their capacity to incite imminent violence or even to build up lasting hatred resulting in harassment or real threats against L. Racism and constraining others to live in an environment full of hatred and real threats cannot find refuge in freedom of expression. This legitimate concern must not, however, blind those who are called upon to take action, and they must be reminded that "hate-speech regulations put actual feelings, often honourable ones, ahead of abstract rights – which seems like common sense. It takes an active effort to resist the impulse to silence the jerks who have wounded you"[12].

Interference and the right of active intermediaries

16. There is general agreement that the Estonian Supreme Court's judgment interfered with Delfi's freedom of expression, though the nature of the right remains somewhat non-specific. In our view the rights concerned are the rights of the press. User comments may enrich the article. The rights of an active intermediary include the right to enable others to impart and receive information.

11. It was of relevance in *Stoll v. Switzerland* ([GC], no. 69698/01, § 54-56, ECHR 2007-V), in the determination of the Government interest at stake, that no criminal action was taken against the applicant; hence the argument relating to the protection of national security was found to be of no relevance.

12. George Packer, "Mute Button", *The New Yorker*, 13 April 2015.

Lawfulness of the interference: the problem of foreseeability

17. According to the prevailing methodology of the Court, the next question to be asked concerns the lawfulness of the measure. This entails a review of the foreseeability of the law. It is accepted by the Court that the applicable law was the Civil Code and not the Information Society Services Act. The Information Society Services Act apparently exempts service providers and provides a "safe harbour" in the sense that, once the service provider becomes aware of the illegal content and removes it expeditiously, it cannot be held liable. Neither the domestic authorities nor the Court explain why the provision of binding European law that is part of the national legal system is immaterial, except to say that the present case concerns a matter of publication rather than data storage. It is, of course, not for this Court to interpret European Union law as such. This does not mean that we should not regard it as part of the domestic system, attributing to it its proper constitutional weight. Be that as it may, section 10 (liability for storage) of the Information Society Services Act provides a "safe harbour" rule for service providers in the case of storage. In these circumstances, a reasonable justification should be required for the choice of the higher level of liability under the Civil Code. The (highly problematic) choice of a publisher's liability does not address the issue of the supremacy of European Union law or the problem of *lex specialis*. It is possible that where the information storage provider generates content, the Information Society Services Act is inapplicable, but this must be demonstrated and must also be foreseeable. Moreover, the service provider in the present case did not generate the impugned content: that content was user-generated. To argue that the commercial nature of the data storage brings the activity within the liability regime applicable to publishers is not convincing. Storage is considered to be a commercial activity but that did not change the equation for the Information Society Services Act, which allowed a "safe harbour" regime.

18. One of the requirements flowing from the expression "prescribed by law" is foreseeability. Thus, a norm cannot be regarded as a "law" within the meaning of Article 10 § 2 unless it is formulated with sufficient precision to enable the citizen to regulate his conduct; he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty (see *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02,

§ 41, ECHR 2007-IV)[13]. A legal adviser could not have informed Delfi with sufficient certainty that the Directive on certain legal aspects of information society services did not apply. The applicable law was not obvious, to the extent that even in 2013 a court in Cyprus found it necessary to ask the Court of Justice of the European Union for a preliminary ruling in a related matter, namely the liability of news portal publishers (see Case C-291/13, *Papasavvas*, CJEU). If there was uncertainty in 2013 in the European Union on a similar but less complicated matter, which was clarified in 2014, how could learned counsel have been sufficiently certain in 2006?

19. More importantly, it was not foreseeable that the applicant company's liability under the Civil Code would be that of a publisher. The Supreme Court judgment itself refers to another Supreme Court judgment of 21 December 2005. That judgment, perhaps already available to Delfi on 24 January 2006 (the date of the article), was summarised by the Supreme Court as follows:

> "[F]or the purposes of section 1047 of the Obligations Act disclosure [*avaldamine*] means communication of information to third parties and the discloser is a person who communicates the information to third parties. ... in the case of publication [*avaldamine*] of information in the media, the discloser/publisher [*avaldaja*] can be a media company as well as the person who transmitted the information to the media publication."

The Supreme Court applied this consideration in the following way:

> "Publishing of news and comments on an Internet portal is also a journalistic activity. At the same time, because of the nature of Internet media, it cannot reasonably be required of a portal operator to edit comments before publishing them in the same manner as applies for a printed media publication. While the publisher is, through editing, the initiator of the publication of a comment, on the Internet portal the initiator of publication is the author of the comment, who makes it accessible to the general public through the portal. Therefore, the portal operator is not the person to whom information is disclosed. Because of [their] economic interest in the publication of comments, both a publisher [*väljaandja*] of printed media and an Internet portal operator are publishers/disclosers [*avaldajad*] as entrepreneurs."

20. This (too) raises serious concerns as to the foreseeability of the Civil Code as applied in the present case. The Supreme Court clearly states that "it cannot reasonably be required of a portal operator to edit comments

13. It is remarkable to note that the rest of this quotation is not taken into consideration in this judgment. The original paragraph contains an important qualification: "Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice." In the present case, however, the issue is not the use of vague terms, for example the fact that the Directive employs a vague term when it refers to "service provider". The issue was that there were two laws and the applicant company believed that the Directive was applicable as European Union law and as special law, whereas the Supreme Court took the view that the other law was applicable, because the service provider was a publisher.

before publishing them in the same manner as applies for a printed media publication". The Internet portal operator is called a "publisher/discloser" in the English translation. The term used in the original Estonian does not look the same as that used for a publisher ("*väljaandja*") but appears to be a different one ("*avaldajad*"). The applicant company argued that other "disclosers" or disseminators (libraries, bookstores) were not held to be publishers under existing tort law. Why would one assume that an Internet operator falls under the duty of care applicable to "*väljaandja*" instead of "*avaldajad*"? There is a contradiction here that hampers foreseeability. As the Chamber rightly acknowledged (see paragraph 75 of its judgment), the text of the relevant provisions of the Constitution, the Civil Code (General Principles) Act and the Law of Obligations Act was "quite general and lack[ed] detail". The provisions of the Law of Obligations Act are all directed at a person or entity that defames – the *tortfeasor*, in this instance, being the author of the comments in question on the applicant company's website – and do not directly address the novel situation of an intermediary providing a platform for such expressive activity while not being the author or a traditional publisher. Only divine legal counsel could have been sufficiently certain that a portal operator would be liable for a comment it was not aware of, under a kind of strict liability that applied to publishers (editors) who operated in full knowledge of the whole publication. It is noteworthy that the three competent levels of jurisdiction applied three different theories of liability. Vaguely worded, ambiguous and therefore unforeseeable laws have a chilling effect on freedom of expression. A troubling uncertainty persists here[14].

21. The Court has previously held that "the policies governing reproduction of material from the printed media and the Internet may differ. The latter undeniably have to be adjusted according to the technology's specific features in order to secure the protection and promotion of the rights and freedoms concerned" (see *Editorial Board of* Pravoye Delo *and Shtekel*, cited above, § 63). This point of principle provides an important benchmark when examining whether the application of domestic law in the present case was reasonably foreseeable for the applicant company, as regards user-generated content on its website. In Recommendation CM/Rec(2011)7 on a new notion of media, the Committee of Ministers noted that "[t]he roles of each actor can easily change or evolve fluidly and seamlessly" and called for a "**differentiated and graduated approach**".

14. In *Editorial Board of* Pravoye Delo *and Shtekel* (cited above), involving an Internet-related dispute under Article 10, although different from the one presented here, the Court found a violation of Article 10 on the sole basis that the interference was not adequately prescribed by law, taking account, amongst other things, of the special problems arising in the Internet era.

Necessary in a democratic society

22. The next question to answer is to what extent the measure aimed at the avoidance of hate speech[15] (which was the most likely justification for the interference, at least in the Court's view, but not that of the domestic authorities – see paragraph 140 of the present judgment) was necessary in a democratic society[16]. The reference to the conflict between Article 8 and Article 10 rights in paragraph 139 points to the applicability of a balancing exercise with a wider margin of appreciation.

23. The Court first states, and we agree, that *some* of the impugned statements are not protected by the Convention. That does not in itself solve the problem, as one cannot, in the circumstances of the case, equate the expressions used by the commenters with the activities of an active intermediary.

Shift to a "relevant and sufficient reasons" analysis

24. The Court considers in paragraph 142 of the present judgment that within the proportionality analysis its task is to examine "[i]n the light of the Supreme Court's reasoning ... whether the domestic courts' finding of liability on the part of the applicant company was based on relevant and sufficient grounds in the particular circumstances of the case (see paragraph 131 above)". No reference is made here to the established principle that the Court, in the exercise of its supervisory role, is not satisfied if the respondent State exercised its discretion only reasonably, carefully and in good faith. Sufficient reasons are more than simply reasonable.

25. More importantly, the "relevant and sufficient grounds" test is only part of the proportionality analysis[17]. Once the Court has found that the

15. Sometimes incitement to violence is also mentioned.

16. Where the balancing exercise between these two rights has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts (see *Axel Springer AG v. Germany* [GC], no. 39954/08, § 88, 7 February 2012, and *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 107, ECHR 2012). It is probably for this reason that the Court's analysis in the present case focuses on the sufficiency of the reasons provided by the domestic courts. However, the domestic courts have *only selectively* considered the criteria laid down in the Court's case-law.

17. The principles quoted in the judgment refer to relevant and sufficient reasons as part of the consideration of the margin of appreciation. This makes sense, for example, when the national authorities provide reasons on the appropriateness of the means or the aims; if these are relevant the margin of appreciation may change and the level of scrutiny may diminish. In the present case, however, the requirement that relevant and sufficient reasons be given becomes detached from the margin of appreciation. A restriction of a Convention right, where the reasons for the limitation are not provided, is arbitrary and therefore cannot be held to be necessary in a democratic society. It is important for the rule of law and the exercise of rights that the restrictive measure itself contain reasons and that these are not made up *ex post facto*. It would be even less acceptable to allow this Court to speculate about possible reasons of its own motion.

reasons given are relevant and sufficient, the proportionality analysis begins rather than ends. The "relevant and sufficient grounds" test is a threshold question to determine whether and how the margin of appreciation is to be applied; it is relevant in the determination of the existence of a pressing social need (see all the authorities cited in paragraph 131 of the present judgment). Why is there a need to determine that the grounds relied upon by the domestic authorities were relevant and sufficient (which is *more* than simply reasonable – see above)? Because, as the Court has always said, and as it also reiterates in this case (see paragraph 131), "the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts" (The Court did not go into an evaluation of the national authorities' assessment of the relevant facts, although this consideration might have been relevant.)

26. The Court has concluded that the Estonian Supreme Court did provide relevant and sufficient reasons for the level of liability it applied. It reached this conclusion after considering the following relevant points: the context of the comments, the measures applied by the applicant company in order to prevent or remove defamatory comments, the liability of the actual authors of the comments as an alternative to the applicant company's liability, and the consequences of the domestic proceedings for the applicant company. These may be relevant, but there may be other relevant considerations as well. We will address only the sufficiency of some of these elements.

Publishers' liability extended: base economic interest

27. The Estonian Supreme Court's judgment is based on the assumption that an active intermediary is a publisher. The case-law of the Court has so far pointed in the opposite direction[18]. The international-law documents cited by the Court emphasise the importance of differentiation, given the specific nature of Internet technology. It has already been mentioned that such differentiation had been recognised a few months previously by the Estonian Supreme Court. However, in the present case, the Estonian Supreme Court equated publishers with active intermediaries: "[b]ecause of [their] economic interest in the publication of comments, both a publisher of printed media and an Internet portal operator are publishers/disclosers as entrepreneurs" (see paragraph 112 of the present judgment). The Court sees no reason to call into question the above approach, although it notes there

18. See *Ashby Donald and Others*, cited above, § 34, and *Węgrzynowski and Smolczewski*, cited above, § 58.

has been "a certain development in favour of distinguishing between the legal principles regulating the activities of the traditional print and audio-visual media, on the one hand, and Internet-based media operations, on the other. ... Therefore, the Court considers that because of the particular nature of the Internet, the 'duties and responsibilities' that are to be conferred on an Internet news portal for the purposes of Article 10 may differ to some degree from those of a traditional publisher as regards third-party content" (see paragraph 113). We could not agree more, but for us it is impossible to see how a recognition of difference may result in eliding publishers and active intermediaries on the sole basis of their commercial nature. The Court seems to accept as relevant and sufficient the position of the Estonian Supreme Court. In this approach, economic interest is sufficient for the identification of the active intermediary with a publisher, although the two were considered to be different just a sentence earlier. No explanation is offered as to how this is compatible with the point of reference of the Court, namely the Committee of Ministers' Recommendation CM/Rec(2011)7 (quoted in paragraph 46 of the present judgment), which calls for a "graduated approach" to apply to the intermediary. The additional reasons referred to in paragraphs 115 to 117 concern the nature of the expression and the size of the intermediary, which are neither relevant nor sufficiently connected to the liability of a traditional publisher.

28. To find that responsibility of the press (or of any speaker, for that matter) is enhanced by the presence of an economic interest does not sit comfortably with the case-law. It is true that the margin of appreciation is broader in the commercial sphere (see *Mouvement raëlien suisse v. Switzerland* [GC], no. 16354/06, § 61, ECHR 2012). "It is however necessary to reduce the extent of the margin of appreciation when what is at stake is not a given individual's purely 'commercial' statements, but his participation in a debate affecting the general interest" (see *Hertel v. Switzerland*, 25 August 1998, § 47, *Reports of Judgments and Decisions* 1998-VI). The fact that the original article and the comments section (offered to the general public for free!) is part of the economic activity of a news portal operator does not change the equation. The article and the related, dedicated comments section are protected because they facilitate and take part in a debate on a matter of public interest.

29. Over the last three hundred years, ideas have been generated for money and this has never been held to reduce the level of protection otherwise granted to speech. We do not live in the aristocratic world of the Roman *auctor* who could afford not to care about the financial return on ideas (though very often being dependent on imperial pleasure). It cannot be held against a newspaper or publisher that they operate an outlet as a

commercial enterprise. One cannot expect the production of ideas for free. There will be no generation of ideas without adequate financial means; the material reward and the commercial nature of the press enterprise are not (and cannot be) grounds for diminishing the level of protection afforded to the press. Information is costly; its efficient communication is not a mere hobby. The same platform that has been understood as commercial, and thus subject to increased liability, is also a platform for enhanced, interactive discourse on a matter of public interest. This aspect has not been taken into consideration in the balancing exercise.

30. However, the Court does provide at least one relevant consideration for extending the liability of an active intermediary. It is certainly true that the active intermediary can exercise control over the comments that appear on its site and it is also true that by creating a comments section, and inviting users to participate, it engages in an expressive activity that entails responsibility. But the nature of the control does not imply identification with a traditional publisher.

31. There are additional differences between a publisher (understood here as a newspaper editor, someone who controls content) and an active intermediary:

(a) in a newspaper the journalist is typically an employee (although there are good reasons to protect a journalist against his or her editor/employer); and

(b) in principle, the editor is in a position to know in advance the content of an article to be published and has the decision-making power and the means to control the publication in advance.

Contrary to the case of a publisher, these elements are only partially present in the case of active intermediaries who host their own content and actively monitor all data (that is to say, are in a position to read it and remove it after the data are made accessible), as in the case of Delfi. The active intermediary has prior control only to the extent that this is made possible by a filtering mechanism. It also has the power to remove a message or block access to it. However, in normal circumstances the active intermediary has no personal control over the person who posts the message. The commenter is not the employee of the publisher and in most cases is not known to the publisher. The publication occurs without the decision of the editor. Hence the level of knowledge and control differs significantly.

32. Control *presupposes* knowledge. In this regard the difference between the editor/publisher and the active intermediary is obvious.

The level of responsibility

33. While Delfi cannot be defined as a publisher, the company does voluntarily provide an opportunity for people to post comments and, even if this activity is a matter of freedom of expression of a journalistic nature, this does not exempt the activity from liability. The Information Society Services Act does envisage such liability, among other things for storage, as is the case here. The Act bases liability on "actual knowledge" and entails a duty of expeditious removal. The Court found this to be insufficient.

34. The Court finds it to be a relevant and sufficient consideration that the Supreme Court limited the responsibility of the applicant company to post-publication liability. However, as quoted in paragraph 153 of the present judgment, the Supreme Court stated that the applicant company "should have *prevented* the publication of comments". The fact that it "also held" that there was a duty of removal after the disclosure does not change the first statement. Both pre- and post-disclosure liability are being advocated here and this cannot be disregarded when it comes to the evaluation of "sufficient reasons"[19]. It was under this standard that Delfi was found to be at fault for the disclosure of the information, which could not have been undone by removal upon request.

35. The duty to remove offensive comments without actual knowledge of their existence and immediately after they are published means that the active intermediary has to provide supervision 24/7. For all practical purposes, this is absolute and strict liability, which is in no sense different from blanket prior restraint. No reasons are given as to why only this level of liability satisfies the protection of the relevant interests.

36. Are there sufficient reasons for this strict liability[20], disguised by the fault rules of the Civil Code? The Court reviewed the precautionary measures applied by Delfi and found them inadequate. These were fairly standard measures: a disclaimer as to illegality, a filtering mechanism, the separation of the comments section from the article, and immediate removal upon notice. It was decisive for the Court that the filtering mechanism failed. There is no review of the adequacy of the filtering mechanism (was it state-of-the-art; can there be a duty to apply state-of-the-art systems;

19. We read the evaluation given by the Court as a declaration of lack of clarity with regard to the Supreme Court judgment: "Therefore, the Supreme Court did not explicitly determine whether the applicant company was under an obligation to prevent the uploading of the comments to the website or whether it would have sufficed under domestic law for the applicant company to have removed the offending comments without delay after publication to escape liability under the Obligations Act" (see paragraph 153 of the present judgment).

20. There is no way to exculpate the active intermediary as it should have known that illegal content had been posted and should have removed it immediately.

is there any reason for being held liable with a state-of-the-art filtering system?). The Court itself found that filtering must have been a simple task and that the system failed. No expert opinion, no cross-examination. We are simply assured that setting up a dedicated team of moderators is not "private censorship". There is no consideration of the possibility of less intrusive measures; only removal "without delay", that is, upon posting (see paragraph 159 of the present judgment), satisfies the goal of eliminating hate speech and its progeny[21]. This insatiable appetite for preventive protection results in circular reasoning: a publisher has a similar liability, therefore an active intermediary is like a publisher.

37. Neither the domestic courts nor the judgment provide sufficient and relevant reasons for a *de facto* strict liability rule. The Court was satisfied that it could find relevant and sufficient reasons in the Estonian Supreme Court's judgment in view of the extreme nature of the comments, the nature of the commercial operation, the insufficiency of the measures applied by the applicant company, the interest in ensuring a realistic prospect of the authors of such comments being held liable, and the mildness of the sanction. Apparently these are the reasons that compelled the Court to endorse constructive knowledge. The Court found that the absolute duty of immediate take-down on publication (as applied to the applicant company) was proportionate to the aim of protecting individuals against hate speech.

38. We would claim, in conformity with all the international documents cited, that an active intermediary which provides a comments section cannot have absolute liability – meaning an absolute duty of knowledge or, in practice, construed (constructive) knowledge. The protection of freedom of expression cannot be turned into an exercise in imposing duties. The "duties and responsibilities" clause of Article 10 § 2 is not a stand-alone provision: it is inserted there to explain why the exercise of the freedom in question may be subject to restrictions, which must be necessary in a democratic society. It is only part of the balance that is required by Article 10 § 2.

Balancing (lack of)

39. If one applies a balancing approach, then the other side of the balance must also be considered. According to the case-law, there must be proper consideration of the following factors, among others:

(a) the interference concerns the press and journalism. Delfi pursued journalistic activities, both in providing a news portal and by attaching a

21. In a standard liability case the contribution of the victim is a matter for consideration. Delfi was blamed for the fact that the illegal content remained online for six weeks. Why did L. and his company not follow an article on a very important news portal concerning their economic activities and report these comments earlier?

comments section to an article. Journalism is not exempt from liability, but it triggers stricter scrutiny. "[T]he safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith and on an accurate factual basis and provide 'reliable and precise' information in accordance with the ethics of journalism" (see *Stoll v. Switzerland* [GC], no. 69698/01, § 103, ECHR 2007-V)[22]. There is no consideration of good faith in the judgment. Moreover, when it comes to online journalism and the responsibility of an active intermediary, due consideration must be given to the role of self-regulation of the profession;

(b) the Court has held that the "punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so" (see *Jersild v. Denmark*, 23 September 1994, § 35, Series A no. 298). The Court has found this to be a relevant principle and we agree that this is of importance for the press, including news portals and active intermediaries. However, this principle is simply not discussed in the judgment;

(c) the opening of a comments section provides a forum for the expression of views concerning public matters. As such it contributes to more robust speech, and enables others to receive and impart information that does not depend on centralised media decisions. Any restriction imposed on the means necessarily interferes with the right to receive and impart information (see, for example, *Öztürk v. Turkey* [GC], no. 22479/93, § 49, ECHR 1999-VI);

(d) the debate was about a matter of public interest. The comments related to the highly controversial behaviour of a large corporation.

40. The Court is reluctant to consider the possibility of less intrusive means, but in our view at least some justification is needed to explain why only the equivalent of prior restraint and absolute liability satisfies the non-specific duties and responsibilities of active intermediaries.

22. The Court did not include this part of the established case-law in its analysis of journalistic responsibilities in paragraph 132 of the present judgment, where it mentions that the duty of the press "is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest". Here, the Court is dealing with a case involving a debate on a matter of public interest. This is not the place to express our doubts regarding the construction of press rights as duties, but we note that alternative language is also in use in our case-law: "Not only do the media have *the task* of imparting such information and ideas; the public also has a right to receive them" (see *News Verlags GmbH & Co.KG v. Austria*, no. 31457/96, § 56, ECHR 2000-I; *Dupuis and Others v. France*, no. 1914/02, § 35, 7 June 2007; and *Campos Dâmaso v. Portugal*, no. 17107/05, § 31, 24 April 2008). See also *Axel Springer AG* (cited above), §§ 80 and 79.

41. Without speculating on the outcome of the balancing analysis, we note that these considerations have been left out. Where part of the required considerations were not included in the balancing exercise carried out by the domestic court, the Court must find a violation.

42. We do not intend to close our eyes to the problem of racist speech. The fact that the comments section technically facilitated the dissemination of racism should be part of the proportionality analysis. In fact, the comments section facilitates the dissemination of all views equally. However, we accept, even without specific evidence, that the more comments there are, the higher the likelihood that racist comments are made. We accept this, though only as a hypothesis, as no evidence to this effect was produced in the proceedings, or referred to by the Court.

43. Even assuming such increased likelihood of racist comments on comment sites (once again, a matter subject to proof), it remains appropriate to consider what the proper level of care is in the face of such risk. Perhaps the filtering mechanism was inadequate to meet this challenge. This was the position taken by the Court, without defining what the appropriate level of care would have been in 2006 in Estonia. We do not know and cannot know. The Court cannot replace the lack of a domestic analysis with its own analysis. Moreover, it is not for the Court to take on the role of national legislator. We cannot rule out that the need to fight racist speech (a matter of public order and not simply a personality right) might *dicta*te a duty of care that would impose duties beyond the measures applied by Delfi. But the task of the Court is to determine whether the interference by the domestic authorities was actually based on proper and credible grounds. These are absent here; hence there was a violation of the Convention.

APPENDIX

We trust that this is not the beginning (or the reinforcement and speeding up) of another chapter of silencing and that it will not restrict the democracy-enhancing potential of the new media. New technologies often overcome the most astute and stubborn politically or judicially imposed barriers. But history offers discouraging examples of censorial regulation of intermediaries with lasting effects. As a reminder, here we provide a short summary of a censorial attempt that targeted intermediaries.

In Reformation England, the licensing system of the Catholic Church was taken over by the State and it became a State tool for control of all printed publications. Licensing provided the Crown with "censorship prior to publication and easy conviction of offenders"[1]. These laws cut seditious material off at the place of mass production – the printer. Initially involving prosecution by the Star Chamber, the licensing scheme punished any printer who failed to receive a licence for the material he intended to print (a licence conditional on royal approval). With the abolition of the Star Chamber there was a brief end to the licensing laws during the English Civil War. Parliament, however, did not like the spreading of radical religious and political ideas. It decided to replace Crown censorship with its own, also in order to protect the vested business interests of the printers' guild. The result was the Licensing Order of 14 June 1643, which reintroduced for Parliament's benefit the previously despised order of the Star Chamber Decree (prepublication licensing; registration of all printed material with the names of author, printer and publisher; search, seizure and destruction of any books offensive to the government; and punishment of printers and publishers). Post-revolution, people tend to reinvent the same tools of oppression that the revolutionaries stood up against. (See also the Alien and Sedition Act enacted in the United States.) The Stationers' Company was given the responsibility of acting as censor, in return for a monopoly on the printing trade. The licensing system, with the financial interest of the publishers'/printers' guild, was a more effective censor than seditious libel laws.

This restored licensing system became John Milton's target in *Areopagitica: A Speech of Mr John Milton for the Liberty of Unlicens'd Printing* in November 1644. It was resistance to the self-censorship imposed on intermediaries (the printers) that produced *Areopagitica*, the first and most important manifesto

1. Philip Hamburger, "The Development of the Law of Seditious Libel and the Control of the Press", 37 *Stanford Law Review* 661, 673 (1985). See also John Feather, *A History of British Publishing*, Routledge, second edition (2002).

of freedom of expression. *Areopagitica* attempted to persuade Parliament that licensing had no place in the free pursuit of truth. It argued that an unlicensed press would lead to a marketplace of ideas in which truth might prevail. It could not undo the bigotry of Parliament. We hope that it will have more success today.

DELFI AS c. ESTONIE
(Requête n° 64569/09)

GRANDE CHAMBRE

ARRÊT DU 16 JUIN 2015[1]

1. Arrêt rendu par la Grande Chambre à la suite du renvoi de l'affaire en application de l'article 43 de la Convention.

SOMMAIRE[1]

Portail d'actualités sur Internet condamné à indemniser une personne visée par des commentaires injurieux déposés sur le site par des tiers anonymes

Pour trancher la question de savoir si les décisions par lesquelles les juridictions internes ont jugé le portail d'actualités sur Internet responsable des commentaires déposés par des tiers ont emporté violation de la liberté d'expression des propriétaires du portail, il faut prendre en compte les éléments suivants : le contexte des commentaires, les mesures appliquées par les propriétaires du portail pour empêcher la publication de commentaires diffamatoires ou retirer ceux déjà publiés, la possibilité que les auteurs des commentaires soient tenus responsables plutôt que le portail, et les conséquences de la procédure interne pour le portail. Pour protéger les droits et intérêts des individus et de la société dans son ensemble, les États contractants peuvent être fondés à juger des portails d'actualités sur Internet responsables sans que cela n'emporte violation de l'article 10 de la Convention, si ces portails ne prennent pas de mesures pour retirer les commentaires clairement illicites sans délai après leur publication, et ce même en l'absence de notification par la victime alléguée ou par des tiers (paragraphes 142 et 159 de l'arrêt).

Article 10

Liberté de communiquer des informations – Liberté d'expression – Portail d'actualités sur Internet condamné à indemniser une personne visée par des commentaires injurieux déposés sur le site par des tiers anonymes – Expression des internautes – « Devoirs et responsabilités » des portails d'actualités en ligne – Prévu par la loi – Prévisibilité – Nécessaire dans une société démocratique – Les droits fondamentaux de l'individu prévalent en principe sur les intérêts économiques de l'exploitant du moteur de recherche et sur les intérêts des autres internautes – L'obligation de prendre des mesures efficaces pour limiter la propagation de propos relevant du discours de haine ou appelant à la violence ne peut être assimilée à de la « censure privée » – Proportionnalité de la sanction

*

* *

En fait

La société requérante est propriétaire de l'un des plus grands portails d'actualités sur Internet d'Estonie. Après avoir publié en 2006 sur ce portail un article concernant une compagnie de ferry qui fit l'objet d'un certain nombre de commentaires

1. Rédigé par le greffe, il ne lie pas la Cour.

comportant des menaces personnelles et des propos injurieux à l'égard du propriétaire de la compagnie de ferry, elle fit l'objet d'une procédure en diffamation, à l'issue de laquelle elle fut condamnée à verser à l'intéressé 320 euros (EUR) à titre de dommages et intérêts.

En droit

Article 10 : c'est la première fois que la Cour est appelée à examiner un grief concernant l'expression des internautes. Tout en reconnaissant les avantages importants qu'Internet présente pour l'exercice de la liberté d'expression, elle considère qu'il faut en principe conserver la possibilité pour les personnes lésées par des propos diffamatoires ou par d'autres types de contenu illicite d'engager une action en responsabilité de nature à constituer un recours effectif contre les violations des droits de la personnalité. De plus, elle observe que les commentaires en cause en l'espèce constituaient un discours de haine et une incitation directe à la violence, que le portail d'actualités de la société requérante était l'un des plus grands médias sur Internet du pays et que la nature polémique des commentaires qui y étaient déposés était le sujet de préoccupations exprimées publiquement. Aussi considère-t-elle que l'affaire concerne les « devoirs et responsabilités », au sens de l'article 10 § 2 de la Convention, qui incombent aux portails d'actualités sur Internet lorsqu'ils fournissent à des fins commerciales une plateforme destinée à la publication de commentaires émanant d'internautes sur des informations précédemment publiées et que certains internautes y déposent des propos clairement illicites.

La Cour estime qu'il était prévisible, à partir des instruments juridiques internes, qu'un éditeur de médias exploitant un portail d'actualités sur Internet à des fins commerciales pût, en principe, voir sa responsabilité engagée en droit interne pour la mise en ligne sur son portail de commentaires clairement illicites. En tant qu'éditrice professionnelle, la société requérante était en mesure d'apprécier les risques liés à ses activités et elle devait être à même de prévoir les conséquences susceptibles d'en découler. L'ingérence litigieuse était donc « prévue par la loi » au sens de l'article 10 de la Convention.

En ce qui concerne la nécessité de l'ingérence portée à la liberté de la société requérante de communiquer des informations, la Cour attache un poids particulier à la nature professionnelle et commerciale du portail d'actualités et au fait que la publication des commentaires représentait un intérêt économique pour la société requérante. De plus, seule la société requérante avait les moyens techniques de modifier ou de supprimer les commentaires publiés sur le portail d'actualités. Le rôle qu'elle jouait dans la publication des commentaires relatifs à ses articles paraissant sur le portail a donc dépassé celui d'un prestataire passif de services purement techniques.

En ce qui concerne la question de savoir si la possibilité de tenir responsables les auteurs des commentaires eux-mêmes pouvait remplacer l'engagement de la responsabilité du portail d'actualités en ligne, la Cour rappelle que, pour important qu'il soit, l'anonymat sur l'Internet doit être mis en balance avec d'autres droits et intérêts. Elle prend en compte l'intérêt pour les internautes de ne pas dévoiler

leur identité, mais souligne aussi que la diffusion illimitée de contenu sur Internet peut avoir des conséquences extrêmement négatives. Elle renvoie aussi à cet égard à un arrêt rendu par la Cour de justice de l'Union européenne, où celle-ci avait conclu que les droits fondamentaux de l'individu prévalaient, en règle générale, sur les intérêts économiques de l'exploitant du moteur de recherche et sur les intérêts des autres internautes[2]. De plus, différents degrés d'anonymat sont possibles sur Internet. Un internaute peut être anonyme pour le grand public tout en étant identifiable par le prestataire de services. En l'espèce, les résultats inégaux des mesures visant à établir l'identité des auteurs des commentaires, joints au fait que la société requérante n'a pas mis en place à cette fin d'instruments qui eussent permis aux éventuelles victimes de discours de haine d'introduire une action efficace contre les auteurs des commentaires, amènent la Cour à conclure comme les juridictions internes que la personne lésée devait avoir le choix d'engager une action contre la société requérante ou contre les auteurs des commentaires.

En ce qui concerne les mesures prises par la société requérante pour lutter contre la publication de commentaires illicites sur son portail, la Cour dit que l'obligation pour un grand portail d'actualités de prendre des mesures efficaces pour limiter la propagation de propos relevant du discours de haine ou appelant à la violence ne peut être assimilée à de la « censure privée ». En effet, il est plus difficile pour une victime potentielle de tels propos de surveiller continuellement l'Internet que pour un grand portail d'actualités commercial en ligne d'empêcher la publication de pareils propos ou de retirer ceux déjà publiés. Même si la société requérante avait mis en place sur son site des mécanismes visant à filtrer les commentaires constitutifs de discours de haine ou de discours incitant à la violence et si ces mécanismes ont pu dans bien des cas constituer un outil approprié de mise en balance des droits et intérêts de tous les intéressés, ils n'ont pas été suffisants dans les circonstances particulières de l'espèce, de sorte que les commentaires illicites sont restés en ligne pendant six semaines.

Enfin, la Cour note que la société requérante a été condamnée à verser à la partie lésée une somme équivalant à 320 EUR. Elle considère que cette somme ne peut nullement passer pour disproportionnée à l'atteinte aux droits de la personnalité constatée par les juridictions internes. Elle observe aussi qu'il n'apparaît pas que la société requérante ait dû changer son modèle d'entreprise du fait de la procédure interne. Il s'ensuit que la décision des juridictions internes de la tenir responsable reposait sur des motifs pertinents et suffisants. Dès lors, la mesure litigieuse ne constituait pas une restriction disproportionnée du droit à la liberté d'expression.

Conclusion : non-violation (quinze voix contre deux).

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VgT Verein gegen Tierfabriken c. Suisse, n° 24699/94, CEDH 2001-VI
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Witzsch c. Allemagne (déc.), n° 7485/03, 13 décembre 2005

En l'affaire Delfi AS c. Estonie,

La Cour européenne des droits de l'homme, siégeant en une Grande Chambre composée de :

Dean Spielmann, *président*,
Josep Casadevall,
Guido Raimondi,
Mark Villiger,
Işıl Karakaş,
Ineta Ziemele,
Boštjan M. Zupančič,
András Sajó,
Ledi Bianku,
Nona Tsotsoria,
Vincent A. De Gaetano,
Angelika Nußberger,
Julia Laffranque,
Linos-Alexandre Sicilianos,
Helena Jäderblom,
Robert Spano,
Jon Fridrik Kjølbro, *juges*,

et de Johan Callewaert, *greffier adjoint de la Grande Chambre*,

Après en avoir délibéré en chambre du conseil le 9 juillet 2014 et le 18 mars 2015,

Rend l'arrêt que voici, adopté à cette dernière date :

PROCÉDURE

1. À l'origine de l'affaire se trouve une requête (n° 64569/09) dirigée contre la République d'Estonie et dont Delfi AS, une société anonyme de droit estonien (« la société requérante »), a saisi la Cour le 4 décembre 2009 en vertu de l'article 34 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales (« la Convention »).

2. La société requérante a été représentée par M^e^ V. Otsmann et M^e^ K. Turk, avocats à Tallinn. Le gouvernement estonien (« le Gouvernement ») a été représenté par son agent, M^me^ M. Kuurberg, du ministère des Affaires étrangères.

3. La société requérante voit dans le fait qu'elle a été jugée responsable des commentaires déposés par des tiers sur son portail d'actualités sur Internet une violation de son droit à la liberté d'expression contraire à l'article 10 de la Convention.

4. La requête a été attribuée à la cinquième section de la Cour (article 52 § 1 du règlement de la Cour – le règlement). Le 1er février 2011, la Cour a modifié la composition de ses sections (article 25 § 1 du règlement). L'affaire est ainsi échue à la première section telle que remaniée. Le 10 octobre 2013, une chambre composée de Isabelle Berro-Lefèvre, présidente, Elisabeth Steiner, Khanlar Hajiyev, Mirjana Lazarova Trajkovska, Julia Laffranque, Ksenija Turković, Dmitry Dedov, juges, et de André Wampach, greffier adjoint de section, a rendu un arrêt dans lequel, à l'unanimité, elle a déclaré la requête recevable et conclu à la non-violation de l'article 10 de la Convention.

5. Le 8 janvier 2014, la société requérante a demandé le renvoi de l'affaire devant la Grande Chambre en vertu de l'article 43 de la Convention. Le collège de la Grande Chambre a fait droit à cette demande le 17 février 2014.

6. La composition de la Grande Chambre a été arrêtée conformément aux articles 26 §§ 4 et 5 de la Convention et 24 du règlement.

7. La société requérante et le Gouvernement ont chacun soumis des observations écrites complémentaires sur le fond de l'affaire (article 59 § 1 du règlement).

8. Par ailleurs, des observations écrites ont été reçues des organisations suivantes, que le président de la Grande Chambre avait autorisées à intervenir dans la procédure écrite en qualité de tierces parties (articles 36 § 2 de la Convention et 44 § 3 a) du règlement) : la Fondation Helsinki pour les droits de l'homme, l'organisation non gouvernementale Article 19, Access, Media Legal Defence Initiative et les vingt-huit organisations qui lui sont associées, et, agissant conjointement, la European Digital Media Association, la Computer & Communications Industry Association et EuroISPA, un groupement paneuropéen d'associations de prestataires de services Internet européens.

9. Une audience s'est déroulée en public au Palais des droits de l'homme, à Strasbourg, le 9 juillet 2014 (article 59 § 3 du règlement).

Ont comparu :

– *pour le Gouvernement*
Mmes M. Kuurberg, *agent*,
M. Kaur,
K. Mägi, *conseillers* ;

– *pour la société requérante*
M. V. Otsmann,
Me K. Turk, *conseils*.

La Cour a entendu M. Otsmann, M^me^ Turk et M^me^ Kuurberg en leurs déclarations ainsi qu'en leurs réponses à des questions posées par les juges Ziemele, Spano, Raimondi, Villiger et Bianku.

EN FAIT

I. LES CIRCONSTANCES DE L'ESPÈCE

10. La société requérante est une société anonyme (*aktsiaselts*) de droit estonien.

A. La genèse de l'affaire

11. La société requérante est propriétaire d'un portail d'actualités sur Internet, Delfi, qui publiait jusqu'à 330 articles par jour au moment où elle a introduit sa requête. Delfi est l'un des plus grands portails d'actualités sur Internet d'Estonie. Il publie dans ce pays des actualités en estonien et en russe et couvre aussi la Lettonie et la Lituanie.

12. Au moment des faits figuraient à la fin de chaque article la mention « Laissez un commentaire » ainsi que des champs pour le commentaire, le nom du commentateur et son adresse électronique (ce dernier champ étant optionnel). Sous ces champs se trouvaient deux boutons : « Publier le commentaire » et « Lire les commentaires ». Le bouton « Lire les commentaires » permettait d'accéder aux commentaires déposés par les autres internautes, qui se trouvaient dans une zone distincte de l'article. Les commentaires des internautes étaient mis en ligne automatiquement sans édition ni modération de la part de la société requérante. Les articles suscitaient environ 10 000 commentaires par jour, que les internautes publiaient pour la plupart sous un pseudonyme.

13. Il existait néanmoins un système de retrait sur notification : tout internaute pouvait marquer un commentaire du mot *leim* (qui désigne en estonien un message injurieux ou offensant ou un message incitant à la haine sur Internet), auquel cas le commentaire était supprimé promptement. De plus, il y avait un système de suppression automatique des commentaires contenant la racine de mots obscènes. Enfin, les personnes s'estimant victimes d'un commentaire diffamatoire pouvaient avertir directement la société requérante, qui supprimait alors immédiatement le commentaire.

14. La société requérante avait pris des mesures pour avertir les internautes que les commentaires diffusés sur le site ne reflétaient pas ses propres opinions et que les auteurs des commentaires étaient responsables de leur

contenu. Elle avait en outre publié sur le site Delfi une « Charte des commentaires », où l'on pouvait lire ceci :

> « Le forum Delfi est un moyen technique qui permet aux internautes de publier des commentaires. Delfi ne modifie pas les commentaires. Chacun est responsable de ses propres commentaires. Veuillez noter qu'il est déjà arrivé que les tribunaux estoniens sanctionnent des internautes à raison de la teneur de leur commentaire (...)
>
> Delfi interdit les commentaires contraires aux bonnes pratiques, à savoir les commentaires qui :
>
> – contiennent des menaces ;
>
> – contiennent des insultes ;
>
> – incitent à l'hostilité et à la violence ;
>
> – incitent à commettre des actes illégaux (...)
>
> – contiennent des liens hors sujet, des spams ou des publicités ;
>
> – sont sans fondement et/ou hors sujet ;
>
> – contiennent des obscénités ou des grossièretés (...)
>
> Delfi se réserve le droit de retirer ces commentaires et de restreindre la possibilité pour leurs auteurs d'en publier d'autres (...) »

La charte expliquait aussi le fonctionnement du système de retrait sur notification.

15. Par ailleurs, le Gouvernement affirme qu'en Estonie, Delfi est connu pour publier des commentaires diffamatoires et dégradants. Il rapporte ainsi que, le 22 septembre 2005, l'hebdomadaire *Eesti Ekspress* a publié une lettre ouverte adressée par sa rédaction au ministre de la Justice, au procureur général et au Chancelier de justice dans laquelle il se serait déclaré préoccupé par les critiques méprisantes propagées sans cesse sur les sites web publics en Estonie. Dans cette lettre, Delfi aurait été mentionné en tant que source de railleries brutales et arrogantes. Les destinataires de la lettre ouverte y répondirent dans l'*Eesti Ekspress* du 29 septembre 2005. Le ministre de la Justice soulignait que les personnes outragées avaient le droit de défendre en justice leur honneur et leur réputation en engageant une action en dommages et intérêts contre Delfi. Le procureur général citait les motifs juridiques susceptibles de faire tomber sous le coup de la loi pénale les menaces, l'incitation à la haine sociale et les abus sexuels sur les mineurs, et il notait que la responsabilité à raison de faits de diffamation et d'injure relevait de la procédure civile. Le Chancelier de justice citait les règles de droit visant à garantir la liberté d'expression et la protection du droit de chacun à l'honneur et à la réputation, notamment les articles 1043 et 1046 de la loi sur les obligations (*Võlaõigusseadus*).

B. L'article et les commentaires publiés sur le portail d'actualités en ligne

16. Le 24 janvier 2006, la société requérante publia sur le portail Delfi un article intitulé « SLK brise une route de glace en formation ». Les routes de glace sont des routes publiques ouvertes en hiver sur la mer gelée en Estonie entre le continent et certaines îles. L'abréviation « SLK » désigne l'entreprise AS Saaremaa Laevakompanii (compagnie de navigation Saaremaa, une société anonyme). Cette entreprise assure une liaison maritime par ferry entre le continent et certaines îles. Au moment des faits, elle avait pour actionnaire unique ou majoritaire un dénommé L., qui était également membre de son conseil de surveillance.

17. Les 24 et 25 janvier 2006, l'article recueillit 185 commentaires. Une vingtaine d'entre eux contenaient des menaces personnelles et des insultes dirigées contre L.

18. Le 9 mars 2006, les avocats de L. demandèrent à la société requérante de retirer les commentaires injurieux et de verser à leur client la somme de 500 000 couronnes estoniennes (EEK), soit environ 32 000 euros (EUR), à titre d'indemnisation pour dommage moral. La demande concernait les vingt commentaires suivants :

> « 1. 1/ il y a des courants dans la [V]äinameri
>
> 2/ les eaux libres sont plus proches des endroits dont vous parlez et la glace est plus fine.
>
> Proposition : il n'y a qu'à faire comme en 1905, aller à [K]uressaare avec des bâtons et mettre [L.] et [Le.] dans un sac
>
> 2. sales enfoirés...
>
> ils se vautrent déjà dans l'argent grâce à leur monopole et aux subventions publiques et maintenant ils commencent à avoir peur qu'on puisse aller pendant quelques jours dans les îles en voiture sans remplir leur porte-monnaie. brûle avec ton bateau, sale juif !
>
> 3. heureusement, les p'tits gars du web qui n'ont pas peur de dire tout haut ce que tout le monde pense tout bas sont toujours là malgré le projet de [La.]. allez, les gars, [L.] au four !
>
> 4. [petit L.] va te noyer
>
> 5. aha... [ça] m'étonnerait que ce soit un accident... bande de cons fdp
>
> 6. vaurien !!! [en russe]
>
> 7. Pas la peine de pleurnicher, il y a qu'à se le faire une bonne fois pour toutes, ce salaud, comme ça les autres (...) sauront ce qu'ils risquent, même eux n'ont qu'une seule toute petite vie.

8. (...) a sacrément raison. Un lynchage, ce serait un avertissement pour les autres [insulaires] et pour ceux qui se prennent pour des hommes. Comme ça, ça n'arrivera plus ! De toute façon, [L.] le mérite bien, pas vrai ?

9. « un homme bien vit longtemps, un gros nul vit un jour ou deux »

10. S'il y avait une route de glace, [on] pourrait économiser facilement 500 [EEK] pour une voiture pleine, fdp de [L.] t'as qu'à les payer, pourquoi tes ferries mettent 3 [heures] s'ils brisent si bien la glace, va plutôt briser la glace du port de Pärnu (...) espèce de macaque, je passerai [le détroit] de toute façon et si je me noie, ce sera ta faute

11. et personne ne peut remettre ces connards à leur place ?

12. habitants des îles de Saaremaa et Hiiumaa, réglez-lui son compte à cet abruti.

13. je me demande s'il ne va pas arriver quelque chose à [L.] à Saaremaa ? arnaquer son monde comme ça !

14. Ça va faire du bruit sur Internet pendant quelques jours, mais ces escrocs (et les planqués que nous avons nous-mêmes élus pour nous représenter) n'en ont rien à faire de ce qu'on dit ici, ils empochent l'argent et c'est tout – tout le monde s'en fout.

[M.] et d'autres grands escrocs faisaient aussi leur loi avant, mais ils ont été rattrapés par leur cupidité (†). C'est aussi ce qui arrivera à ces escrocs-ci tôt ou tard. Ils récolteront ce qu'ils ont semé, mais il faut quand même les arrêter (et nous faire justice nous-mêmes, car l'état ne peut rien contre eux – c'est eux qui gouvernent en fait), parce qu'ils vivent au jour le jour. Après eux, le déluge.

15. un de ces jours, je m'en vais entarter [V.]

bon sang, dès qu'on met un chaudron sur le feu et que la fumée sort de la cheminée du sauna, les corbeaux de Saaremaa arrivent – ils croient (...) qu'on va égorger un porc. eh ben non

16. salopards !!!! l'Ofelia aussi a une certif[ication] glace, alors ça n'explique pas pourquoi on avait besoin du Ola !!!

17. Bien sûr, l'état estonien, dirigé par des raclures [et] financé par des raclures, ne fait rien pour empêcher ou sanctionner les agissements antisociaux des raclures. Mais bon, il y a une Saint-Michel[3] pour chaque [L.] (...) et ce n'est pas comme pour les béliers. Vraiment désolé pour [L.] – c'est quand même un être humain... :D :D :D

18. (...) si après ça [L.] était tout d'un coup en arrêt [de] maladie, et encore la prochaine fois qu'une route de glace est détruite (...) est-ce qu'il [oserait] se comporter comme un sagouin une troisième fois ? :)

19. quel enfoiré, ce [L.]... j'aurais pu rentrer bientôt chez moi avec ma puce (...) de toute façon sa compagnie n'assure même pas un service de ferry normal et c'est

3. Il s'agit d'une allusion à un dicton estonien, « tout bélier a sa Saint-Michel », qui renvoie à une ancienne coutume consistant à sacrifier un bélier châtré en automne, aux environs de la Saint-Michel (le 29 septembre), mais qui est de nos jours employé pour signifier que nul n'échappe à son destin.

tellement cher (...) ça fait peur (...) on se demande quelles poches et quelles bouches il remplit pour continuer ses saloperies d'année en année

20. on ne fait pas du pain avec de la merde ; les journaux et Internet laissent tout passer ; moi, juste pour le plaisir (en vérité, l'état et [L.] n'en ont rien à faire de ce que pensent les gens) (...) juste pour le plaisir, pas pour l'argent – [L.], je lui pisse dans l'oreille et je lui chie sur la tête. :) »

19. La société requérante retira les commentaires injurieux le jour même, c'est-à-dire six semaines après leur publication.

20. Le 23 mars 2006, en réponse à la demande des avocats de L., elle informa celui-ci que les commentaires avaient été retirés en vertu de l'obligation de retrait sur notification, mais qu'elle refusait de l'indemniser.

C. La procédure civile dirigée contre la société requérante

21. Le 13 avril 2006, L. engagea une action civile contre la société requérante devant le tribunal départemental de Harju.

22. À l'audience du 28 mai 2007, les représentants de la société requérante arguèrent notamment que dans certains cas, telle l'affaire de la « Nuit de bronze » (des troubles de l'ordre public liés au déplacement de la statue du Soldat de bronze en avril 2007), Delfi avait retiré de cinq à dix mille commentaires par jour, de sa propre initiative.

23. Par un jugement du 25 juin 2007, le tribunal départemental rejeta l'action de L. Il considéra qu'en vertu de la loi sur les services de la société de l'information (*Infoühiskonna teenuse seadus*), fondée sur la directive 2000/31/CE du Parlement européen et du Conseil du 8 juin 2000 relative à certains aspects juridiques des services de la société de l'information, et notamment du commerce électronique, dans le marché intérieur (« directive sur le commerce électronique »), la responsabilité de la société requérante ne pouvait être engagée. Il estima qu'il fallait distinguer la zone de commentaires de la zone journalistique du portail d'actualités de la société requérante et que, la société faisant de la zone de commentaires une administration de nature essentiellement mécanique et passive, elle ne pouvait être considérée comme la publicatrice des commentaires et n'avait pas non plus l'obligation de les surveiller.

24. L. contesta ce jugement devant la cour d'appel de Tallinn, qui statua en sa faveur le 22 octobre 2007, considérant que c'était à tort que le tribunal départemental avait conclu que la responsabilité de la société requérante n'était pas engagée en application de la loi sur les services de la société de l'information. La cour d'appel annula le jugement du tribunal départemental et lui renvoya l'affaire.

25. La société requérante forma un recours devant la Cour d'État, qui, le 21 janvier 2008, refusa de l'examiner.

26. Le 27 juin 2008, après avoir réexaminé l'affaire, le tribunal départemental de Harju statua en faveur de L. Conformément aux instructions de la cour d'appel, il s'appuya sur la loi sur les obligations et déclara la loi sur les services de la société de l'information inapplicable. Il observa que la société requérante avait affiché sur son site Internet une note avertissant que les commentaires n'étaient pas édités, qu'il était interdit de déposer des commentaires contraires aux bonnes pratiques et qu'elle se réservait le droit de retirer pareils commentaires. Il nota également qu'elle appliquait un système permettant aux internautes de l'avertir de la présence de commentaires inappropriés. Le tribunal considéra toutefois que ces mesures étaient insuffisantes et ne permettaient pas de protéger correctement les droits de la personnalité des tiers. Il conclut que la société requérante devait être considérée comme la publicatrice des commentaires et qu'elle ne pouvait décliner sa responsabilité quant à leur contenu en publiant une clause limitative à cet égard.

27. Le tribunal départemental estima que l'article publié sur le portail d'actualités Delfi était en lui-même équilibré, mais qu'un certain nombre de commentaires étaient grossiers, humiliants et diffamatoires et portaient atteinte à l'honneur de L., à sa dignité et à sa réputation. Il jugea que ces commentaires dépassaient les limites de la critique justifiée et constituaient purement et simplement des injures. Il conclut qu'ils n'étaient donc pas protégés par la liberté d'expression et qu'il y avait eu violation des droits de la personnalité de L., à qui il octroya des dommages et intérêts d'un montant de 5 000 EEK (320 EUR) pour préjudice moral.

28. Le 16 décembre 2008, la cour d'appel de Tallinn confirma le jugement du tribunal départemental. Elle précisa que la société requérante n'avait pas l'obligation de contrôler en amont les commentaires déposés sur son portail d'actualités, mais que, puisqu'elle avait choisi de ne pas le faire, elle aurait dû mettre en place un autre système efficace garantissant en pratique le retrait rapide des commentaires à caractère illicite qui y étaient publiés. Elle considéra que les mesures prises par la société requérante n'étaient pas suffisantes et qu'il était contraire au principe de bonne foi de faire reposer la charge de la surveillance des commentaires sur leurs victimes potentielles.

29. La cour d'appel rejeta l'argument de la société requérante consistant à dire qu'en vertu de la loi sur les services de la société de l'information, sa responsabilité ne pouvait être engagée. Elle jugea en effet que Delfi n'était pas un simple intermédiaire s'agissant des commentaires et que son rôle ne revêtait pas un caractère purement technique, automatique et passif puisque le site invitait les internautes à commenter les articles. Elle conclut donc que la société requérante était un prestataire de services de contenu et non de services techniques.

30. La société requérante contesta cet arrêt devant la Cour d'État, qui la débouta le 10 juin 2009. La haute juridiction confirma l'arrêt de la cour d'appel quant au fond, mais en réforma en partie le raisonnement.

31. Elle déclara notamment ce qui suit :

« 10. La chambre [de la Cour d'État] juge que les moyens exposés dans le recours ne permettent pas d'infirmer l'arrêt de la cour d'appel. La conclusion à laquelle celle-ci est parvenue dans son arrêt est correcte, mais le raisonnement juridique qu'elle a suivi doit être modifié et complété sur la base de l'article 692 § 2 du code de procédure civile.

11. Les parties ne contestent pas les éléments suivants :

– le 24 janvier 2006, la défenderesse a publié sur son portail Internet « Delfi » un article intitulé « SLK brise une route de glace en formation » ;

– la défenderesse donnait aux internautes visitant le portail Internet la possibilité de commenter les articles ;

– parmi les commentaires publiés [*avaldatud*[4]] sur ledit article, vingt d'entre eux dénigraient le demandeur [L.] ;

– la défenderesse a retiré ces vingt commentaires après réception de la lettre du demandeur datée du 9 mars 2006.

12. La controverse juridique entre les parties porte sur la question de savoir si la défenderesse a publié ces commentaires en qualité de professionnel au sens de la loi sur les obligations, si ces commentaires sont illicites de par leur contenu, et si la défenderesse est responsable de la publication de commentaires illicites.

13. La chambre conclut comme la cour d'appel que les circonstances excluant la responsabilité énoncées à l'article 10 de la loi SSI [loi sur les services de la société de l'information] ne sont pas applicables dans le cas de la défenderesse.

En vertu de l'article 2 § 6 de la loi sur les règles et normes techniques, un service de la société de l'information est un service visé à l'article 2 § 1 de la loi SSI. Selon cette disposition, les « services de la société de l'information » sont des services fournis sous la forme d'activités économiques ou professionnelles en réponse à une demande directe du destinataire de ces services sans que les parties ne soient simultanément présentes au même endroit, et ils impliquent le traitement, le stockage ou la transmission de données par des moyens électroniques destinés au traitement et au stockage numériques de données. Dès lors, pour qu'il y ait prestation de services de la société de l'information il faut que les services en question soient fournis en dehors de la présence physique des parties, que les données soient transmises par des moyens électroniques, et que le service soit fourni à titre onéreux à la demande de l'utilisateur du service.

Les articles 8 à 11 de la loi SSI définissent la responsabilité des prestataires des différents services de la société de l'information. L'article 10 énonce que, en cas de fourniture d'un service consistant à stocker des informations fournies par un destinataire du service, le prestataire du service n'est pas responsable des informations stockées à

4. Les mots estoniens *avaldama* et *avaldaja* signifient à la fois publier/publicateur et révéler/révélateur.

la demande d'un destinataire du service à condition que : a) il n'ait pas effectivement connaissance de la teneur de l'information et, en ce qui concerne une demande en dommages et intérêts, il n'ait pas connaissance de faits ou de circonstances faisant apparaître l'existence d'informations ou d'activités illicites ; b) il agisse promptement dès qu'il prend connaissance ou conscience de tels faits pour retirer ou bloquer le contenu concerné. La disposition en question s'applique donc lorsque le service fourni consiste à stocker des données sur un serveur [du prestataire de services] et à ouvrir aux utilisateurs l'accès à ces données. Sous réserve des conditions énoncées dans cet article, la responsabilité du prestataire d'un tel service ne peut être engagée à raison de la teneur du contenu qu'il stocke, car ce prestataire ne joue qu'un rôle d'intermédiaire au sens de la disposition susvisée, et ne crée ni ne modifie le contenu.

La loi sur les services de la société de l'information reprenant la directive 2000/31/CE du Parlement européen et du Conseil du 8 juin 2000 relative à certains aspects juridiques des services de la société de l'information, et notamment du commerce électronique, dans le marché intérieur (directive sur le commerce électronique), il faut aussi, pour en interpréter les dispositions, prendre en compte les principes et objectifs de cette directive. Les articles 12 à 15 de celle-ci, qui forment la base des articles 8 à 11 de la loi SSI, sont complétés par le considérant 42 du préambule, selon lequel les dérogations en matière de responsabilité posées aux articles 12 à 15 ne couvrent que les cas où l'activité du prestataire de services de la société de l'information est limitée au processus technique d'exploitation et de fourniture d'un accès à un réseau de communication sur lequel les informations fournies par des tiers sont transmises ou stockées temporairement dans le seul but d'améliorer l'efficacité de la transmission ; cette activité revêt un caractère purement technique, automatique et passif, ce qui implique que le prestataire de services de la société de l'information ne connaît ni ne contrôle les informations transmises ou stockées. Partant, les prestataires de services dits « de contenu » qui contrôlent la teneur des informations stockées ne peuvent invoquer les dérogations prévues aux articles 12 à 15 de la directive.

La chambre [de la Cour d'État] considère comme la cour d'appel que les activités de la défenderesse lorsqu'elle publie des commentaires ne revêtent pas un caractère purement technique, automatique et passif. L'objectif de la défenderesse n'est pas simplement la prestation d'un service d'intermédiaire. Elle a intégré la zone de commentaires dans son portail d'actualités, invitant les visiteurs du site à enrichir les actualités de leurs propres jugements [*hinnangud*] et opinions (commentaires). Dans cette zone, elle appelle activement les internautes à commenter les actualités apparaissant sur le portail. Le nombre de visites que celui-ci reçoit dépend du nombre de commentaires ; les revenus tirés des publicités qui y sont publiées dépendent eux-mêmes du [nombre de visites]. Ainsi, la publication de commentaires représente pour la défenderesse un intérêt économique. Le fait qu'elle ne les rédige pas elle-même ne signifie pas qu'elle n'ait pas de contrôle sur la zone des commentaires. Elle fixe les règles auxquelles cette zone est soumise et la modifie (en retirant certains commentaires) si ces règles sont enfreintes. À l'inverse, les internautes ne peuvent pas modifier ou supprimer les commentaires qu'ils ont publiés. Ils peuvent seulement signaler les commentaires inappropriés. Ainsi, la défenderesse peut choisir quels commentaires seront publiés et lesquels ne le seront pas. Ce n'est pas parce qu'elle ne fait pas usage de cette possibilité qu'il faut en conclure qu'elle ne

contrôle pas la publication des commentaires. La chambre considère comme la cour d'appel que la défenderesse, qui régit les données stockées dans la zone de commentaires, fournit un service de contenu, raison pour laquelle les circonstances excluant la responsabilité énoncées à l'article 10 de la loi SSI ne s'appliquent pas en l'espèce.

14. Il n'est pas contesté que la défenderesse a publié sur le portail Internet Delfi le 24 janvier 2006 un article intitulé « SLK brise une route de glace en formation ». Le tribunal départemental a jugé qu'il y avait lieu de considérer qu'elle était également la publicatrice des commentaires relatifs à cet article. Se ralliant à cet avis, la cour d'appel a jugé que le fait que la défenderesse s'estimait victime d'une violation du droit à la liberté d'expression montrait qu'elle considérait que c'était elle qui avait publié les commentaires, et non leurs auteurs. De l'avis de la chambre [de la Cour d'État], tant la défenderesse que les auteurs des commentaires en sont en l'espèce les publicateurs au sens de la loi sur les obligations. Le demandeur est libre de choisir la partie contre laquelle il souhaite diriger son action. Or, en l'espèce, il a choisi de poursuivre la défenderesse [Delfi].

La chambre a donné la définition des termes « révélation » et « révélateur » au paragraphe 24 de l'arrêt qu'elle a rendu le 21 décembre 2005 dans l'affaire civile n° 3-2-1-95-05. Elle a alors dit que, aux fins de l'article 1047 de la loi sur les obligations, on devait entendre par « révélation » [*avaldamine*] la communication d'informations à des tiers, et par « révélateur » la personne qui communique des informations à des tiers. Elle a précisé que, dans le cas de la publication [*avaldamine*] d'informations dans les médias, le publicateur/révélateur [*avaldaja*] pouvait être aussi bien l'entreprise de médias que la personne qui lui avait transmis les informations en question. La publication d'actualités et de commentaires sur un portail Internet est aussi une activité journalistique [*ajakirjanduslik tegevus*]. Cependant, la nature des médias sur Internet [*Internetiajakirjandus*] fait que l'on ne peut raisonnablement exiger d'un exploitant de portail qu'il édite les commentaires avant de les publier comme si son site était une publication de la presse écrite [*trükiajakirjanduse väljaanne*]. Si l'éditeur [(*väljaandja*) d'une publication de la presse écrite] est, parce qu'il les soumet à un contrôle éditorial, à l'origine de la publication des commentaires, sur un portail Internet en revanche, ce sont les auteurs des commentaires qui sont à l'origine de leur publication et qui les rendent accessibles au grand public par l'intermédiaire du portail. L'exploitant du portail n'est donc pas la personne à qui l'information est révélée. Néanmoins, en raison de l'intérêt économique que représente pour eux la publication des commentaires, aussi bien l'éditeur [*väljaandja*] de publications imprimées que l'exploitant d'un portail Internet sont les publicateurs/révélateurs [*avaldajad*] de ces commentaires en qualité de professionnels.

Dans les affaires concernant un jugement de valeur [*väärtushinnang*] qui dénigre une personne et porte préjudice à son honneur et à sa réputation, il est sans pertinence aux fins de déterminer ce que sont la publication/révélation et le publicateur/révélateur que le jugement de valeur découle des informations publiées/révélées ou qu'il soit négatif en raison de sa signification propre (...) Ainsi, la publication/révélation est constituée en pareil cas par la communication à des tiers d'un jugement de valeur (article 1046 § 1 de la loi sur les obligations) et/ou d'informations qui permettent de porter un jugement de valeur sur une personne ; et toute personne qui communique pareils jugements

[*hinnangud*] et informations à un tiers en est la publicatrice/révélatrice. En l'espèce, les commentaires ont été rendus accessibles à un nombre illimité de personnes (le grand public).

15. En réponse aux moyens invoqués par [Delfi] au soutien de son pourvoi, à savoir que la cour d'appel aurait fait une application erronée de l'article 45 de la Constitution en ce qu'elle se serait appuyée pour justifier l'ingérence portée dans l'exercice de la liberté d'expression sur le principe de bonne foi et non sur le droit, et que le retrait d'un commentaire du portail porterait atteinte à la liberté d'expression de la personne ayant déposé le commentaire, la chambre explique ce qui suit.

L'exercice de tout droit fondamental est encadré par l'article 19 § 2 de la Constitution, qui dispose que chacun doit honorer et respecter les droits et libertés d'autrui et doit se conformer à la loi dans l'exercice de ses propres droits et libertés et dans l'accomplissement de ses obligations. La première phrase du paragraphe 1 de l'article 45 de la Constitution énonce le droit de chacun à la liberté d'expression, c'est-à-dire le droit de diffuser des informations de toute teneur, de quelque manière que ce soit. Ce droit est toutefois restreint par l'interdiction de porter une atteinte diffamatoire à l'honneur et à la réputation d'autrui telle qu'énoncée dans la Constitution (article 17). La chambre estime qu'en cas de conflit entre la liberté d'expression, d'une part, et l'honneur et la réputation, d'autre part, il faut tenir compte du fait que l'article 17 de la Constitution, qui a la forme d'une négation, n'exclut pas totalement toute restriction du droit à l'honneur et à la réputation, mais se borne à interdire la diffamation (article 1046 de la loi sur les obligations). En d'autres termes, il ne serait pas conforme à la Constitution de méconnaître cette interdiction (article 11 de la Constitution). La deuxième phrase du paragraphe 1 de l'article 45 de la Constitution dispose que la loi peut restreindre la liberté d'expression afin de protéger le droit à l'honneur et à la réputation.

On peut considérer que les dispositions suivantes de la loi sur les obligations restreignent la liberté d'expression dans l'intérêt de la protection du droit à l'honneur et à la réputation : l'article 1045 § 1 al. 4, l'article 1046 § 1, l'article 1047 §§ 1, 2 et 4, l'article 1055 §§ 1 et 2, et l'article 134 § 2. Le tribunal départemental a jugé que l'atteinte à l'honneur du demandeur n'était pas justifiée et qu'elle était donc illégale, les commentaires ne débattant pas du sujet d'actualité mais consistant simplement à insulter le demandeur pour le rabaisser. La cour d'appel a souscrit à cette opinion. La chambre estime quant à elle que si l'on interprète conformément à la Constitution l'article 1046 de la loi sur les obligations, on doit conclure qu'il est illégal de porter atteinte à l'honneur d'une personne. L'appréciation juridique que les juridictions [inférieures] ont faite des vingt commentaires dénigrants est fondée. C'est à bon droit qu'elles ont conclu que ces commentaires étaient diffamatoires, car ils étaient grossiers et attentatoires à la dignité humaine et contenaient des menaces.

Contrairement à la cour d'appel, la chambre [de la Cour d'État] ne considère pas que le retrait des commentaires illicites attentatoires aux droits de la personnalité du demandeur n'a pas entraîné d'ingérence dans l'exercice par les auteurs de ces commentaires de leur liberté d'expression. Elle estime que l'application de toute mesure restreignant un droit fondamental de quelque manière que ce soit peut être considérée comme une ingérence dans l'exercice de ce droit fondamental. Cependant, l'ingérence

portée par un exploitant professionnel de portail Internet dans l'exercice de leur liberté d'expression par les personnes déposant des commentaires est justifiée par l'obligation de respecter l'honneur et la réputation des tiers que font peser sur lui la Constitution (article 17) et la loi (article 1046 de la loi sur les obligations), d'une part, et par son obligation de faire en sorte de ne pas causer de préjudice à autrui (article 1045 § 1 al. 4 de la loi sur les obligations), d'autre part.

16. La cour d'appel a jugé que, de par leur teneur, les commentaires, qui étaient formulés en termes déplacés, étaient illicites. Les jugements de valeur (...) constituent des propos inappropriés lorsqu'il apparaît à l'évidence à un lecteur sensé que leur signification est grossière et qu'elles visent à porter atteinte à la dignité humaine et à tourner une personne en ridicule. Les commentaires ne comportaient aucun contenu de nature à exiger une vérification excessivement lourde à l'initiative de l'exploitant du portail. L'allégation de la défenderesse selon laquelle elle n'avait pas et n'était pas censée avoir connaissance du caractère illicite de ces commentaires est donc infondée.

En raison de son obligation légale de faire en sorte de ne pas porter préjudice à autrui, la défenderesse aurait dû empêcher la publication de commentaires clairement illicites de par leur teneur. Or elle n'en a rien fait. En vertu de l'article 1047 § 3 de la loi sur les obligations, la révélation d'informations ou de propos n'est pas considérée comme illicite si l'émetteur ou le destinataire des informations ou propos a un intérêt légitime à leur révélation, et si l'émetteur les a vérifiés avec un soin correspondant à la gravité de l'atteinte susceptible d'en résulter. Cependant, la publication de jugements de valeur formulés en termes déplacés et portant atteinte à l'honneur d'un tiers ne peut être justifiée par l'invocation des circonstances énoncées dans cette disposition : pareils jugements ne découlent pas d'informations révélées mais sont créés et publiés dans le but de porter atteinte à l'honneur et à la réputation de leur cible. La publication de commentaires de nature clairement illicite est donc elle-même illicite. Par ailleurs, une fois les commentaires publiés, la défenderesse, qui aurait dû être consciente de leur teneur illicite, ne les a pas retirés du portail de sa propre initiative. Dans ces conditions, les juges ne se sont pas montrés déraisonnables en jugeant son inertie illicite. La défenderesse est donc responsable du préjudice causé au demandeur, les tribunaux ayant établi qu'elle n'avait pas prouvé qu'elle n'avait pas commis de faute [*süü*] (article 1050 § 1 de la loi sur les obligations). »

D. Les événements ultérieurs

32. Le 1er octobre 2009, Delfi annonça sur son portail Internet que les personnes ayant laissé des commentaires injurieux ne pourraient pas déposer de nouveaux commentaires avant d'avoir lu et accepté la Charte des commentaires, et que la direction avait mis en place une équipe de modérateurs qui pratiquait une modération *a posteriori* des commentaires publiés sur le portail. Ces modérateurs passaient en revue toutes les notifications d'internautes signalant des commentaires inappropriés. Ils contrôlaient également le respect de la Charte des commentaires. Selon les informations publiées sur le site, en août 2009, les internautes y avaient déposé 190 000

commentaires, les modérateurs en avaient retiré 15 000 (environ 8 %), principalement des spams ou des commentaires sans pertinence, et moins de 0,5 % du nombre total de commentaires déposés étaient diffamatoires.

II. LE DROIT ET LA PRATIQUE INTERNES PERTINENTS

33. La Constitution de la République d'Estonie (*Eesti Vabariigi põhiseadus*) dispose, en ses articles pertinents :

Article 17

« Nul ne doit subir d'atteinte diffamatoire à son honneur ou à sa réputation. »

Article 19

« 1. Chacun a le droit de se réaliser librement.

2. Chacun doit faire preuve de respect et de considération pour les droits et libertés d'autrui et respecter la loi dans l'exercice de ses droits et libertés et l'accomplissement de ses obligations. »

Article 45

« 1. Chacun a le droit de diffuser librement des idées, des opinions, des convictions et des informations oralement, par écrit, par l'image ou par tout autre moyen. Ce droit peut faire l'objet de restrictions prévues par la loi afin de protéger l'ordre public, la morale, ainsi que les droits et libertés, la santé, l'honneur et la réputation d'autrui. En outre, l'exercice de ce droit par les fonctionnaires de l'État ou des collectivités territoriales peut faire l'objet de restrictions prévues par la loi afin de protéger les secrets d'État et les secrets industriels ainsi que les informations communiquées à titre confidentiel dont ces agents ont connaissance du fait de leurs fonctions, afin de protéger la vie privée et familiale d'autrui, ou dans l'intérêt de la justice.

2. Il ne peut y avoir de censure. »

34. L'article 138 de la loi sur les principes généraux du code civil (*Tsiviilseadustiku üldosa seadus*) dispose que les droits sont exercés et les obligations accomplies de bonne foi. Nul ne peut exercer un droit de manière illégitime ou dans le but de causer un préjudice à autrui.

35. Le paragraphe 2 de l'article 134 de la loi sur les obligations (*Võlaõigusseadus*) est ainsi libellé :

« Lorsque naît l'obligation de réparer un préjudice découlant de (...) la violation d'un droit de la personnalité, notamment d'un acte de diffamation, la personne à laquelle incombe l'obligation n'indemnise la personne lésée d'un préjudice moral que si la gravité de la violation le justifie, notamment en cas de blessure physique ou morale. »

36. L'article 1043 de la loi sur les obligations dispose que celui (l'auteur du dommage) qui cause d'une manière illicite un dommage à autrui (la victime) est tenu de le réparer si ce dommage découle de sa responsabilité pour faute (*süü*) ou de sa responsabilité simple.

37. En vertu de l'article 1045 de la loi sur les obligations, un dommage est causé de manière illicite notamment s'il résulte de la violation d'un droit de la personnalité de la victime.

38. La loi sur les obligations renferme d'autres dispositions pertinentes :

Article 1046 – Illicéité de l'atteinte aux droits de la personnalité

« 1) Sauf disposition contraire de la loi, commet un acte illicite toute personne qui porte atteinte à l'honneur d'une autre, notamment en exprimant sur elle un jugement de valeur indu, en utilisant de manière injustifiée son nom ou son image ou en portant atteinte à son égard à l'inviolabilité de la vie privée ou d'un autre droit de la personnalité. Pour établir l'illicéité, il faut tenir compte de la nature de l'atteinte portée, de sa motivation et de sa gravité relativement au but poursuivi.

2) L'atteinte à un droit de la personnalité n'est pas illicite si elle est justifiée au regard d'autres droits protégés par la loi et des droits de tiers ou de l'intérêt public. En pareil cas, l'illicéité est établie à l'issue d'une appréciation comparative des différents droits et intérêts protégés par la loi. »

Article 1047 – Illicéité de la révélation d'informations inexactes

« 1) Commet un acte illicite toute personne qui porte atteinte aux droits de la personnalité d'un tiers ou interfère dans ses activités économiques ou professionnelles en révélant [*avaldamine*] des informations inexactes, incomplètes ou trompeuses le concernant ou concernant ses activités, à moins qu'elle ne prouve que, au moment où elle a révélé les informations en question, elle ne savait pas et n'était pas censée savoir que celles-ci étaient inexactes ou incomplètes.

2) Est présumée commettre un acte illicite toute personne qui émet des propos portant atteinte à l'honneur ou risquant de nuire à la situation économique d'autrui, à moins qu'elle ne prouve la véracité de ces propos.

3) Nonobstant les dispositions des paragraphes 1) et 2) du présent article, l'émission d'informations ou de propos n'est pas considérée comme illicite si l'émetteur ou le destinataire des informations ou propos a un intérêt légitime à leur révélation, et si l'émetteur les a vérifiés avec un soin correspondant à la gravité de l'atteinte susceptible d'en résulter.

4) En cas de révélation d'informations inexactes, la victime peut exiger que l'auteur de la révélation démente ces informations ou publie un rectificatif à ses frais, que la révélation ait été illicite ou non. »

Article 1050 – Responsabilité pour faute [*süü*]

« 1) Sauf disposition contraire de la loi, la responsabilité de l'auteur d'un dommage est écartée s'il prouve que le dommage n'est pas arrivé par sa faute [*süüdi*].

2) La situation, l'âge, le niveau d'éducation, les connaissances, les capacités et les autres éléments caractérisant la personne sont pris en compte pour déterminer si elle a commis une faute [*süü*] aux fins du présent chapitre.

3) Si plusieurs personnes sont responsables d'un dommage et obligées de le réparer et que, légalement, l'une ou plusieurs d'entre elles sont tenues de réparer ce dommage pour l'avoir causé de manière illicite, avec ou sans faute de leur part, le caractère répréhensible du comportement et la forme de faute des différentes personnes dont la responsabilité est engagée sont pris en compte pour la répartition entre elles de l'obligation de réparer le dommage. »

Article 1055 – Interdiction des actes dommageables

« 1) Si une personne cause un dommage illicite de manière continue ou menace de causer un dommage illicite, la victime ou la personne menacée a le droit d'exiger la cessation de la conduite qui cause le dommage ou de la menace d'une telle conduite. En cas de dommage corporel, d'atteinte à la santé ou d'atteinte à l'inviolabilité de la vie privée ou à d'autres droits de la personnalité, il peut être exigé notamment qu'il soit interdit à l'auteur du dommage de s'approcher de certaines personnes (ordonnance restrictive), que l'usage d'un logement ou de communications soit encadré ou que d'autres mesures semblables soient appliquées.

2) Le droit d'exiger la cessation de la conduite qui cause le dommage, énoncé au paragraphe 1 du présent article, ne s'applique pas si l'on peut raisonnablement considérer que cette conduite relève d'un comportement tolérable dans les relations humaines ou si elle répond à un intérêt public important. En pareils cas, la victime a le droit de demander une indemnisation des dommages causés de manière illicite.

(...) »

39. La loi sur les services de la société de l'information (*Infoühiskonna teenuse seadus*) dispose :

Article 8 – Responsabilité limitée en cas de simple transmission d'informations ou de simple fourniture d'accès à un réseau public de communication de données

« 1) En cas de fourniture d'un service consistant seulement à transmettre sur un réseau public de communication de données des informations fournies par le destinataire du service, ou à fournir un accès à un réseau public de communication de données, le prestataire de services n'est pas responsable des informations transmises, à condition qu'il :

1. ne soit pas à l'origine de la transmission ;

2. ne sélectionne pas le destinataire de la transmission ; et

3. ne sélectionne et ne modifie pas les informations faisant l'objet de la transmission.

2) Les activités de transmission et de fourniture d'accès visées au paragraphe 1 du présent article englobent le stockage automatique, intermédiaire et transitoire des informations transmises, pour autant que ce stockage serve exclusivement à l'exécution de la transmission sur le réseau public de communication de données et que sa durée n'excède pas le temps raisonnablement nécessaire à la transmission. »

Article 9 – Responsabilité limitée en cas de stockage temporaire d'informations dans la mémoire en cache

« 1) En cas de fourniture d'un service consistant à transmettre sur un réseau public de communication de données des informations fournies par un destinataire du service, le prestataire n'est pas responsable au titre du stockage automatique, intermédiaire et temporaire de ces informations si la méthode de transmission concernée nécessite de stocker les informations dans la mémoire en cache pour des raisons techniques et que le seul but de cette procédure est de rendre plus efficace la transmission ultérieure des informations à la demande d'autres destinataires du service, à condition que :

1. le prestataire ne modifie pas l'information ;

2. le prestataire se conforme aux conditions d'accès à l'information ;

3. le prestataire se conforme aux règles concernant la mise à jour de l'information, indiquées d'une manière largement reconnue et utilisées par les entreprises ;

4. le prestataire n'entrave pas l'utilisation licite de la technologie, largement reconnue et utilisée par l'industrie, dans le but d'obtenir des données sur l'utilisation de l'information ;

5. le prestataire agisse promptement pour retirer l'information qu'il a stockée ou pour en rendre l'accès impossible dès qu'il a effectivement connaissance de ce que l'information à l'origine de la transmission a été retirée du réseau, que l'accès à cette information a été rendu impossible, ou que ce retrait a été ordonné par un tribunal, par la police ou par une autorité administrative. »

Article 10 – Responsabilité limitée en cas de fourniture d'un service de stockage de l'information

« 1) En cas de fourniture d'un service consistant à stocker des informations fournies par un destinataire du service, le prestataire n'est pas responsable des informations stockées à la demande d'un destinataire du service à condition que :

1. le prestataire n'ait pas effectivement connaissance de la teneur de l'information et, en ce qui concerne une demande en dommages et intérêts, il n'ait pas connaissance de faits ou de circonstances faisant apparaître l'existence d'informations ou d'activités illicites ;

2. le prestataire, dès le moment où il a connaissance de faits visés au point 1 du présent paragraphe, agisse promptement pour retirer les informations ou rendre l'accès à celles-ci impossible.

2) Le paragraphe 1 du présent article ne s'applique pas lorsque le destinataire du service agit sous l'autorité ou le contrôle du prestataire. »

Article 11 – Absence d'obligation de contrôle

« 1) Les prestataires de services visés aux articles 8 à 10 de la présente loi ne sont pas tenus de contrôler les informations dont ils n'assurent que la transmission, auxquelles ils donnent simplement accès, qu'ils stockent temporairement dans la mémoire en

cache ou qu'ils stockent à la demande du destinataire du service. Ils ne sont pas non plus tenus de rechercher activement des informations ou des circonstances indiquant la présence d'une activité illicite.

2) Les dispositions du paragraphe 1 du présent article ne restreignent pas le droit des agents de contrôle de demander au prestataire de services la divulgation de ces informations.

3) Les prestataires de services sont tenus d'informer promptement les autorités de contrôle compétentes des allégations selon lesquelles des destinataires de leurs services visés aux articles 8 à 10 de la présente loi exerceraient des activités illicites ou publieraient des contenus illicites, et de communiquer aux autorités compétentes les informations permettant d'identifier les destinataires de leurs services avec lesquels ils ont conclu un accord d'hébergement.

(...) »

40. Les articles 244 et suivants du code de procédure civile (*Tsiviilkohtumenetluse seadustik*) prévoient une procédure d'administration de preuves avant le procès (*eeltõendamismenetlus*), dans le cadre de laquelle des éléments de preuve peuvent être recueillis avant le début de la procédure judiciaire s'il y a lieu de penser qu'elles risquent de disparaître ou que leur utilisation ultérieure risque de se révéler difficile.

41. Dans un arrêt du 21 décembre 2005 (affaire n° 3-2-1-95-05), la Cour d'État a jugé que, aux fins de l'article 1047 de la loi sur les obligations, on devait entendre par révélation (*avaldamine*) la communication d'informations à des tiers. Dès lors, une personne communiquant des informations à un éditeur de médias (*meediaväljaanne*) pouvait être qualifiée de révélatrice (*avaldaja*) même si elle n'était pas la publicatrice de l'article (*ajalehetikli avaldaja*). La haute juridiction a confirmé cette position dans ses arrêts ultérieurs, par exemple dans un arrêt du 21 décembre 2010 (affaire n° 3-2-1-67-10).

42. Dans plusieurs affaires internes de diffamation, les actions ont été engagées contre plusieurs parties, par exemple contre l'éditeur du journal et l'auteur de l'article (arrêt de la Cour d'État du 7 mai 1998, affaire n° 3-2-1-61-98), ou contre l'éditeur du journal et la personne dont le journal rapportait les propos (arrêt de la Cour d'État du 1er décembre 1997, affaire n° 3-2-1-99-97). Dans d'autres, elles étaient dirigées contre l'éditeur du journal seulement (arrêt de la Cour d'État du 30 octobre 1997, affaire n° 3-2-1-123-97, et arrêt du 10 octobre 2007, affaire n° 3-2-1-53-07).

43. Depuis l'arrêt rendu par la Cour d'État le 10 juin 2009 en l'affaire n° 3-2-1-43-09, qui a donné naissance à la présente espèce, plusieurs juridictions du fond ont tranché de la même manière la question de la responsabilité au titre des commentaires relatifs à des articles d'actualité en ligne. Ainsi, dans un arrêt du 21 février 2012 (affaire n° 2-08-76058), la cour d'appel

de Tallinn a confirmé le jugement par lequel, statuant sur une action en diffamation engagée contre l'éditeur d'un journal, la juridiction de première instance avait jugé l'éditeur responsable des commentaires diffamatoires déposés par les lecteurs du journal dans la zone de commentaires de son site Internet. Les juges ont ainsi considéré que l'éditeur était un prestataire de services de contenu. Ils ont rejeté sa demande de saisine préjudicielle de la Cour de justice de l'Union européenne (CJUE), estimant que, de toute évidence, l'éditeur ne répondait pas aux critères en vertu desquels l'exploitant pouvait être considéré comme un prestataire de services passif au sens de l'interprétation posée par la CJUE et par la Cour d'État, et que les règles à appliquer en l'espèce étaient suffisamment claires. Ils ont donc jugé inutile de solliciter d'autres indications auprès de la CJUE. Ils ont aussi relevé qu'en vertu de l'arrêt que celle-ci avait rendu le 23 mars 2010 (affaires jointes C-236/08 à C-238/08 Google France SARL et Google Inc., Rec. 2010 p. I-2417), il appartenait aux juridictions nationales de déterminer si le rôle exercé par le prestataire de services était neutre, c'est-à-dire si son comportement était purement technique, automatique et passif, impliquant une absence de connaissance ou de contrôle des données stockées par lui. Ils ont considéré que tel n'était pas le cas dans l'affaire dont ils étaient saisis. Quant aux commentaires diffamatoires en eux-mêmes, l'éditeur les avait déjà supprimés au moment du prononcé de l'arrêt : les juges ne statuèrent donc pas sur ce point, et ils rejetèrent la demande d'indemnisation pour dommage moral introduite par le demandeur. Un autre arrêt analogue a été rendu le 27 juin 2013 dans l'affaire n° 2-10-46710 : là encore, dans une affaire qui concernait des commentaires diffamatoires déposés par les visiteurs d'un portail d'actualités sur Internet, la cour d'appel de Tallinn a jugé le portail responsable et rejeté la demande d'indemnisation pour dommage moral.

III. INSTRUMENTS INTERNATIONAUX PERTINENTS

A. Conseil de l'Europe

44. Le 28 mai 2003, le Comité des Ministres du Conseil de l'Europe a adopté, à la 840e réunion des Délégués des Ministres, la Déclaration sur la liberté de la communication sur l'Internet. En ses parties pertinentes, cette déclaration se lit ainsi :

> « Les États membres du Conseil de l'Europe,
>
> (...)
>
> Convaincus également qu'il est nécessaire de limiter la responsabilité des fournisseurs de services qui font office de simples transporteurs ou, de bonne foi, donnent accès aux contenus émanant de tiers ou les hébergent ;

Rappelant à ce sujet la Directive 2000/31/CE du Parlement européen et du Conseil du 8 juin 2000 relative à certains aspects juridiques des services de la société de l'information, et notamment du commerce électronique, dans le marché intérieur (« directive sur le commerce électronique ») ;

Soulignant que la liberté de communication sur l'Internet ne devrait pas porter atteinte à la dignité humaine, aux droits de l'homme ni aux libertés fondamentales d'autrui, tout particulièrement des mineurs ;

Considérant qu'un équilibre doit être trouvé entre le respect de la volonté des usagers de l'Internet de ne pas divulguer leur identité et la nécessité pour les autorités chargées de l'application de la loi de retrouver la trace des responsables d'actes délictueux ;

(...)

Déclarent qu'ils cherchent à se conformer aux principes suivants dans le domaine de la communication sur l'Internet :

Principe 1 : Règles à l'égard des contenus sur l'Internet

Les États membres ne devraient pas soumettre les contenus diffusés sur l'Internet à des restrictions allant au-delà de celles qui s'appliquent à d'autres moyens de diffusion de contenus.

(...)

Principe 3 : Absence de contrôle préalable de l'État

Les autorités publiques ne devraient pas, au moyen de mesures générales de blocage ou de filtrage, refuser l'accès du public à l'information et autres communications sur l'Internet, sans considération de frontières. Cela n'empêche pas l'installation de filtres pour la protection des mineurs, notamment dans des endroits accessibles aux mineurs tels que les écoles ou les bibliothèques.

À condition que les garanties de l'article 10, paragraphe 2, de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales soient respectées, des mesures peuvent être prises pour supprimer un contenu Internet clairement identifiable ou, alternativement, faire en sorte de bloquer son accès si les autorités nationales compétentes ont pris une décision provisoire ou définitive sur son caractère illicite.

(...)

Principe 6 : Responsabilité limitée des fournisseurs de services pour les contenus diffusés sur l'Internet

Les États membres ne devraient pas imposer aux fournisseurs de services l'obligation générale de surveiller les contenus diffusés sur l'Internet auxquels ils donnent accès, qu'ils transmettent ou qu'ils stockent, ni celle de rechercher activement des faits ou des circonstances révélant des activités illicites.

Les États membres devraient veiller à ce que les fournisseurs de services ne soient pas tenus pour responsables des contenus diffusés sur l'Internet lorsque leur fonction se

limite, selon la législation nationale, à transmettre des informations ou à donner accès à l'Internet.

Si les fonctions des fournisseurs de services sont plus larges et qu'ils stockent des contenus émanant d'autres parties, les États membres peuvent les tenir pour coresponsables dans l'hypothèse où ils ne prennent pas rapidement des mesures pour supprimer ou pour bloquer l'accès aux informations ou aux services dès qu'ils ont connaissance, comme cela est défini par le droit national, de leur caractère illicite ou, en cas de plainte pour préjudice, de faits ou de circonstances révélant la nature illicite de l'activité ou de l'information.

En définissant, dans le droit national, les obligations des fournisseurs de services telles qu'énoncées au paragraphe précédent, une attention particulière doit être portée au respect de la liberté d'expression de ceux qui sont à l'origine de la mise à disposition des informations, ainsi que du droit correspondant des usagers à l'information.

Dans tous les cas, les limitations de responsabilité susmentionnées ne devraient pas affecter la possibilité d'adresser des injonctions lorsque les fournisseurs de services sont requis de mettre fin à ou d'empêcher, dans la mesure du possible, une violation de la loi.

Principe 7 : Anonymat

Afin d'assurer une protection contre les surveillances en ligne et de favoriser l'expression libre d'informations et d'idées, les États membres devraient respecter la volonté des usagers de l'Internet de ne pas révéler leur identité. Cela n'empêche pas les États membres de prendre des mesures et de coopérer pour retrouver la trace de ceux qui sont responsables d'actes délictueux, conformément à la législation nationale, à la Convention de sauvegarde des droits de l'homme et des libertés fondamentales et aux autres traités internationaux dans le domaine de la justice et de la police. »

45. Dans sa recommandation CM/Rec(2007)16 aux États membres sur des mesures visant à promouvoir la valeur de service public de l'Internet (adoptée le 7 novembre 2007), le Comité des Ministres a noté que l'Internet pouvait, d'une part, considérablement favoriser l'exercice de certains des droits de l'homme et des libertés fondamentales et, d'autre part, entraver ces mêmes droits ainsi que d'autres. Il a recommandé aux États membres de définir les limites des rôles et des responsabilités de toutes les principales parties prenantes dans le domaine des nouvelles technologies de l'information et de la communication en élaborant un cadre juridique clair à cet égard.

46. La recommandation CM/Rec(2011)7 du Comité des Ministres aux États membres sur une nouvelle conception des médias (adoptée le 21 septembre 2011) est ainsi libellée :

« (...)

Le Comité des Ministres, en vertu de l'article 15.*b* du Statut du Conseil de l'Europe, recommande aux États membres :

– d'adopter une conception des médias, nouvelle et élargie, qui englobe tous ceux qui participent à la production et à la diffusion, à un public potentiellement vaste, de contenus (informations, analyses, commentaires, opinions, éducation, culture, art et divertissements sous forme écrite, sonore, visuelle, audiovisuelle ou toute autre forme) et d'applications destinées à faciliter la communication de masse interactive (réseaux sociaux, par exemple) ou d'autres expériences interactives à grande échelle basées sur des contenus (jeux en ligne, par exemple), tout en conservant (dans tous les cas susmentionnés) la surveillance ou le contrôle éditorial de ces contenus ;

– d'évaluer la nécessité d'interventions réglementaires pour tous les acteurs fournissant des services ou des produits dans l'écosystème médiatique, pour garantir à toute personne le droit de chercher, de recevoir et de transmettre des informations conformément à l'article 10 de la Convention européenne des droits de l'homme, et pour étendre à ces acteurs les garanties applicables contre les ingérences susceptibles de porter atteinte aux droits consacrés par l'article 10, notamment dans des situations risquant d'aboutir à une autolimitation ou à une autocensure injustifiées ;

– d'appliquer les critères annexés à la présente recommandation lors de l'élaboration d'une réponse graduelle et différenciée pour les acteurs relevant d'une nouvelle conception des médias, basés sur les normes pertinentes du Conseil de l'Europe dans le domaine des médias, en tenant compte des fonctions spécifiques des acteurs précités dans l'activité des médias, ainsi que de leur impact potentiel et de leur importance pour le fonctionnement ou l'amélioration de la bonne gouvernance dans une société démocratique ;

(...) »

En ses parties pertinentes, l'annexe à cette recommandation est ainsi libellée :

« 7. Dans le cadre d'une approche différenciée et graduelle, chaque acteur dont les services sont considérés comme un média ou une activité intermédiaire ou auxiliaire bénéficie à la fois de la forme (différenciée) et du niveau (graduel) appropriés de protection, et les responsabilités sont également délimitées conformément à l'article 10 de la Convention européenne des droits de l'homme et à d'autres normes pertinentes élaborées par le Conseil de l'Europe.

(...)

30. Le contrôle éditorial peut être mis en évidence par les décisions stratégiques propres à l'acteur en question, concernant le contenu à rendre accessible ou à promouvoir, et la manière de présenter ou d'organiser ce contenu. Les médias traditionnels publient quelquefois des politiques éditoriales écrites, mais il est également possible de trouver une référence au contrôle éditorial dans des instructions ou des critères internes pour le choix ou le traitement du contenu (vérification ou validation, par exemple). Dans les nouveaux environnements de communication, les politiques éditoriales peuvent être intégrées à des énoncés de mission ou à des conditions générales d'utilisation d'un service (qui peuvent comporter des dispositions très détaillées sur le contenu), ou être formulées d'une manière informelle comme un engagement à respecter certains principes (par exemple la nétiquette, un mot d'ordre).

(...)

32. Le traitement éditorial peut faire appel aux utilisateurs (par exemple examen collégial et demandes de suppression de certains contenus), les décisions finales étant prises suivant une procédure définie en interne, compte tenu de critères précis (modération réactive). En ce qui concerne le contenu généré par l'utilisateur, les nouveaux médias ont souvent recours à la modération *a posteriori* (souvent appelée post-modération), qui peut être imperceptible à première vue. Le traitement éditorial peut également être automatisé (par exemple au moyen d'algorithmes préalables qui sélectionnent le contenu ou le comparent avec le matériel protégé par le droit d'auteur).

(...)

35. Encore une fois, il faudrait noter qu'à chaque niveau de contrôle éditorial correspond un certain niveau de responsabilité éditoriale. Une réponse différenciée et graduelle est nécessaire en fonction du degré de contrôle éditorial ou des modalités éditoriales (par exemple prémodération, par opposition à une postmodération).

36. Par conséquent, on ne devrait pas considérer comme un média un fournisseur de services intermédiaires ou auxiliaires qui contribue au fonctionnement d'un média ou à l'accès à ce dernier, mais qui n'exerce pas (ou ne devrait pas exercer) lui-même un contrôle éditorial et n'a donc pas de responsabilité éditoriale (ou seulement une responsabilité limitée). Son action reste toutefois utile dans le monde des médias. Même si elle découle d'obligations légales (par exemple suppression de contenus faisant suite à une décision de justice), une action prise par un fournisseur de services intermédiaires ou auxiliaires ne devrait pas être considérée comme un contrôle éditorial au sens qui en est donné ci-dessus.

(...)

63. Il convient de souligner ici le rôle important des intermédiaires. Ces derniers proposent des alternatives et des moyens ou canaux complémentaires de diffusion de contenus, ce qui permet aux médias d'élargir leur portée et d'atteindre plus efficacement leurs objectifs. Dans un marché compétitif pour les intermédiaires et auxiliaires, ceux-ci peuvent réduire de manière significative le risque d'ingérence de la part des autorités. Toutefois, vu le degré de confiance que les médias doivent avoir en eux dans le nouvel écosystème, il risque d'y avoir aussi une censure par les intermédiaires et les auxiliaires. Certaines situations font également courir le risque d'une censure privée (exercée par les intermédiaires et auxiliaires sur les médias auxquels ils fournissent des services ou sur le contenu qu'ils diffusent). »

47. Le 16 avril 2014, le Comité des Ministres a adopté la recommandation CM/Rec(2014)6 aux États membres sur un Guide des droits de l'homme pour les utilisateurs d'Internet. En ses parties pertinentes, ce guide est ainsi libellé :

Liberté d'expression et d'information

« Vous avez le droit de rechercher, d'obtenir et de communiquer les informations et les idées de votre choix, sans ingérence et sans considération de frontière. Cela signifie que :

1. vous avez le droit de vous exprimer en ligne et d'accéder à l'information et aux opinions et propos d'autres personnes. Ce droit s'applique également aux discours politiques, aux points de vue sur les religions et aux convictions et expressions accueillies favorablement ou considérées comme inoffensives mais aussi à celles qui peuvent heurter, choquer ou inquiéter autrui. Vous devriez tenir dûment compte de la réputation et des droits des autres, notamment de leur droit à la vie privée ;

2. des restrictions peuvent s'appliquer aux propos qui incitent à la discrimination, à la haine ou à la violence. Ces restrictions doivent alors entrer dans un cadre légal, être étroitement définies et appliquées sous contrôle judiciaire ;

(...)

6. vous devriez être libre de ne pas divulguer votre identité en ligne, par exemple en utilisant un pseudonyme. Toutefois, vous devriez être conscient que, même dans ce cas, les autorités nationales peuvent prendre des mesures conduisant à la révélation de votre identité. »

B. Autres sources internationales

48. Dans son rapport du 16 mai 2011 au Conseil des droits de l'homme (A/HRC/17/27), le rapporteur spécial des Nations unies sur la promotion et la protection du droit à la liberté d'opinion et d'expression a dit ceci :

« 25. Les types légitimes d'information susceptibles de restriction comprennent la pédopornographie (afin de protéger les droits des enfants), le discours haineux (pour protéger les droits des communautés qui en sont la cible), la diffamation (pour protéger les droits et la réputation d'autrui d'attaques infondées), l'incitation publique et directe à commettre un génocide (pour protéger les droits d'autrui) et l'apologie de la haine ethnique, raciale ou religieuse qui constitue une incitation à la discrimination, l'hostilité et la violence (afin de protéger les droits d'autrui dont le droit à la vie).

(...)

27. En outre, le rapporteur spécial souligne qu'en raison des spécificités de l'Internet, les restrictions et règles que l'on pourrait considérer comme légitimes et proportionnées pour les médias traditionnels ne le sont pas toujours pour ce nouveau média. Dans le cas de la diffamation, par exemple, comme l'individu ayant subi le préjudice peut exercer son droit de réponse afin de réparer le préjudice causé, les sanctions appliquées à la diffamation hors ligne pourraient s'avérer inutiles ou disproportionnées. (...)

(...)

43. Le rapporteur spécial estime que la censure ne devrait jamais être déléguée à une entité privée et que nul ne devrait être tenu pour responsable d'un contenu diffusé sur Internet s'il n'en est pas l'auteur. En effet, aucun État ne devrait utiliser les intermédiaires ou les forcer à censurer en son nom (...)

(...)

74. Les intermédiaires jouent un rôle fondamental dans la mesure où ils permettent aux usagers de l'Internet de jouir de leur droit à la liberté d'expression ainsi que d'accéder à l'information. Compte tenu de leur influence sans précédent sur les informations qui circulent sur Internet et sur la manière dont elles sont diffusées, les États cherchent de plus en plus à exercer un contrôle sur eux et à les rendre légalement responsables de ne pas empêcher l'accès à des contenus jugés illégaux. »

49. Dans une déclaration conjointe adoptée le 21 décembre 2005, le rapporteur spécial des Nations unies sur le droit à la liberté d'opinion et d'expression, le représentant de l'Organisation pour la sécurité et la coopération en Europe pour la liberté des médias et le rapporteur spécial de l'Organisation des États américains pour la liberté d'expression ont dit ceci :

« Nul ne devrait être tenu pour responsable de contenus sur Internet dont il n'est pas l'auteur, à moins d'avoir fait siens ces contenus ou d'avoir refusé d'obéir à une décision de justice lui enjoignant de les retirer. »

IV. NORMES PERTINENTES DE L'UNION EUROPÉENNE ET ÉLÉMENTS DE DROIT COMPARÉ

A. Les instruments et la jurisprudence des organes de l'Union européenne

1. La directive 2000/31/CE

50. En ses parties pertinentes, la directive 2000/31/CE du Parlement européen et du Conseil du 8 juin 2000 relative à certains aspects juridiques des services de la société de l'information, et notamment du commerce électronique, dans le marché intérieur (« directive sur le commerce électronique ») prévoit ceci :

« (9) Dans bien des cas, la libre circulation des services de la société de l'information peut refléter spécifiquement, dans la législation communautaire, un principe plus général, à savoir la liberté d'expression, consacrée par l'article 10, paragraphe 1, de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales, qui a été ratifiée par tous les États membres. Pour cette raison, les directives couvrant la fourniture de services de la société de l'information doivent assurer que cette activité peut être exercée librement en vertu de l'article précité, sous réserve uniquement des restrictions prévues au paragraphe 2 du même article et à l'article 46, paragraphe 1, du traité. La présente directive n'entend pas porter atteinte aux règles et principes fondamentaux nationaux en matière de liberté d'expression.

(...)

(42) Les dérogations en matière de responsabilité prévues par la présente directive ne couvrent que les cas où l'activité du prestataire de services dans le cadre de la société de l'information est limitée au processus technique d'exploitation et de fourniture d'un accès à un réseau de communication sur lequel les informations fournies par des tiers sont transmises ou stockées temporairement, dans le seul but d'améliorer l'efficacité de

la transmission. Cette activité revêt un caractère purement technique, automatique et passif, qui implique que le prestataire de services de la société de l'information n'a pas la connaissance ni le contrôle des informations transmises ou stockées.

(43) Un prestataire de services peut bénéficier de dérogations pour le « simple transport » et pour la forme de stockage dite « caching » lorsqu'il n'est impliqué en aucune manière dans l'information transmise. Cela suppose, entre autres, qu'il ne modifie pas l'information qu'il transmet. Cette exigence ne couvre pas les manipulations à caractère technique qui ont lieu au cours de la transmission, car ces dernières n'altèrent pas l'intégrité de l'information contenue dans la transmission.

(44) Un prestataire de services qui collabore délibérément avec l'un des destinataires de son service afin de se livrer à des activités illégales va au-delà des activités de « simple transport » ou de « caching » et, dès lors, il ne peut pas bénéficier des dérogations en matière de responsabilité prévues pour ce type d'activité.

(45) Les limitations de responsabilité des prestataires de services intermédiaires prévues dans la présente directive sont sans préjudice de la possibilité d'actions en cessation de différents types. Ces actions en cessation peuvent notamment revêtir la forme de décisions de tribunaux ou d'autorités administratives exigeant qu'il soit mis un terme à toute violation ou que l'on prévienne toute violation, y compris en retirant les informations illicites ou en rendant l'accès à ces dernières impossible.

(46) Afin de bénéficier d'une limitation de responsabilité, le prestataire d'un service de la société de l'information consistant dans le stockage d'informations doit, dès qu'il prend effectivement connaissance ou conscience du caractère illicite des activités, agir promptement pour retirer les informations concernées ou rendre l'accès à celles-ci impossible. Il y a lieu de procéder à leur retrait ou de rendre leur accès impossible dans le respect du principe de la liberté d'expression et des procédures établies à cet effet au niveau national. La présente directive n'affecte pas la possibilité qu'ont les États membres de définir des exigences spécifiques auxquelles il doit être satisfait promptement avant de retirer des informations ou d'en rendre l'accès impossible.

(47) L'interdiction pour les États membres d'imposer aux prestataires de services une obligation de surveillance ne vaut que pour les obligations à caractère général. Elle ne concerne pas les obligations de surveillance applicables à un cas spécifique et, notamment, elle ne fait pas obstacle aux décisions des autorités nationales prises conformément à la législation nationale.

(48) La présente directive n'affecte en rien la possibilité qu'ont les États membres d'exiger des prestataires de services qui stockent des informations fournies par des destinataires de leurs services qu'ils agissent avec les précautions que l'on peut raisonnablement attendre d'eux et qui sont définies dans la législation nationale, et ce afin de détecter et d'empêcher certains types d'activités illicites.

(...)

Article premier – Objectif et champ d'application

1. La présente directive a pour objectif de contribuer au bon fonctionnement du marché intérieur en assurant la libre circulation des services de la société de l'information entre les États membres.

(...)

Article 2 – Définitions

Aux fins de la présente directive, on entend par :

a) « services de la société de l'information » : les services au sens de l'article 1er, paragraphe 2, de la directive 98/34/CE, telle que modifiée par la directive 98/48/CE ;

b) « prestataire » : toute personne physique ou morale qui fournit un service de la société de l'information ;

c) « prestataire établi » : prestataire qui exerce d'une manière effective une activité économique au moyen d'une installation stable pour une durée indéterminée. La présence et l'utilisation des moyens techniques et des technologies requis pour fournir le service ne constituent pas en tant que telles un établissement du prestataire ; (...)

(...)

Section 4 : Responsabilité des prestataires intermédiaires

Article 12 – Simple transport (« Mere conduit »)

1. Les États membres veillent à ce que, en cas de fourniture d'un service de la société de l'information consistant à transmettre, sur un réseau de communication, des informations fournies par le destinataire du service ou à fournir un accès au réseau de communication, le prestataire de services ne soit pas responsable des informations transmises, à condition que le prestataire :

a) ne soit pas à l'origine de la transmission ;

b) ne sélectionne pas le destinataire de la transmission, et

c) ne sélectionne et ne modifie pas les informations faisant l'objet de la transmission.

2. Les activités de transmission et de fourniture d'accès visées au paragraphe 1 englobent le stockage automatique, intermédiaire et transitoire des informations transmises, pour autant que ce stockage serve exclusivement à l'exécution de la transmission sur le réseau de communication et que sa durée n'excède pas le temps raisonnablement nécessaire à la transmission.

3. Le présent article n'affecte pas la possibilité, pour une juridiction ou une autorité administrative, conformément aux systèmes juridiques des États membres, d'exiger du prestataire qu'il mette fin à une violation ou qu'il prévienne une violation.

Article 13 – Forme de stockage dite « caching »

1. Les États membres veillent à ce que, en cas de fourniture d'un service de la société de l'information consistant à transmettre, sur un réseau de communication,

des informations fournies par un destinataire du service, le prestataire ne soit pas responsable au titre du stockage automatique, intermédiaire et temporaire de cette information fait dans le seul but de rendre plus efficace la transmission ultérieure de l'information à la demande d'autres destinataires du service, à condition que :

a) le prestataire ne modifie pas l'information ;

b) le prestataire se conforme aux conditions d'accès à l'information ;

c) le prestataire se conforme aux règles concernant la mise à jour de l'information, indiquées d'une manière largement reconnue et utilisées par les entreprises ;

d) le prestataire n'entrave pas l'utilisation licite de la technologie, largement reconnue et utilisée par l'industrie, dans le but d'obtenir des données sur l'utilisation de l'information

et

e) le prestataire agisse promptement pour retirer l'information qu'il a stockée ou pour en rendre l'accès impossible dès qu'il a effectivement connaissance du fait que l'information à l'origine de la transmission a été retirée du réseau ou du fait que l'accès à l'information a été rendu impossible, ou du fait qu'un tribunal ou une autorité administrative a ordonné de retirer l'information ou d'en rendre l'accès impossible.

2. Le présent article n'affecte pas la possibilité, pour une juridiction ou une autorité administrative, conformément aux systèmes juridiques des États membres, d'exiger du prestataire qu'il mette fin à une violation ou qu'il prévienne une violation.

Article 14 – Hébergement

1. Les États membres veillent à ce que, en cas de fourniture d'un service de la société de l'information consistant à stocker des informations fournies par un destinataire du service, le prestataire ne soit pas responsable des informations stockées à la demande d'un destinataire du service à condition que :

a) le prestataire n'ait pas effectivement connaissance de l'activité ou de l'information illicites et, en ce qui concerne une demande en dommages et intérêts, n'ait pas connaissance de faits ou de circonstances selon lesquels l'activité ou l'information illicite est apparente

ou

b) le prestataire, dès le moment où il a de telles connaissances, agisse promptement pour retirer les informations ou rendre l'accès à celles-ci impossible.

2. Le paragraphe 1 ne s'applique pas lorsque le destinataire du service agit sous l'autorité ou le contrôle du prestataire.

3. Le présent article n'affecte pas la possibilité, pour une juridiction ou une autorité administrative, conformément aux systèmes juridiques des États membres, d'exiger du prestataire qu'il mette un terme à une violation ou qu'il prévienne une violation et n'affecte pas non plus la possibilité, pour les États membres, d'instaurer des procédures régissant le retrait de ces informations ou les actions pour en rendre l'accès impossible.

Article 15 – Absence d'obligation générale en matière de surveillance

1. Les États membres ne doivent pas imposer aux prestataires, pour la fourniture des services visée aux articles 12, 13 et 14, une obligation générale de surveiller les informations qu'ils transmettent ou stockent, ou une obligation générale de rechercher activement des faits ou des circonstances révélant des activités illicites.

2. Les États membres peuvent instaurer, pour les prestataires de services de la société de l'information, l'obligation d'informer promptement les autorités publiques compétentes d'activités illicites alléguées qu'exerceraient les destinataires de leurs services ou d'informations illicites alléguées que ces derniers fourniraient ou de communiquer aux autorités compétentes, à leur demande, les informations permettant d'identifier les destinataires de leurs services avec lesquels ils ont conclu un accord d'hébergement. »

2. La directive 98/34/CE telle que modifiée par la directive 98/48/CE

51. La directive 98/34/CE du Parlement européen et du Conseil du 22 juin 1998 prévoyant une procédure d'information dans le domaine des normes et réglementations techniques et des règles relatives aux services de la société de l'information, telle que modifiée par la directive 98/48/CE, est ainsi libellée en ses passages pertinents :

Article premier

« Au sens de la présente directive, on entend par

(...)

2. « service » : tout service de la société de l'information, c'est-à-dire tout service presté normalement contre rémunération, à distance par voie électronique et à la demande individuelle d'un destinataire de services.

Aux fins de la présente définition, on entend par :

– les termes « à distance » : un service fourni sans que les parties soient simultanément présentes,

– « par voie électronique » : un service envoyé à l'origine et reçu à destination au moyen d'équipements électroniques de traitement (y compris la compression numérique) et de stockage de données, et qui est entièrement transmis, acheminé et reçu par fils, par radio, par moyens optiques ou par d'autres moyens électromagnétiques,

– « à la demande individuelle d'un destinataire de services » : un service fourni par transmission de données sur demande individuelle.

Une liste indicative des services non visés par cette définition figure à l'annexe V.

La présente directive n'est pas applicable :

– aux services de radiodiffusion sonore,

– aux services de radiodiffusion télévisuelle visés à l'article 1er, point a), de la directive 89/552/CEE. »

3. La jurisprudence de la CJUE

52. Dans un arrêt du 23 mars 2010 (affaires jointes C-236/08 à C-238/08, Google France SARL et Google Inc.), la Cour de justice de l'Union européenne (CJUE) a dit que, pour vérifier si la responsabilité du prestataire d'un service de référencement pouvait être limitée au titre de l'article 14 de la directive sur le commerce électronique, il convenait d'examiner si le rôle exercé par ledit prestataire était neutre, c'est-à-dire si son comportement était purement technique, automatique et passif, impliquant une absence de connaissance ou de contrôle des données stockées par lui. Elle a jugé que l'article 14 de ladite directive devait être interprété comme signifiant que la règle y énoncée s'appliquait au prestataire d'un service de référencement sur Internet lorsque ce prestataire n'avait pas joué un rôle actif de nature à lui conférer une connaissance ou un contrôle des données stockées, auquel cas le prestataire ne pouvait être tenu pour responsable des données qu'il avait stockées à la demande d'un annonceur à moins que, ayant eu connaissance du caractère illicite de ces données ou d'activités de cet annonceur, il n'ait pas promptement retiré ou rendu inaccessibles lesdites données.

53. Dans un arrêt du 12 juillet 2011 (affaire C-324/09, *L'Oréal* SA et autres), la CJUE a jugé que l'article 14, paragraphe 1, de la directive sur le commerce électronique devait être interprété comme s'appliquant à l'exploitant d'une place de marché en ligne lorsque celui-ci n'avait pas joué un rôle actif qui lui permette d'avoir une connaissance ou un contrôle des données stockées, et que ledit exploitant jouait un tel rôle actif quand il prêtait une assistance qui consistait notamment à optimiser la présentation des offres à la vente en cause ou à les promouvoir. Elle a précisé que, néanmoins, lorsque l'exploitant de la place de marché en ligne n'avait pas joué un tel rôle actif et que sa prestation de service relevait, par conséquent, du champ d'application de l'article 14, paragraphe 1, de la directive sur le commerce électronique, il ne pouvait se prévaloir de l'exonération de responsabilité prévue par cette disposition, dans une affaire susceptible de donner lieu à une condamnation au paiement de dommages et intérêts, s'il avait eu connaissance de faits ou de circonstances sur la base desquels un opérateur économique diligent aurait dû constater l'illicéité des offres à la vente en cause et, dans l'hypothèse d'une telle connaissance, n'avait pas promptement agi conformément au paragraphe 1 b) dudit article 14.

54. Dans un arrêt du 24 novembre 2011 (affaire C-70/10, Scarlet Extended SA), la CJUE a jugé qu'un fournisseur d'accès à Internet ne pouvait faire l'objet d'une injonction lui ordonnant de mettre en place un système de filtrage de toutes les communications électroniques transitant

par ses services, notamment par l'emploi de logiciels *peer-to-peer*, qui s'applique indistinctement à l'égard de toute sa clientèle, à titre préventif, à ses frais exclusifs et sans limitation dans le temps, et qui soit capable d'identifier sur le réseau de ce fournisseur la circulation de fichiers électroniques contenant une œuvre musicale, cinématographique ou audiovisuelle sur laquelle le demandeur prétendrait détenir des droits de propriété intellectuelle, en vue de bloquer le transfert de fichiers dont l'échange porterait atteinte au droit d'auteur.

55. Dans un arrêt du 16 février 2012 (affaire C-360/10), Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM), la CJUE a dit que la directive sur le commerce électronique, les directives 2001/29/CE et 2004/48/CE s'opposaient à une injonction faite par un juge national à un prestataire de services d'hébergement de mettre en place un système de filtrage des informations stockées sur ses serveurs par les utilisateurs de ses services, qui s'applique indistinctement à l'égard de l'ensemble de ces utilisateurs, à titre préventif, aux frais exclusifs du prestataire et sans limitation dans le temps, et qui soit capable d'identifier les fichiers électroniques contenant des œuvres musicales, cinématographiques ou audiovisuelles sur lesquelles le demandeur prétendrait détenir des droits de propriété intellectuelle, en vue de bloquer une mise à disposition du public desdites œuvres qui porterait atteinte au droit d'auteur.

56. Dans un arrêt du 13 mai 2014 (affaire C-131/12, Google Spain SL et Google Inc.), la CJUE, appelée à interpréter la directive 95/46/CE du Parlement européen et du Conseil du 24 octobre 1995 relative à la protection des personnes physiques à l'égard du traitement des données à caractère personnel et à la libre circulation de ces données, a dit que l'activité d'un moteur de recherche sur Internet devait être qualifiée de « traitement de données à caractère personnel » au sens de la directive 95/46/CE, et que ce traitement de données à caractère personnel, réalisé par l'exploitant d'un moteur de recherche, était susceptible d'affecter significativement les droits fondamentaux au respect de la vie privée et à la protection des données à caractère personnel (garantis par les articles 7 et 8 de la Charte des droits fondamentaux de l'Union européenne) lorsque la recherche au moyen de ce moteur était effectuée à partir du nom d'une personne physique, car ce traitement pouvait permettre à tout internaute d'obtenir par la liste de résultats un aperçu structuré des informations relatives à cette personne trouvables sur Internet et ainsi d'établir un profil plus ou moins détaillé de la personne concernée. Elle a ajouté que l'effet de l'ingérence dans lesdits droits de la personne concernée se trouvait démultiplié en raison du rôle important que jouaient Internet et les moteurs de recherche dans la société moderne, lesquels conféraient aux informations contenues dans une telle

liste de résultats un caractère ubiquitaire. Elle a estimé qu'au vu de la gravité potentielle de cette ingérence, celle-ci ne pouvait être justifiée par le seul intérêt économique de l'exploitant. Elle a considéré qu'il y avait lieu de rechercher un juste équilibre entre l'intérêt légitime des internautes à avoir accès à l'information et les droits fondamentaux de la personne concernée, jugeant que les droits fondamentaux de la personne concernée prévalaient, en règle générale, sur l'intérêt des internautes, mais que cet équilibre pouvait toutefois dépendre de la nature de l'information en question et de sa sensibilité pour la vie privée de la personne concernée ainsi que de l'intérêt du public à disposer de cette information. Elle a dit que, dans certains cas, l'exploitant d'un moteur de recherche était obligé de supprimer de la liste de résultats, affichée à la suite d'une recherche effectuée à partir du nom d'une personne, des liens vers des pages web, publiées par des tiers et contenant des informations relatives à cette personne, et ce, le cas échéant, même lorsque leur publication en elle-même sur lesdites pages était licite. Elle a précisé que tel était notamment le cas lorsque les données apparaissaient inadéquates, pas ou plus pertinentes ou excessives au regard des finalités pour lesquelles elles avaient été traitées et du temps qui s'était écoulé.

57. Dans un arrêt du 11 septembre 2014 (affaire C-291/13, Sotiris Papasavvas), la CJUE a dit que, dès lors qu'une société d'édition de presse qui publiait sur son site Internet la version électronique d'un journal avait, en principe, connaissance des informations qu'elle publiait et exerçait un contrôle sur celles-ci, elle ne pouvait être considérée comme un « prestataire intermédiaire » au sens des articles 12 à 14 de la directive sur le commerce électronique, et ce que l'accès au site fût payant ou gratuit. Elle a conclu que les limitations à la responsabilité civile énoncées aux articles 12 à 14 de la directive sur le commerce électronique ne visaient pas le cas d'une société d'édition de presse qui disposait d'un site Internet sur lequel était publiée la version électronique d'un journal, cette société étant par ailleurs rémunérée par les revenus générés par les publicités commerciales diffusées sur ce site, dès lors qu'elle avait connaissance des informations publiées et exerçait un contrôle sur celles-ci, que l'accès audit site fût gratuit ou payant.

B. Le droit comparé

58. Il ressort des informations dont dispose la Cour que dans un certain nombre d'États membres du Conseil de l'Europe, également membres de l'Union européenne, la directive sur le commerce électronique, telle que transposée dans le droit national, constitue une source primaire de droit dans le domaine en question. Il apparaît aussi que plus l'exploitant est impliqué dans le contenu déposé par les tiers avant sa mise en ligne – que ce soit par une censure préalable, par une modification de celui-ci, par la

sélection des destinataires, par l'appel à commentaires sur des thèmes définis à l'avance ou par l'appropriation du contenu – plus il risque de voir sa responsabilité engagée à raison de ce contenu. Certains pays ont adopté des règles supplémentaires concernant expressément les procédures de retrait de contenu Internet estimé illicite ainsi que des dispositions relatives à la répartition de la responsabilité dans ce contexte.

EN DROIT

SUR LA VIOLATION ALLÉGUÉE DE L'ARTICLE 10 DE LA CONVENTION

59. La société requérante soutient que le fait qu'elle a été jugée responsable des commentaires publiés par les visiteurs de son portail d'actualités sur Internet a emporté violation à son égard du droit à la liberté d'expression protégé par l'article 10 de la Convention, ainsi libellé :

> « 1. Toute personne a droit à la liberté d'expression. Ce droit comprend la liberté d'opinion et la liberté de recevoir ou de communiquer des informations ou des idées sans qu'il puisse y avoir ingérence d'autorités publiques et sans considération de frontière. Le présent article n'empêche pas les États de soumettre les entreprises de radiodiffusion, de cinéma ou de télévision à un régime d'autorisations.
>
> 2. L'exercice de ces libertés comportant des devoirs et des responsabilités peut être soumis à certaines formalités, conditions, restrictions ou sanctions prévues par la loi, qui constituent des mesures nécessaires, dans une société démocratique, à la sécurité nationale, à l'intégrité territoriale ou à la sûreté publique, à la défense de l'ordre et à la prévention du crime, à la protection de la santé ou de la morale, à la protection de la réputation ou des droits d'autrui, pour empêcher la divulgation d'informations confidentielles ou pour garantir l'autorité et l'impartialité du pouvoir judiciaire. »

60. Le Gouvernement conteste cette thèse.

A. L'arrêt de la chambre

61. Dans son arrêt du 10 octobre 2013, la chambre a noté d'emblée une divergence entre les parties quant au rôle de la société requérante en l'espèce : le Gouvernement était d'avis qu'elle devait être considérée comme la révélatrice des commentaires diffamatoires, tandis qu'elle-même estimait que sa liberté de transmettre un contenu créé et publié par des tiers était en jeu et qu'elle n'était pas l'éditrice des commentaires déposés par les internautes. La chambre n'a pas cherché à déterminer le rôle exact à lui attribuer à cet égard, notant simplement qu'il n'était pas contesté, en substance, que les décisions rendues par les juridictions internes en l'espèce avaient constitué

une ingérence dans l'exercice par la société requérante du droit à la liberté d'expression garanti par l'article 10 de la Convention.

62. En ce qui concerne la légalité de la mesure litigieuse, la chambre a rejeté l'argument de la société requérante consistant à dire que l'ingérence dans l'exercice par elle du droit à la liberté d'expression n'était pas « prévue par la loi ». Observant que les juges estoniens avaient conclu que les activités de la société requérante ne relevaient pas de la portée de la directive sur le commerce électronique ni de celle de la loi sur les services de la société de l'information, elle a rappelé que la Cour n'a pas pour tâche de se substituer aux juridictions internes et que c'est au premier chef aux autorités nationales, notamment aux cours et tribunaux, qu'il incombe d'interpréter la législation interne. Elle a par ailleurs estimé établi que, combinées à la jurisprudence existant en la matière, les dispositions pertinentes du droit civil – même si elles étaient assez générales et peu détaillées par rapport à celles, par exemple, de la loi sur les services de la société de l'information – prévoyaient clairement que les éditeurs de médias étaient responsables des propos diffamatoires tenus dans leurs publications. Sachant que la société requérante exploitait à titre professionnel l'un des plus grands portails d'actualités sur Internet d'Estonie et s'était fait connaître avec les commentaires publiés dans la zone du site réservée à cet effet, la chambre a considéré que cette société était en mesure d'apprécier les risques liés à ses activités et qu'elle aurait dû être à même de prévoir, à un degré raisonnable, les conséquences que celles-ci pouvaient entraîner.

63. La chambre a jugé que la restriction apportée à la liberté d'expression de la société requérante poursuivait le but légitime de protéger la réputation et les droits d'autrui. Elle a estimé que ce n'était pas parce que les auteurs des commentaires en étaient aussi responsables en principe que le fait de tenir la société requérante pour responsable de toute atteinte à la réputation ou aux droits d'autrui était dénué de légitimité.

64. Sur la proportionnalité de l'ingérence dans l'exercice par la société requérante de sa liberté d'expression, la chambre a noté qu'il n'était pas contesté que les commentaires en cause étaient de nature diffamatoire. Pour apprécier la proportionnalité de cette ingérence, elle a examiné premièrement le contexte des commentaires, deuxièmement les mesures appliquées par la société requérante pour empêcher la publication de commentaires diffamatoires ou retirer ceux déjà publiés, troisièmement la possibilité que les auteurs des commentaires soient tenus pour responsables plutôt que la société requérante, et quatrièmement les conséquences de la procédure interne pour la société requérante.

65. En particulier, la chambre a considéré que l'article de la société requérante qui avait recueilli les commentaires diffamatoires traitait d'un

sujet présentant un intérêt public et que la société requérante aurait pu prévoir qu'il susciterait des réactions négatives et exercer une certaine prudence afin d'éviter d'être tenue pour responsable d'une éventuelle atteinte à la réputation d'autrui. Elle a formulé plusieurs constats : le système de filtrage automatique en amont et de retrait sur notification mis en place par la société n'avait pas permis une protection suffisante des droits des tiers ; la publication des articles et des commentaires des internautes à leur sujet faisait partie de l'activité professionnelle de la société requérante ; les revenus publicitaires de celle-ci dépendaient du nombre de lecteurs et de commentaires de ses articles ; la société avait les moyens d'exercer un contrôle important sur les commentaires déposés par les internautes et de prévoir la nature de ceux que les articles étaient susceptibles de recueillir et ainsi de prendre des mesures d'ordre technique ou manuel pour empêcher la publication de propos diffamatoires. Elle a relevé de surcroît qu'il n'y avait pas de possibilité réaliste d'engager une action civile à l'encontre des auteurs des commentaires, car il était très difficile d'établir leur identité. Enfin, elle a dit ne pas être convaincue qu'un système ne permettant à la partie lésée de se retourner que contre les auteurs des commentaires diffamatoires eût garanti une protection effective du droit au respect de la vie privée. Observant que c'était la société requérante qui avait choisi de permettre aux internautes de déposer des commentaires sans s'inscrire au préalable, elle a estimé qu'il fallait considérer que ce faisant, la société requérante avait accepté d'assumer une part de responsabilité à raison de ces commentaires. Pour tous ces motifs, et compte tenu de la modicité de la somme que la société requérante avait été condamnée à payer à titre de dommages et intérêts, la chambre a jugé que la restriction apportée à la liberté d'expression de l'intéressée était justifiée et proportionnée au but poursuivi. Elle a dès lors conclu à la non-violation de l'article 10 de la Convention.

B. Thèses des parties devant la Grande Chambre

1. La société requérante

a) Remarques générales

66. La société requérante arguë que dans le monde d'aujourd'hui ce sont de plus en plus les internautes eux-mêmes qui génèrent le contenu publié sur Internet, et que cette contribution est très précieuse : les commentaires sur les articles d'actualité seraient souvent à l'origine de débats de société importants et ils informeraient même les journalistes d'éléments inconnus du public, contribuant ainsi au déclenchement d'enquêtes journalistiques. La possibilité pour « chacun » d'enrichir le débat public ferait progresser la démocratie et serait le meilleur moyen de concrétiser les objectifs de la

liberté d'expression. Ce serait une gageure dans ce contexte de faire en sorte que ceux qui portent atteinte aux droits d'autrui répondent de leurs actes, et ce en évitant la censure.

67. En ce qui concerne le contenu généré par les internautes, la société requérante estime qu'il est suffisant que l'hébergeur retire promptement le contenu illicite dès qu'il a connaissance de son illicéité. Elle considère que si la Cour jugeait cela au contraire insuffisant, on aboutirait soit à la prohibition du discours public anonyme soit à ce que l'intermédiaire, qui se trouverait incité à pécher par excès de prudence afin de ne pas risquer de voir sa responsabilité engagée, impose des restrictions arbitraires à la liberté d'expression des commentateurs.

b) Sur le rôle de Delfi

68. La société requérante invite la Grande Chambre à examiner l'ensemble des circonstances de l'affaire, y compris la question de savoir si elle-même doit passer pour une société d'édition classique ou pour un intermédiaire. Elle soutient qu'elle doit être considérée non comme une société d'édition, arguant que ce type de société est responsable de tout le contenu publié quel qu'en soit l'auteur, mais comme un intermédiaire, et que, en cette qualité, elle est fondée à suivre le cadre juridique précis et prévisible qui limite selon elle l'obligation de contrôler les commentaires déposés par des tiers. À l'en croire, les intermédiaires ne sont pas les mieux placés pour juger de la licéité du contenu généré par les internautes, en particulier dans le domaine de la diffamation, car elle estime que seule la victime est en mesure de dire si un contenu donné porte ou non atteinte à sa réputation.

c) Sur la base légale

69. La société requérante arguë que l'ingérence portée dans l'exercice de sa liberté d'expression – touchant en particulier son droit de stocker du contenu et de permettre aux internautes d'exprimer leur opinion – n'était pas prévue par la loi. Elle soutient qu'il n'était indiqué nulle part dans les textes de loi ou dans la jurisprudence que les intermédiaires devaient être considérés comme les éditeurs de contenu dont ils n'avaient pas connaissance. Au contraire, le droit applicable aurait expressément exclu de tenir les prestataires de services pour responsables à raison du contenu généré par les tiers. À cet égard, la société requérante cite la directive sur le commerce électronique, la loi estonienne sur les services de la société de l'information et la déclaration du Conseil de l'Europe sur la liberté de la communication sur l'Internet. La directive de l'Union européenne prévoirait une limitation de responsabilité reposant sur la notification assortie de procédures de retrait du contenu illicite. Dans ce cadre, la responsabilité des prestataires de services

serait dégagée lorsque, dès qu'ils ont effectivement connaissance d'activités illicites, ils agissent promptement pour retirer le contenu concerné ou en rendre l'accès impossible. De plus, il faudrait respecter, lors du retrait ou du blocage du contenu, le principe de la liberté d'expression et les procédures établies à cette fin au niveau national (considérant 46 du préambule de la directive). La société requérante plaide que les dispositions qu'elle invoque sont incontestablement formulées de manière suffisamment précise pour permettre au citoyen de régler sa conduite. Elle aurait donc agi en pleine conformité avec les règles de droit applicables puisqu'elle aurait retiré les commentaires diffamatoires le jour même où elle aurait reçu la demande de retrait émanant de la personne qui s'estimait diffamée.

70. La société requérante ajoute que, même dans le cadre du droit positif de la responsabilité délictuelle, les diffuseurs (services postaux, bibliothèques, librairies, etc.) ne sont pas considérés comme des éditeurs. Elle peine donc à comprendre comment la chambre a pu considérer que la législation existante en matière de responsabilité délictuelle avait été appliquée en l'espèce à un « domaine nouveau, celui des nouvelles technologies », c'est-à-dire à l'exploitant d'un portail d'actualités sur Internet dont le service consiste selon elle à permettre aux internautes d'interagir avec les journalistes et entre eux et de communiquer des idées intéressantes pour alimenter les débats sur des thèmes d'intérêt public. Elle estime pour sa part qu'aucune loi ne lui impose l'obligation de contrôler activement les commentaires déposés par les internautes.

d) Sur l'existence d'un but légitime

71. La société requérante admet que l'ingérence litigieuse poursuivait un but légitime.

e) Sur la nécessité dans une société démocratique

72. La société requérante estime que l'ingérence litigieuse n'était pas nécessaire dans une société démocratique. Elle arguë que l'arrêt de la chambre ne lui laisse que deux possibilités : soit employer une armée de modérateurs extrêmement bien formés pour inspecter, en temps réel, chaque zone de commentaires, pour chaque article, et détecter tout message susceptible d'être perçu comme diffamatoire (ou susceptible de violer les droits de propriété intellectuelle d'autrui, entre autres choses), de sorte qu'au bout du compte, ces modérateurs supprimeraient par précaution tout commentaire sensible, ce qui limiterait toutes les discussions aux sujets les moins polémiques ; soit éviter un risque aussi élevé en fermant purement et simplement ces forums. Dans les deux cas, cela reviendrait à renoncer à offrir au lecteur ordinaire, comme la technologie le permet, la possibilité de

commenter librement l'actualité quotidienne en assumant en toute indépendance la responsabilité de ses propres commentaires.

73. La société requérante plaide que l'arrêt de la Cour d'État a eu un « effet inhibiteur » sur l'exercice de la liberté d'expression et qu'il a restreint sa liberté de communiquer des informations. Selon elle, cet arrêt instaure une obligation de censurer les particuliers.

74. À l'appui de sa thèse selon laquelle l'ingérence litigieuse n'était pas nécessaire dans une société démocratique, la société requérante avance les éléments suivants.

75. Premièrement, les internautes auraient réagi dans leurs commentaires à un événement causé par la compagnie de navigation Saaremaa et non à l'article lui-même. Celui-ci aurait été équilibré et neutre et aurait traité d'une question revêtant une grande importance pour les habitants de la plus grande île d'Estonie et concernant leur vie quotidienne. Ainsi, ce ne serait pas l'article, mais la compagnie de navigation, qui aurait provoqué les réactions négatives des lecteurs.

76. Deuxièmement, la société requérante aurait pris des mesures suffisantes pour empêcher la publication de commentaires diffamatoires et retirer ceux qui auraient pu être publiés tout de même. En l'espèce, elle aurait retiré les commentaires en cause le jour même où elle aurait été avertie de leur présence.

77. Troisièmement, la société requérante estime que ce sont les auteurs des commentaires eux-mêmes qui doivent être tenus pour responsables de leur contenu. Elle conteste la conclusion de la chambre selon laquelle il serait difficile d'établir leur identité : selon elle, ce serait tout à fait possible dans le cadre d'une procédure d'administration de preuves avant le procès menée en vertu de l'article 244 du code de procédure civile, et, une fois connus les noms et adresses des auteurs, on pourrait sans aucune difficulté engager une action contre eux.

78. Quatrièmement, la société requérante soutient que nul besoin social impérieux n'impose d'obliger les prestataires de services à assumer une responsabilité objective. Elle arguë qu'un consensus européen se dégage pour considérer qu'aucun prestataire de services ne devrait être tenu pour responsable à raison d'un contenu dont il n'est pas l'auteur et que, dès lors, la marge d'appréciation dont jouissent les États contractants dans ce domaine est nécessairement étroite. Elle pense par ailleurs que le fait qu'elle n'ait été condamnée à payer qu'une somme modique à titre d'indemnisation du dommage moral subi par l'individu visé par les commentaires ne justifie pas l'ingérence litigieuse. Elle ajoute que, si elle avait bénéficié d'une limitation de responsabilité, la victime n'aurait pas été privée de recours mais aurait pu poursuivre les auteurs des commentaires. Elle estime que l'on établit ici

une censure privée, ce contre quoi elle s'élève, alors qu'il suffit d'appliquer un système de protection des droits des tiers basé sur deux mécanismes : un système de retrait sur notification, d'une part, et la possibilité d'engager une action contre les auteurs de commentaires diffamatoires, d'autre part. Selon elle, il n'a pas été établi de manière convaincante qu'il existait un « besoin social impérieux » d'engager la responsabilité des prestataires de services Internet.

79. La société requérante souligne aussi l'importance, pour la liberté de l'expression sur Internet, de l'anonymat, lequel favoriserait la pleine participation de tous, y compris des membres de groupes marginalisés, des dissidents politiques et des lanceurs d'alerte, et mettrait ces individus à couvert d'éventuelles représailles.

80. Enfin, la société requérante soutient que les juridictions internes ont fait une interprétation manifestement erronée du droit de l'Union européenne. Elle estime par conséquent que l'arrêt de la chambre crée un conflit d'obligations et une incertitude juridique en ce sens que les États qui suivraient le droit de l'Union européenne sur la question de la responsabilité des prestataires de service d'hébergement enfreindraient la Convention tandis que ceux qui appliqueraient le critère énoncé dans cet arrêt méconnaîtraient le droit de l'Union européenne.

2. Le Gouvernement

a) Remarques générales

81. Le Gouvernement expose les considérations suivantes en ce qui concerne la portée de l'affaire. Premièrement, selon la jurisprudence de la Cour, il appartiendrait aux juridictions internes de déterminer le droit applicable au niveau interne et de l'interpréter. De plus, l'interprétation du droit de l'Union européenne incomberait à la CJUE. En l'espèce, les juridictions internes auraient conclu par des décisions motivées que la loi applicable était la loi estonienne sur les obligations et non la directive sur le commerce électronique ou la loi sur les services de la société de l'information. La Grande Chambre devrait elle aussi partir de ce principe ; quant aux allégations de la société requérante relatives à l'applicabilité du droit de l'Union européenne, elles seraient irrecevables. Deuxièmement, le Gouvernement estime que, comme il existe différents types de portails Internet, la question de la responsabilité de leurs exploitants ne peut être traitée de manière globale. La présente affaire ne concernerait que les activités du portail Delfi au moment des faits. À cet égard, le Gouvernement souligne que la société Delfi avait activement invité les lecteurs à commenter des articles, articles qu'elle aurait choisis elle-même et qu'elle aurait publiés au même endroit que les

commentaires laissés à leur sujet, lesquels auraient été déposés de manière anonyme et n'auraient pu être modifiés et supprimés que par elle. Ce serait dans ce contexte précis qu'il faudrait évaluer la responsabilité de la société requérante.

82. Le Gouvernement observe qu'il n'est pas contesté que les commentaires en cause étaient diffamatoires.

83. Il affirme que contrairement à ce qu'allègue la société requérante, elle n'a pas été contrainte de refuser les commentaires anonymes ou de modifier son modèle d'entreprise. Au contraire, Delfi demeurerait le plus grand portail Internet d'Estonie, on pourrait toujours y laisser des commentaires anonymes, et le nombre de commentaires déposés par mois serait passé de 190 000 en 2009 à 300 000 en 2013. Selon un article publié le 26 septembre 2013, Delfi supprimerait de 20 000 à 30 000 commentaires par mois (soit 7 à 10 % du nombre total de commentaires). Postimees, le deuxième plus grand portail, supprimerait jusqu'à 7 % des 120 000 commentaires recueillis. Chacun des deux portails emploierait cinq personnes pour retirer les commentaires injurieux. Depuis décembre 2013, Delfi utiliserait un environnement de commentaires en deux parties pour séparer les commentaires publiés par les utilisateurs inscrits de ceux laissés par des internautes anonymes.

b) Sur la base légale

84. Le Gouvernement affirme que l'ingérence litigieuse était « prévue par la loi ». Il s'appuie sur la législation et la jurisprudence internes résumées aux paragraphes 32 à 36, 38 et 39 de l'arrêt de la chambre ainsi que sur la jurisprudence de la Cour en la matière également rappelée dans l'arrêt de la chambre. Il déclare qu'il n'existe pas en Estonie de jurisprudence sur le fondement de laquelle la société Delfi – qui aurait invité les lecteurs à laisser des commentaires sur des articles qu'elle aurait sélectionnés et publiés elle-même – aurait pu présumer que, parce que ses publications s'inscrivaient dans le cadre des nouveaux médias, le propriétaire d'un portail Internet ne pouvait être tenu pour responsable du préjudice causé par les commentaires relatifs à ses articles. Selon lui, ces commentaires faisaient partie intégrante des actualités publiées et, de plus, seule Delfi pouvait les administrer. De surcroît, à l'époque où les décisions de justice internes ont été rendues dans l'affaire *Delfi*, il aurait été plus que clair que les médias sur Internet avaient une large influence sur le public et que pour protéger la vie privée des tiers, il fallait aussi appliquer les règles de la responsabilité à ces nouveaux médias.

85. Le Gouvernement répète qu'il faut ignorer les références au droit de l'Union européenne et à la loi sur les services de la société de l'information que la société requérante a citées. Il soutient que la Grande Chambre

ne peut que statuer sur le point de savoir si les effets de l'interprétation que les juridictions internes ont donnée de la loi sur les obligations sont compatibles avec l'article 10 § 2 de la Convention, et qu'elle ne peut pas se prononcer sur la législation qu'elles ont jugée inapplicable. Il ajoute que les juridictions internes ont accordé suffisamment d'attention à la question de savoir si la société requérante devait être considérée comme un prestataire de *caching* ou de services d'hébergement, pour conclure que tel n'était pas le cas. En particulier, dans l'hypothèse de l'hébergement, le prestataire de services ne ferait que fournir un service de stockage de données, tandis que les données stockées ainsi que leur insertion, leur modification, leur retrait et leur contenu demeureraient sous le contrôle des utilisateurs du service. Or, dans la zone de commentaires du portail Delfi, les internautes perdraient le contrôle de leurs commentaires dès leur soumission et ils ne pourraient ni les modifier ni les supprimer. Les juridictions internes auraient aussi pris en compte les autres aspects de l'affaire : Delfi aurait choisi les articles et leurs titres, elle aurait invité les lecteurs à laisser des commentaires selon des règles qu'elle aurait fixées elle-même, en vertu desquelles notamment les commentaires devaient avoir un lien avec l'article, elle aurait obtenu des recettes publicitaires d'autant plus élevées que les articles recueillaient des commentaires plus nombreux, et, enfin, elle aurait contrôlé certains commentaires. Sur cette base, les juridictions internes auraient conclu que la société requérante n'avait pas agi simplement en qualité de prestataire de services techniques intermédiaire et ne pouvait pas être qualifiée de fournisseur de mémoire cache ou d'hébergeur. Le Gouvernement ajoute que la CJUE n'a jamais eu à connaître d'une affaire analogue à l'affaire *Delfi* et que, en tout état de cause, même si la jurisprudence de la CJUE, par exemple son arrêt L'Oréal SA et autres, était pertinente en l'espèce, il y aurait lieu de conclure que le rôle joué par Delfi était un rôle actif et que, dès lors, la société requérante ne pouvait bénéficier des exonérations de responsabilité prévues par la directive sur le commerce électronique.

c) Sur l'existence d'un but légitime

86. Le Gouvernement soutient que l'ingérence dans l'exercice par la société requérante des droits protégés par l'article 10 visait un but légitime, à savoir la protection de l'honneur d'autrui.

d) Sur la nécessité dans une société démocratique

87. En ce qui concerne la nécessité de l'ingérence litigieuse dans une société démocratique, le Gouvernement souligne d'emblée l'importance de ménager un juste équilibre entre les droits garantis respectivement par l'article 10 et par l'article 8 de la Convention.

88. Le Gouvernement s'appuie largement sur le raisonnement exposé à cet égard dans l'arrêt de la chambre. De plus, il avance les arguments suivants.

89. Premièrement, en ce qui concerne le contexte des commentaires, le Gouvernement relève que les juridictions internes ont attaché de l'importance au fait que la sélection et la publication des articles d'actualité ainsi que la publication des commentaires des lecteurs dans le même environnement faisaient partie de l'activité professionnelle de publication d'informations exercée par la société requérante. Il ajoute que Delfi invitait les lecteurs à commenter ses articles, au titre souvent provocateur, et qu'elle affichait le nombre de commentaires sur la page principale immédiatement sous le titre de chaque article, en rouge et en gras, de manière à susciter encore plus de commentaires, contributions qui lui rapportaient un revenu publicitaire.

90. Deuxièmement, en ce qui concerne les mesures appliquées par la société requérante, le Gouvernement considère qu'il est important d'assurer la protection des tiers dans le domaine de l'Internet, devenu un moyen de communication de large portée ouvert à la majorité de la population et utilisé quotidiennement. Il ajoute que la responsabilité de la société requérante quant aux commentaires découle aussi à l'évidence du fait que leurs auteurs ne pouvaient ni les modifier ni les supprimer une fois qu'ils étaient publiés sur le portail d'actualités, seul Delfi ayant techniquement les moyens de le faire. Il estime également que tout ce qui est publié sur Internet se répand avec une telle rapidité que des mesures prises quelques semaines ou même quelques jours plus tard pour protéger l'honneur des personnes concernées ne suffisent plus, car, à ce stade, les commentaires injurieux ont déjà atteint le grand public et causé un préjudice. Il précise que sur les plus grands portails d'actualités internationaux, le dépôt de commentaires anonymes (c'est-à-dire de commentaires déposés par des internautes non inscrits) n'est pas permis, et il cite une opinion selon laquelle la tendance est de ne plus permettre l'anonymat. Il indique par ailleurs que les commentaires laissés sous le couvert de l'anonymat sont souvent plus injurieux que ceux qui le sont par des utilisateurs inscrits, et que les propos virulents attirent plus de lecteurs. Il affirme que c'est précisément pour cette raison que Delfi s'est fait connaître.

91. Troisièmement, en ce qui concerne la responsabilité des auteurs de commentaires, le Gouvernement soutient que dans les procédures civiles, lesquelles seraient préférables aux procédures pénales en matière de diffamation, les mesures d'enquête telles que la mise en place d'une surveillance ne sont pas possibles. Quant à la procédure d'administration de preuves avant le procès, il considère qu'il ne s'agit pas d'une solution raisonnable en cas de commentaires anonymes : d'une part, on ne pourrait pas toujours déter-

miner l'adresse IP (Internet Protocol) de l'ordinateur utilisé pour déposer le commentaire, par exemple si les données relatives à l'utilisateur ou le commentaire ont été supprimés ou s'il a été fait usage d'un serveur intermédiaire (proxy) anonyme; d'autre part, même à supposer que l'on parvienne à repérer l'ordinateur utilisé, il pourrait néanmoins se révéler impossible de déterminer quel est l'individu qui a écrit le commentaire, par exemple s'il a utilisé un ordinateur public, un point de connexion (*hotspot*) Wi-Fi, une adresse IP dynamique ou un serveur situé dans un pays étranger, ou encore pour d'autres raisons techniques.

92. Quatrièmement, en ce qui concerne les conséquences de la procédure interne pour la société requérante, le Gouvernement affirme que Delfi n'a pas eu à changer son modèle d'entreprise ni à interdire les commentaires anonymes. Le nombre total de commentaires publiés sur le portail aurait même augmenté – il s'agirait principalement de commentaires anonymes –, alors que Delfi emploierait désormais cinq modérateurs. Le Gouvernement souligne aussi que le constat de responsabilité ne vise pas une condamnation au paiement de dommages et intérêts exemplaires ou punitifs : la somme que Delfi a été condamnée à verser à titre d'indemnisation pour dommage moral serait d'ailleurs dérisoire (320 EUR) et, dans la jurisprudence ultérieure (paragraphe 43 ci-dessus), les tribunaux auraient jugé que le constat d'une violation ou la suppression du commentaire litigieux pouvaient constituer une réparation suffisante. En conclusion, le Gouvernement soutient que le fait que la société requérante ait été jugée civilement responsable n'a pas eu d'« effet inhibiteur » sur la liberté d'expression mais qu'il s'agissait d'une mesure justifiée et proportionnée.

93. Enfin, renvoyant au droit et à la pratique de plusieurs États européens, le Gouvernement arguë qu'il n'y a pas au niveau européen de consensus au sujet de l'exclusion de la responsabilité du propriétaire d'un portail Internet qui agit en tant que prestataire de services de contenu et diffuseur de commentaires anonymes sur ses propres articles, ni même de tendance en ce sens.

C. Observations des parties intervenantes

1. Fondation Helsinki pour les droits de l'homme

94. La Fondation Helsinki pour les droits de l'homme de Varsovie souligne que des différences distinguent Internet et les médias traditionnels. Elle estime que les prestataires de services en ligne tels que Delfi jouent simultanément deux rôles : d'une part, celui de prestataire de services de contenu en ce qui concerne les articles qu'ils publient, et, d'autre part, celui de prestataire de services d'hébergement en ce qui concerne les commentaires

laissés par les tiers. Elle avance que la modération du contenu généré par les internautes et le pouvoir de bloquer l'accès à ce contenu ne doivent pas être considérés comme l'exercice d'un contrôle éditorial effectif. Les prestataires de services intermédiaires ne devraient pas selon elle être assimilés à des médias traditionnels ni soumis au même régime de responsabilité que ceux-ci.

95. La Fondation Helsinki est d'avis que ce sont les auteurs des commentaires diffamatoires qui doivent avoir à en répondre, et que l'État devrait fixer un cadre réglementaire qui permette d'identifier et de poursuivre les auteurs d'infractions en ligne. Pour autant, elle estime que la possibilité de publier anonymement du contenu sur Internet doit être considérée comme précieuse.

2. Organisation non gouvernementale Article 19

96. L'organisation Article 19 estime que l'une des caractéristiques les plus novatrices d'Internet est la facilité avec laquelle tout un chacun peut, grâce à ce média, faire part de ses opinions au monde entier sans avoir à obtenir préalablement l'approbation d'un éditeur. Les plateformes de commentaires permettraient et encourageraient le débat public sous sa forme la plus pure et cela n'aurait guère de rapport avec la communication d'informations sur l'actualité. Dans les faits comme dans la forme, les zones de commentaires des sites web d'actualités devraient plutôt être considérées comme un signe que les journaux s'approprient le modèle de débat privé né sur Internet, et non l'inverse. Article 19 estime qu'en rendant les sites web responsables des commentaires déposés par les utilisateurs, on leur imposerait une charge inacceptable.

97. Selon Article 19, la directive sur le commerce électronique a été conçue pour empêcher que les sites web soient jugés responsables des commentaires laissés par leurs visiteurs, quelle qu'en soit la teneur. Article 19 considère que, si les sites d'actualités en ligne doivent demeurer soumis aux règles normales de la responsabilité pour les articles qu'ils publient, en revanche, en ce qui concerne leurs zones de commentaires, ils doivent être considérés comme des hébergeurs et non comme des éditeurs. En tant qu'hébergeurs, ils ne devraient pas en principe, à son avis, voir leur responsabilité engagée à raison du contenu généré par des internautes lorsqu'ils n'ont pas participé directement à la modification de ce contenu. Article 19 considère que les hébergeurs ne devraient pas être jugés responsables lorsqu'ils ont pris toutes mesures raisonnables pour retirer un contenu dès notification, ni être automatiquement jugés responsables au simple motif qu'ils ont décidé de ne pas retirer un commentaire qui leur a été signalé.

3. Access

98. Selon Access, le recours à l'anonymat et à des pseudonymes favorise l'exercice des droits fondamentaux que sont le droit à la vie privée et le droit à la liberté d'expression. À son avis, une interdiction réglementaire de l'usage anonyme d'Internet constituerait une atteinte au droit au respect de la vie privée et au droit à la liberté d'expression protégés par les articles 8 et 10 de la Convention, et frapper de restrictions générales la possibilité de s'exprimer sous le couvert de l'anonymat ou d'un pseudonyme porterait atteinte à l'essence même de ces droits. Access mentionne aussi une ligne de jurisprudence qui, dans plusieurs pays, protège depuis longtemps le droit à la communication anonyme, en ligne et hors ligne.

99. De plus, Access souligne que les services destinés à offrir une plus grande confidentialité et un anonymat accru sur Internet ont gagné en popularité à la suite des révélations faisant état d'une surveillance massive des utilisateurs de services connectés. Elle ajoute que restreindre l'expression sur Internet aux personnes identifiées nuirait à l'économie numérique. Elle cite à cet égard des recherches qui ont conclu que les plus importants contributeurs en ligne étaient ceux qui utilisaient des pseudonymes.

100. En ce qui concerne l'obligation pour l'internaute d'utiliser sa véritable identité, Access indique que l'application de cette mesure en Chine a provoqué une baisse spectaculaire du nombre de commentaires publiés. Par ailleurs, l'expérience aurait démontré en Corée du Sud que cette obligation ne permettait pas d'améliorer les commentaires de façon significative, mais qu'elle entraînait une discrimination à l'égard des entreprises Internet locales, les internautes se tournant en pareil cas vers des plateformes internationales continuant d'autoriser la publication de commentaires de manière anonyme ou sous pseudonyme.

4. Media Legal Defence Initiative

101. Media Legal Defence Initiative (MLDI) a communiqué des observations au nom de vingt-huit organisations non gouvernementales et éditeurs de médias. Elle note que la grande majorité des médias en ligne permettent aux lecteurs de réagir au contenu publié. Grâce à la possibilité de déposer des commentaires, les lecteurs pourraient débattre de l'actualité entre eux et avec les journalistes. Ainsi, les médias ne seraient plus un flux de communication à sens unique, mais ils deviendraient une forme de discours participatif qui donnerait la parole au lecteur et permettrait l'expression de différents points de vue.

102. MLDI note que la frontière entre accès et contenu tend à s'estomper et que les « intermédiaires » comprennent les services de recherche

améliorée, les sites de vente et d'achat en ligne, les applications web 2.0 et les sites de réseaux sociaux. Du point de vue des utilisateurs, tous ces services faciliteraient l'accès au contenu et son utilisation, et ils seraient d'une importance cruciale pour l'exercice du droit à la liberté d'expression.

103. MLDI soutient qu'il appartient aux États de mettre en place un cadre réglementaire qui protège et promeuve la liberté d'expression tout en garantissant d'autres droits et intérêts. Cette organisation présente en détail le cadre réglementaire instauré pour la responsabilité des intermédiaires aux États-Unis et dans l'Union européenne. Elle note que l'approche américaine et l'approche européenne sont distinctes mais néanmoins similaires en ce qu'elles reconnaissent toutes deux qu'un certain niveau de protection des intermédiaires est crucial et que les intermédiaires ne sont pas tenus de contrôler le contenu généré par les internautes. Elle note aussi que dans certains États membres, les procédures de retrait sur notification ont conduit à l'imposition aux intermédiaires d'une responsabilité excessive et au retrait de contenus légitimes.

104. MLDI présente également les bonnes pratiques qui apparaissent dans le domaine de la régulation par les médias de contenus créés par les internautes. Elle souligne que la majorité des publications en Amérique du Nord et en Europe ne filtrent pas et ne contrôlent pas les commentaires avant leur mise en ligne, mais appliquent une modération *a posteriori*. De nombreux médias en ligne utiliseraient aussi des logiciels de filtrage et recourraient à des mécanismes destinés à bloquer la possibilité de déposer des commentaires pour les internautes qui enfreignent les règles de manière répétée. La majorité des médias en ligne, parmi lesquels de grands portails d'actualités européens, imposeraient aux internautes souhaitant laisser un commentaire de s'inscrire, mais non de révéler leur véritable identité.

5. EDiMA, CCIA Europe et EuroISPA

105. La European Digital Media Association (EDiMA), la Computer & Communications Industry Association (CCIA Europe) et EuroISPA, un groupement paneuropéen d'associations de prestataires de services Internet européens, ont communiqué des observations conjointes.

106. Ces associations indiquent qu'il se dégage à ce jour de la loi, des accords internationaux et des recommandations internationales un équilibre en vertu duquel, premièrement, la responsabilité des prestataires de services d'hébergement ne peut pas être engagée à raison de contenus dont ils n'ont pas « effectivement connaissance », et deuxièmement, les États ne peuvent imposer aux prestataires de services d'hébergement l'obligation de procéder à un contrôle général du contenu.

107. Elles notent que même si une partie de l'information mise en ligne provient de sources classiques telles que les journaux, et est régie à juste titre par le droit applicable aux éditeurs, une quantité importante du contenu mis en ligne provient plutôt d'individus qui peuvent ainsi exposer leur point de vue sans devoir passer par les sociétés d'édition classiques. Les forums de commentaires seraient fondamentalement différents des publications traditionnelles en ce que, contrairement à celles-ci, ils permettraient d'exercer un droit de réponse.

108. Les intervenantes estiment que, d'un point de vue technologique, on ne peut pas distinguer les techniques et procédures de fonctionnement d'un forum de discussion sur les actualités en ligne comme celui de Delfi de celles des services d'hébergement tels que les plateformes de médias/de réseaux sociaux, les blogs/microblogs et les autres sites du même type. Le contenu créé et mis en ligne par les internautes serait rendu public automatiquement sans intervention humaine. Pour bien des hébergeurs, des considérations d'échelle rendraient en pratique impossible l'exercice d'une surveillance humaine en amont de tout le contenu déposé par les internautes. Pour les petits sites web et les jeunes entreprises (*start-up*), le contrôle du contenu risquerait d'être extrêmement difficile et d'un coût prohibitif.

109. Les intervenantes indiquent que le cadre juridique et pratique de l'hébergement de contenu sur Internet dans le droit de l'Union européenne et différents droits nationaux prévoit un système de retrait sur notification. Cet équilibre des responsabilités entre internautes et hébergeurs permettrait aux plateformes de repérer et de retirer les propos diffamatoires et autres propos illicites tout en laissant aux internautes la possibilité de discuter à loisir de sujets polémiques faisant l'objet d'un débat public ; il rendrait l'exploitation de plateformes de discussion possible à grande échelle.

D. Appréciation de la Cour

1. Remarques préliminaires et portée de l'appréciation de la Cour

110. La Cour note d'emblée que la possibilité pour les individus de s'exprimer sur Internet constitue un outil sans précédent d'exercice de la liberté d'expression. C'est là un fait incontesté, comme elle l'a reconnu en plusieurs occasions (*Ahmet Yıldırım c. Turquie*, n° 3111/10, § 48, CEDH 2012, et *Times Newspapers Ltd c. Royaume-Uni (nos 1 et 2)*, nos 3002/03 et 23676/03, § 27, CEDH 2009). Cependant, les avantages de ce média s'accompagnent d'un certain nombre de risques. Des propos clairement illicites, notamment des propos diffamatoires, haineux ou appelant à la violence, peuvent être diffusés comme jamais auparavant dans le monde entier, en quelques secondes, et parfois demeurer en ligne pendant fort longtemps. Ce sont ces

deux réalités contradictoires qui sont au cœur de la présente affaire. Compte tenu de la nécessité de protéger les valeurs qui sous-tendent la Convention et considérant que les droits qu'elle protège respectivement en ses articles 10 et 8 méritent un égal respect, il y a lieu de ménager un équilibre qui préserve l'essence de l'un et l'autre de ces droits. Ainsi, tout en reconnaissant les avantages importants qu'Internet présente pour l'exercice de la liberté d'expression, la Cour considère qu'il faut en principe conserver la possibilité pour les personnes lésées par des propos diffamatoires ou par d'autres types de contenu illicite d'engager une action en responsabilité de nature à constituer un recours effectif contre les violations des droits de la personnalité.

111. Sur ce fondement, et considérant en particulier que c'est la première fois qu'elle est appelée à examiner un grief s'inscrivant dans ce domaine d'innovation technologique en évolution, la Cour juge nécessaire de délimiter la portée de son examen à la lumière des faits de la présente cause.

112. Premièrement, la Cour observe que la Cour d'État (au paragraphe 14 de son arrêt du 10 juin 2009, repris au paragraphe 31 ci-dessus) s'est exprimée ainsi : « [l]a publication d'actualités et de commentaires sur un portail Internet est aussi une activité journalistique. Cependant, la nature des médias sur Internet fait que l'on ne peut raisonnablement exiger d'un exploitant de portail qu'il édite les commentaires avant de les publier comme si son site était une publication de la presse écrite. Si l'éditeur [d'une publication de la presse écrite] est, parce qu'il les soumet à un contrôle éditorial, à l'origine de la publication des commentaires, sur un portail Internet en revanche, ce sont les auteurs des commentaires qui sont à l'origine de leur publication et qui les rendent accessibles au grand public par l'intermédiaire du portail. L'exploitant du portail n'est donc pas la personne à qui l'information est révélée. Néanmoins, en raison de l'intérêt économique que représente pour eux la publication de commentaires, aussi bien l'éditeur de publications imprimées que l'exploitant d'un portail Internet sont les publicateurs/révélateurs de ces commentaires en qualité de professionnels. »

113. La Cour ne voit pas de raisons de remettre en question la distinction établie par les juges de la Cour d'État dans ce raisonnement. Au contraire, elle estime que le point de départ de leur réflexion, à savoir la reconnaissance des différences entre un exploitant de portail et un éditeur traditionnel, est conforme aux instruments internationaux adoptés dans ce domaine, instruments dans lesquels on perçoit une certaine évolution en faveur de l'établissement d'une distinction entre les principes juridiques régissant les activités des médias imprimés et audiovisuels classiques, d'une part, et les activités des médias sur Internet, d'autre part. Dans la récente recommandation du Comité des Ministres aux États membres du Conseil

de l'Europe sur une nouvelle conception des médias, cette distinction est formulée en termes d'« approche différenciée et graduelle [dans le cadre de laquelle] chaque acteur dont les services sont considérés comme un média ou une activité intermédiaire ou auxiliaire bénéficie à la fois de la forme (différenciée) et du niveau (graduel) appropriés de protection, et les responsabilités sont également délimitées conformément à l'article 10 de la Convention européenne des droits de l'homme et à d'autres normes pertinentes élaborées par le Conseil de l'Europe » (paragraphe 7 de l'annexe à la recommandation CM/Rec(2011)7, repris au paragraphe 46 ci-dessus). Dès lors, la Cour considère qu'en raison de la nature particulière de l'Internet, les « devoirs et responsabilités » que doit assumer un portail d'actualités sur Internet aux fins de l'article 10 peuvent dans une certaine mesure différer de ceux d'un éditeur traditionnel en ce qui concerne le contenu fourni par des tiers.

114. Deuxièmement, la Cour observe que la Cour d'État a déclaré : « L'appréciation juridique que les juridictions [inférieures] ont faite des vingt commentaires dénigrants est fondée. C'est à bon droit qu'elles ont conclu que ces commentaires étaient diffamatoires, car ils étaient grossiers et attentatoires à la dignité humaine et contenaient des menaces » (paragraphe 15 de l'arrêt, repris au paragraphe 31 ci-dessus). La haute juridiction a répété, au paragraphe 16 de son arrêt, que les commentaires en question portaient atteinte à la « dignité humaine » et étaient « clairement illicites ». La Cour note que cette qualification et cette analyse de la nature illicite des commentaires (paragraphe 18 ci-dessus) reposent à l'évidence sur le fait que la majorité d'entre eux s'analysent au premier coup d'œil en une incitation à la haine ou à la violence contre L.

115. Aussi la Cour considère-t-elle que l'affaire concerne les « devoirs et responsabilités », au sens de l'article 10 § 2 de la Convention, qui incombent aux portails d'actualités sur Internet lorsqu'ils fournissent à des fins commerciales une plateforme destinée à la publication de commentaires émanant d'internautes sur des informations précédemment publiées et que certains internautes – qu'ils soient identifiés ou anonymes – y déposent des propos clairement illicites portant atteinte aux droits de la personnalité de tiers et constituant un discours de haine et une incitation à la violence envers ces tiers. La Cour souligne que la présente affaire concerne un grand portail d'actualités sur Internet exploité à titre professionnel et à des fins commerciales, qui publie des articles sur l'actualité rédigés par ses services et qui invite les lecteurs à les commenter.

116. Dès lors, la présente affaire ne concerne pas d'autres types de forums sur Internet susceptibles de publier des commentaires provenant d'internautes, par exemple les forums de discussion ou les sites de diffusion

électronique, où les internautes peuvent exposer librement leurs idées sur n'importe quel sujet sans que la discussion ne soit canalisée par des interventions du responsable du forum, ou encore les plateformes de médias sociaux où le fournisseur de la plateforme ne produit aucun contenu et où le fournisseur de contenu peut être un particulier administrant un site ou un blog dans le cadre de ses loisirs.

117. De plus, la Cour rappelle que le portail d'actualités de la société requérante était l'un des plus grands médias sur Internet du pays ; il recueillait une large audience et la nature polémique des commentaires qui y étaient déposés était le sujet de préoccupations exprimées publiquement (paragraphe 15 ci-dessus). En outre, comme cela a été souligné plus haut, les commentaires en cause en l'espèce, ainsi qu'en a jugé la Cour d'État, consistaient principalement en un discours de haine et en des propos appelant directement à la violence. Ainsi, il n'était pas nécessaire de les soumettre à une analyse linguistique ou juridique pour établir qu'ils étaient illicites : l'illicéité apparaissait au premier coup d'œil. Cela étant posé, la Cour va procéder à l'examen du grief de la société requérante.

2. Sur l'existence d'une ingérence

118. La Cour note qu'il n'est pas controversé entre les parties que les décisions des juridictions internes ont constitué une ingérence dans l'exercice par la société requérante de son droit à la liberté d'expression garanti par l'article 10 de la Convention. Elle ne voit pas de raisons de conclure différemment.

119. Pour être conforme à la Convention, cette ingérence devait être « prévue par la loi », poursuivre un ou plusieurs buts légitimes au sens du paragraphe 2 de l'article 10, et être « nécessaire dans une société démocratique ».

3. Sur la légalité de l'ingérence

120. La Cour rappelle que les mots « prévue par la loi » contenus au deuxième paragraphe de l'article 10 non seulement imposent que la mesure incriminée ait une base légale en droit interne, mais visent aussi la qualité de la loi en cause : ainsi, celle-ci doit être accessible aux justiciables et prévisible dans ses effets (voir, parmi d'autres, *VgT Verein gegen Tierfabriken c. Suisse*, n° 24699/94, § 52, CEDH 2001-VI, *Rotaru c. Roumanie* [GC], n° 28341/95, § 52, CEDH 2000-V, *Gawęda c. Pologne*, n° 26229/95, § 39, CEDH 2002-II, et *Maestri c. Italie* [GC], n° 39748/98, § 30, CEDH 2004-I). Toutefois, il appartient au premier chef aux autorités nationales, notamment aux tribunaux, d'interpréter et d'appliquer le droit interne (*Centro Europa 7 S.r.l. et Di Stefano c. Italie* [GC], n° 38433/09, § 140, CEDH 2012, *Kruslin*

c. France, 24 avril 1990, § 29, série A n° 176-A, et *Kopp c. Suisse*, 25 mars 1998, § 59, *Recueil des arrêts et décisions* 1998-II).

121. L'une des exigences qui découlent de l'expression « prévue par la loi » est la prévisibilité. Ainsi, on ne peut considérer comme une « loi » au sens de l'article 10 § 2 qu'une norme énoncée avec assez de précision pour permettre au citoyen de régler sa conduite ; en s'entourant au besoin de conseils éclairés, il doit être à même de prévoir, à un degré raisonnable dans les circonstances de la cause, les conséquences qui peuvent découler d'un acte déterminé. Les conséquences n'ont pas besoin d'être prévisibles avec une certitude absolue. La certitude, bien que souhaitable, s'accompagne parfois d'une rigidité excessive ; or le droit doit pouvoir s'adapter aux changements de situation. Aussi beaucoup de lois se servent-elles, par la force des choses, de formules plus ou moins vagues dont l'interprétation et l'application dépendent de la pratique (voir, par exemple, *Lindon, Otchakovsky-Laurens et July c. France* [GC], n^os^ 21279/02 et 36448/02, § 41, CEDH 2007-IV, et *Centro Europa 7 S.r.l. et Di Stefano*, précité, § 141).

122. Le niveau de précision de la législation interne – qui ne peut en aucun cas prévoir toutes les hypothèses – dépend dans une large mesure du contenu de la loi en question, du domaine qu'elle est censée couvrir et du nombre et du statut de ceux à qui elle s'adresse (*Centro Europa 7 S.r.l. et Di Stefano*, précité, § 142). La Cour a déjà dit par le passé que l'on peut attendre des professionnels, habitués à devoir faire preuve d'une grande prudence dans l'exercice de leur métier, qu'ils mettent un soin particulier à évaluer les risques qu'il comporte (*Lindon, Otchakovsky-Laurens et July*, précité, § 41, avec les références à *Cantoni c. France*, 15 novembre 1996, § 35, *Recueil* 1996-V, et *Chauvy et autres c. France*, n° 64915/01, §§ 43-45, CEDH 2004-VI).

123. En l'espèce, les parties ne s'entendent pas sur le point de savoir si l'ingérence dans l'exercice par la société requérante de son droit à la liberté d'expression était « prévue par la loi ». La société requérante soutient qu'aucune règle de droit interne ne prévoyait qu'un intermédiaire soit considéré comme l'éditeur professionnel des commentaires déposés par des tiers sur son site web, qu'il ait ou non connaissance de leur teneur précise. Elle arguë au contraire que tant la législation interne que la législation européenne sur les prestataires de services Internet interdisaient expressément de tenir ceux-ci pour responsables à raison du contenu mis en ligne par des tiers.

124. Le Gouvernement renvoie pour sa part aux dispositions pertinentes du droit civil et à la jurisprudence nationale, en vertu desquelles les éditeurs de médias sont selon lui responsables de leurs publications au même titre que les auteurs de celles-ci. Il ajoute qu'il n'existe aucune jurisprudence sur la base de laquelle la société requérante pouvait présumer que, parce que

ses publications s'inscrivaient dans le cadre des nouveaux médias, le propriétaire d'un portail d'actualités sur Internet n'était pas responsable des commentaires suscités par ses articles. Il estime que la Cour devrait partir des faits établis et du droit appliqué et interprété par les juridictions internes et ne pas tenir compte des références faites par la société requérante au droit de l'Union européenne. Il considère d'ailleurs que les dispositions du droit de l'Union européenne invoquées par la société requérante confirment en réalité les interprétations et conclusions des juridictions internes.

125. La Cour relève que la différence de vues entre les parties en ce qui concerne le droit à appliquer découle de leur divergence d'opinions quant à la façon de classer la société requérante. Celle-ci estime qu'elle devrait être qualifiée d'intermédiaire pour ce qui est des commentaires déposés par des tiers, tandis que le Gouvernement pense qu'elle doit être considérée comme un éditeur de médias, y compris à l'égard de ces commentaires.

126. La Cour observe (paragraphes 112-113 ci-dessus) que la Cour d'État a reconnu les différences entre les rôles respectifs d'un éditeur de publications imprimées et d'un exploitant de portail Internet pratiquant la publication de médias à des fins commerciales, mais qu'elle a aussi jugé que, en raison de « l'intérêt économique que représente pour eux la publication de commentaires, aussi bien l'éditeur de publications imprimées que l'exploitant d'un portail Internet sont les publicateurs/révélateurs de ces commentaires en qualité de professionnels » aux fins de l'article 1047 de la loi sur les obligations (paragraphe 14 de son arrêt, repris au paragraphe 31 ci-dessus).

127. La Cour considère que, en substance, la société requérante arguë que les juridictions internes n'auraient pas dû appliquer aux faits de la cause les dispositions générales de la loi sur les obligations mais les dispositions de la législation interne et européenne relatives aux prestataires de services Internet. Comme la chambre, la Grande Chambre rappelle dans ce contexte qu'il ne lui appartient pas de se substituer aux juridictions internes. C'est au premier chef aux autorités nationales, notamment aux tribunaux, qu'il appartient d'interpréter et d'appliquer le droit interne (voir, entre autres, *Centro Europa 7 S.r.l. et Di Stefano*, précité, § 140, et *Rekvényi c. Hongrie* [GC], n° 25390/94, § 35, CEDH 1999-III). La Cour réaffirme également que ce n'est pas à elle de se prononcer sur l'opportunité des techniques choisies par le législateur d'un État défendeur pour réglementer tel ou tel domaine ; son rôle se limite à vérifier si les méthodes adoptées et les conséquences qu'elles entraînent sont en conformité avec la Convention (*Gorzelik et autres c. Pologne* [GC], n° 44158/98, § 67, CEDH 2004-I). Ainsi, elle se bornera à rechercher si l'application faite par la Cour d'État des dispositions

générales de la loi sur les obligations à la situation de la société requérante était prévisible aux fins de l'article 10 § 2 de la Convention.

128. Sur le fondement des dispositions pertinentes de la Constitution, de la loi sur les principes généraux du code civil et de la loi sur les obligations (paragraphes 33 à 38 ci-dessus) telles qu'interprétées et appliquées par les juridictions internes, la société requérante a été considérée comme une société d'édition et jugée responsable de la publication des commentaires clairement illicites. Les juridictions internes ont choisi d'appliquer ces normes après avoir conclu que la réglementation spéciale contenue dans la loi sur les services de la société de l'information transposant en droit estonien la directive sur le commerce électronique ne trouvait pas à s'appliquer en l'espèce car cette directive concernait les activités à caractère purement technique, automatique et passif, ce qui n'était pas le cas selon elles de celles de la société requérante, et que l'objectif de cette dernière n'était pas simplement la prestation d'un service d'intermédiaire (paragraphe 13 de l'arrêt de la Cour d'État repris au paragraphe 31 ci-dessus). Dans ce contexte particulier, la Cour tient compte du fait que certains pays ont reconnu que l'importance et la complexité de la question, qui impliquent de ménager un juste équilibre entre différents intérêts et droits fondamentaux, appellent l'adoption de règles spécifiques pour les situations telles que celle en jeu en l'espèce (paragraphe 58 ci-dessus). Cette démarche va dans le sens de l'« approche différenciée et graduelle » des règles régissant les nouveaux médias recommandée par le Conseil de l'Europe (paragraphe 46 ci-dessus) et elle est étayée par la jurisprudence de la Cour (voir, *mutatis mutandis*, *Comité de rédaction de* Pravoye Delo *et Shtekel c. Ukraine*, n° 33014/05, §§ 63-64, CEDH 2011). Cependant, bien qu'il soit possible de suivre différentes approches dans la législation pour tenir compte de la nature des nouveaux médias, la Cour estime que, dans les circonstances de l'espèce, il était prévisible, à partir des dispositions de la Constitution, de la loi sur les principes généraux du code civil et de la loi sur les obligations, lues à la lumière de la jurisprudence pertinente, qu'un éditeur de médias exploitant un portail d'actualités sur Internet à des fins commerciales pût, en principe, voir sa responsabilité engagée en droit interne pour la mise en ligne sur son portail de commentaires clairement illicites tels que ceux en cause en l'espèce.

129. La Cour conclut donc que, en tant qu'éditrice professionnelle, la société requérante aurait dû connaître la législation et la jurisprudence, et qu'elle aurait aussi pu solliciter un avis juridique. Elle observe dans ce contexte que le portail d'actualités Delfi est l'un des plus grands d'Estonie. Des préoccupations avaient déjà été exprimées publiquement avant la publication des commentaires en cause en l'espèce, et le ministre de la

Justice avait alors déclaré que les victimes d'injures pouvaient engager une action en dommages et intérêts contre Delfi (paragraphe 15 ci-dessus). La Cour considère en conséquence que la société requérante était en mesure d'apprécier les risques liés à ses activités et qu'elle devait être à même de prévoir, à un degré raisonnable, les conséquences susceptibles d'en découler. L'ingérence litigieuse était donc « prévue par la loi » au sens du paragraphe 2 de l'article 10 de la Convention.

4. Sur l'existence d'un but légitime

130. Les parties devant la Grande Chambre ne contestent pas que la restriction apportée à la liberté d'expression de la société requérante poursuivait le but légitime consistant à protéger la réputation et les droits d'autrui. La Cour ne voit pas de raisons de conclure autrement.

5. Sur la nécessité dans une société démocratique

a) Principes généraux

131. Les principes fondamentaux en ce qui concerne le caractère « nécessaire dans une société démocratique » d'une ingérence dans l'exercice de la liberté d'expression sont bien établis dans la jurisprudence de la Cour et se résument comme suit (voir, entre autres, *Hertel c. Suisse*, 25 août 1998, § 46, *Recueil* 1998-VI, *Steel et Morris c. Royaume-Uni*, n° 68416/01, § 87, CEDH 2005-II, *Mouvement raëlien suisse c. Suisse* [GC], n° 16354/06, § 48, CEDH 2012, et *Animal Defenders International c. Royaume-Uni* [GC], n° 48876/08, § 100, CEDH 2013) :

> « i. La liberté d'expression constitue l'un des fondements essentiels d'une société démocratique, l'une des conditions primordiales de son progrès et de l'épanouissement de chacun. Sous réserve du paragraphe 2 de l'article 10, elle vaut non seulement pour les « informations » ou « idées » accueillies avec faveur ou considérées comme inoffensives ou indifférentes, mais aussi pour celles qui heurtent, choquent ou inquiètent : ainsi le veulent le pluralisme, la tolérance et l'esprit d'ouverture sans lesquels il n'est pas de « société démocratique ». Telle que la consacre l'article 10, elle est assortie d'exceptions qui appellent toutefois une interprétation étroite, et le besoin de la restreindre doit se trouver établi de manière convaincante (...)
>
> ii. L'adjectif « nécessaire », au sens de l'article 10 § 2, implique un « besoin social impérieux ». Les États contractants jouissent d'une certaine marge d'appréciation pour juger de l'existence d'un tel besoin, mais elle se double d'un contrôle européen portant à la fois sur la loi et sur les décisions qui l'appliquent, même quand elles émanent d'une juridiction indépendante. La Cour a donc compétence pour statuer en dernier lieu sur le point de savoir si une « restriction » se concilie avec la liberté d'expression que protège l'article 10.

iii. La Cour n'a point pour tâche, lorsqu'elle exerce son contrôle, de se substituer aux juridictions internes compétentes, mais de vérifier sous l'angle de l'article 10 les décisions qu'elles ont rendues en vertu de leur pouvoir d'appréciation. Il ne s'ensuit pas qu'elle doive se borner à rechercher si l'État défendeur a usé de ce pouvoir de bonne foi, avec soin et de façon raisonnable : il lui faut considérer l'ingérence litigieuse à la lumière de l'ensemble de l'affaire pour déterminer si elle était « proportionnée au but légitime poursuivi » et si les motifs invoqués par les autorités nationales pour la justifier apparaissent « pertinents et suffisants » (...) Ce faisant, la Cour doit se convaincre que les autorités nationales ont appliqué des règles conformes aux principes consacrés à l'article 10 et ce, de surcroît, en se fondant sur une appréciation acceptable des faits pertinents (...) »

132. La Cour a aussi souligné le rôle essentiel que joue la presse dans une société démocratique : si elle ne doit pas franchir certaines limites, tenant notamment à la protection de la réputation et des droits d'autrui ainsi qu'à la nécessité d'empêcher la divulgation d'informations confidentielles, il lui incombe néanmoins de communiquer, dans le respect de ses devoirs et de ses responsabilités, des informations et des idées sur toutes les questions d'intérêt public (*Jersild c. Danemark*, 23 septembre 1994, § 31, série A n° 298, *De Haes et Gijsels c. Belgique*, 24 février 1997, § 37, *Recueil* 1997-I, et Bladet Tromsø *et Stensaas c. Norvège* [GC], n° 21980/93, § 58, CEDH 1999-III). Par ailleurs, la liberté journalistique comprend aussi le recours possible à une certaine dose d'exagération, voire même de provocation (*Prager et Oberschlick c. Autriche*, 26 avril 1995, § 38, série A n° 313, et Bladet Tromsø *et Stensaas*, précité, § 59). Les limites de la critique admissible sont plus larges à l'égard du gouvernement ou d'une personnalité politique que d'un simple particulier (voir, par exemple, *Castells c. Espagne*, 23 avril 1992, § 46, série A n° 236, *Incal c. Turquie*, 9 juin 1998, § 54, *Recueil* 1998-IV, et *Tammer c. Estonie*, n° 41205/98, § 62, CEDH 2001-I).

133. De plus, la Cour a déjà dit que grâce à leur accessibilité ainsi qu'à leur capacité à conserver et à diffuser de grandes quantités de données, les sites Internet contribuent grandement à améliorer l'accès du public à l'actualité et, de manière générale, à faciliter la communication de l'information (*Ahmet Yıldırım*, précité, § 48, et *Times Newspapers Ltd*, précité, § 27). Dans le même temps, les communications en ligne et leur contenu risquent assurément bien plus que la presse de porter atteinte à l'exercice et à la jouissance des droits et libertés fondamentaux, en particulier du droit au respect de la vie privée (*Comité de rédaction de* Pravoye Delo *et Shtekel*, précité, § 63).

134. S'agissant des « devoirs et responsabilités » d'un journaliste, l'impact potentiel du média concerné revêt de l'importance et l'on s'accorde à dire que les médias audiovisuels ont des effets souvent beaucoup plus immédiats et puissants que la presse écrite (*Purcell et autres c. Irlande*, n° 15404/89,

décision de la Commission du 16 avril 1991, Décisions et rapports 70, p. 262). Un compte rendu objectif et équilibré peut emprunter des voies fort diverses en fonction entre autres du média dont il s'agit (*Jersild*, précité, § 31).

135. Par ailleurs, « sanctionner un journaliste pour avoir aidé à la diffusion de déclarations émanant d'un tiers dans un entretien entraverait gravement la contribution de la presse aux discussions de problèmes d'intérêt général et ne saurait se concevoir sans raisons particulièrement sérieuses » (*Jersild*, précité, § 35, *Thoma c. Luxembourg*, n° 38432/97, § 62, CEDH 2001-III, et, *mutatis mutandis*, *Verlagsgruppe News GmbH c. Autriche*, n° 76918/01, § 31, 14 décembre 2006, et *Print Zeitungsverlag GmbH c. Autriche*, n° 26547/07, § 39, 10 octobre 2013).

136. De plus, la Cour a déjà dit qu'en vertu de l'article 17 de la Convention, le discours incompatible avec les valeurs proclamées et garanties par la Convention n'est pas protégé par l'article 10. Les exemples de pareil discours dont elle a eu à connaître comprennent des propos niant l'Holocauste, justifiant une politique pronazie, associant tous les musulmans à un acte grave de terrorisme, ou qualifiant les Juifs de source du mal en Russie (*Lehideux et Isorni c. France*, 23 septembre 1998, §§ 47 et 53, *Recueil* 1998-VII, *Garaudy c. France* (déc.), n° 65831/01, CEDH 2003-IX, *Norwood c. Royaume-Uni* (déc.), n° 23131/03, CEDH 2004-XI, *Witzsch c. Allemagne* (déc.), n° 7485/03, 13 décembre 2005, et *Pavel Ivanov c. Russie* (déc.), n° 35222/04, 20 février 2007).

137. La Cour rappelle aussi que le droit à la protection de la réputation est un droit qui relève, en tant qu'élément du droit au respect de la vie privée, de l'article 8 de la Convention (*Chauvy et autres*, précité, § 70, *Pfeifer c. Autriche*, n° 12556/03, § 35, 15 novembre 2007, et *Polanco Torres et Movilla Polanco c. Espagne*, n° 34147/06, § 40, 21 septembre 2010). Cependant, pour que l'article 8 trouve à s'appliquer, l'atteinte à la réputation doit atteindre un certain seuil de gravité et avoir été portée de manière à nuire à la jouissance personnelle du droit au respect de la vie privée (*A. c. Norvège*, n° 28070/06, § 64, 9 avril 2009, et *Axel Springer AG c. Allemagne* [GC], n° 39954/08, § 83, 7 février 2012).

138. Lorsqu'elle examine la nécessité dans une société démocratique d'une restriction apportée à la liberté d'expression en vue de la « protection de la réputation ou des droits d'autrui », la Cour peut être amenée à vérifier si les autorités nationales ont ménagé un juste équilibre entre deux valeurs garanties par la Convention et qui peuvent entrer en conflit dans certaines affaires, à savoir, d'une part, la liberté d'expression protégée par l'article 10 et, d'autre part, le droit au respect de la vie privée garanti par l'article 8 (*Hachette Filipacchi Associés c. France*, n° 71111/01, § 43, 14 juin 2007,

MGN Limited c. Royaume-Uni, n° 39401/04, § 142, 18 janvier 2011, et *Axel Springer AG*, précité, § 84).

139. La Cour a déjà dit dans de précédentes affaires que, les droits garantis respectivement par l'article 8 et par l'article 10 méritant par principe un égal respect, l'issue d'une requête ne saurait normalement varier selon qu'elle a été portée devant elle, sous l'angle de l'article 10 de la Convention, par l'éditeur d'un article injurieux, ou, sous l'angle de l'article 8 de la Convention, par la personne faisant l'objet de cet article. Dès lors, la marge d'appréciation doit en principe être la même dans les deux cas (*Axel Springer AG*, précité, § 87, et *Von Hannover c. Allemagne (n° 2)* [GC], n^os^ 40660/08 et 60641/08, § 106, CEDH 2012, avec les références aux affaires *Hachette Filipacchi Associés (ICI PARIS),* n° 12268/03, § 41, 23 juillet 2009, *Timciuc c. Roumanie* (déc.), n° 28999/03, § 144, 12 octobre 2010, et *Mosley c. Royaume-Uni*, n° 48009/08, § 111, 10 mai 2011). Si la mise en balance de ces deux droits par les autorités nationales s'est faite dans le respect des critères établis dans la jurisprudence de la Cour, il faut des raisons sérieuses pour que celle-ci substitue son avis à celui des juridictions internes (*Axel Springer AG*, précité, § 88, et *Von Hannover*, précité, § 107, avec les références à *MGN Limited*, précité, §§ 150 et 155, et *Palomo Sánchez et autres c. Espagne* [GC], n^os^ 28955/06 et 3 autres, § 57, CEDH 2011). En d'autres termes, la Cour reconnaît de façon générale à l'État une ample marge d'appréciation lorsqu'il doit ménager un équilibre entre des intérêts privés concurrents ou différents droits protégés par la Convention (*Evans c. Royaume-Uni* [GC], n° 6339/05, § 77, CEDH 2007-I, *Chassagnou et autres c. France* [GC], n^os^ 25088/94 et 2 autres, § 113, CEDH 1999-III, et *Ashby Donald et autres c. France*, n° 36769/08, § 40, 10 janvier 2013).

b) Application de ces principes en l'espèce

i. Éléments pour l'appréciation de la proportionnalité

140. La Cour note qu'il n'est pas contesté que les commentaires déposés par les lecteurs en réaction à l'article publié sur le portail d'actualités en ligne Delfi, tels qu'ils figuraient dans la zone de commentaires du portail, étaient de nature clairement illicite. La société requérante les a d'ailleurs retirés sur notification de la partie lésée, et elle les a qualifiés devant la chambre d'abusifs et d'illicites (paragraphe 84 de l'arrêt de la chambre). De plus, la Cour juge que la majorité des commentaires litigieux étaient constitutifs d'un discours de haine ou d'une incitation à la violence et que, dès lors, ils n'étaient pas protégés par l'article 10 (paragraphe 136 ci-dessus). La liberté d'expression des auteurs de ces commentaires n'est donc pas en jeu en l'espèce. La question que la Cour est appelée à trancher est plutôt

celle de savoir si les décisions par lesquelles les juridictions internes ont jugé la société requérante responsable de ces commentaires déposés par des tiers ont emporté violation à l'égard de l'intéressée de la liberté de communiquer des informations protégée par l'article 10 de la Convention.

141. La Cour observe que, bien que la société requérante ait retiré les commentaires en question de son site web dès qu'elle a reçu une notification à cet effet des avocats de L. (paragraphes 18 et 19 ci-dessus), la Cour d'État l'a jugée responsable en vertu de la loi sur les obligations au motif qu'elle aurait dû empêcher la publication de commentaires clairement illicites de par leur teneur. À cet égard, la haute juridiction a rappelé qu'en vertu de l'article 1047 § 3 de la loi sur les obligations, la révélation d'informations ou de propos n'est pas considérée comme illicite si l'émetteur ou le destinataire des informations ou propos a un intérêt légitime à leur révélation, et si l'émetteur les a vérifiés avec un soin correspondant à la « gravité de l'atteinte susceptible d'en résulter ». Observant que, une fois les commentaires publiés, la société requérante, qui aurait dû être consciente de leur teneur illicite, ne les avait pas retirés du portail de sa propre initiative, elle a jugé cette inertie illicite, la société requérante n'ayant pas « prouvé qu'elle n'avait pas commis de faute » au sens de l'article 1050 § 1 de la loi sur les obligations (paragraphe 16 de l'arrêt de la Cour d'État repris au paragraphe 31 ci-dessus).

142. À la lumière du raisonnement de la Cour d'État, la Cour doit, conformément à sa jurisprudence constante, déterminer si la décision des juridictions internes de tenir la société requérante pour responsable reposait sur des motifs pertinents et suffisants dans les circonstances particulières de l'espèce (paragraphe 131 ci-dessus). Elle observe que pour trancher la question de savoir si les décisions par lesquelles les juridictions internes ont jugé la société requérante responsable des commentaires déposés par des tiers ont emporté violation de la liberté d'expression de l'intéressée, la chambre s'est appuyée sur les éléments suivants : premièrement le contexte des commentaires, deuxièmement les mesures appliquées par la société requérante pour empêcher la publication de commentaires diffamatoires ou retirer ceux déjà publiés, troisièmement la possibilité que les auteurs des commentaires soient tenus pour responsables plutôt que la société requérante, et quatrièmement les conséquences de la procédure interne pour la société requérante (paragraphes 85 et suivants de l'arrêt de la chambre).

143. La Grande Chambre juge elle aussi ces éléments pertinents aux fins de l'appréciation concrète de la proportionnalité de l'ingérence en cause, compte tenu également de la portée de son examen en l'espèce (paragraphes 112 à 117 ci-dessus).

ii. Le contexte des commentaires

144. En ce qui concerne le contexte des commentaires, la Cour admet que l'article relatif à la compagnie de navigation publié sur le portail d'actualités Delfi était équilibré et exempt de termes injurieux, et que nul n'a allégué au cours de la procédure interne qu'il contînt des déclarations illicites. Elle est par ailleurs consciente du fait que même cet article équilibré sur un sujet apparemment neutre peut provoquer des débats enflammés sur Internet. De plus, elle attache un poids particulier, dans le présent contexte, à la nature du portail d'actualités Delfi. Elle rappelle qu'il s'agissait d'un portail d'actualités sur Internet exploité à titre professionnel dans le cadre d'une activité commerciale, qui visait à recueillir un grand nombre de commentaires sur les articles d'actualité qu'il publiait. Elle observe que la Cour d'État a expressément relevé que la société requérante avait intégré dans son site la zone de commentaires sur la page où les articles d'actualités étaient publiés et qu'elle y invitait les internautes à enrichir les actualités de leurs propres jugements et opinions (commentaires). Relevant que, dans cette zone, la société requérante appelait activement les lecteurs à commenter les articles publiés sur le portail, et que le nombre de commentaires publiés conditionnait le nombre de visites que recevait le portail, lequel conditionnait à son tour les revenus que la société requérante tirait des publicités qu'elle y publiait, la Cour d'État a conclu que les commentaires représentaient un intérêt économique pour la société requérante. La haute juridiction a estimé que le fait que celle-ci ne rédigeait pas elle-même les commentaires n'impliquait pas qu'elle n'avait pas de contrôle sur la zone en question (paragraphe 13 de l'arrêt de la Cour d'État repris au paragraphe 31 ci-dessus).

145. La Cour note aussi à cet égard que la Charte des commentaires du site Delfi indiquait que la société requérante interdisait le dépôt de commentaires sans fondement et/ou hors sujet, contraires aux bonnes pratiques, contenant des menaces, des insultes, des obscénités ou des grossièretés, ou incitant à l'hostilité, à la violence ou à la commission d'actes illégaux. Ces commentaires pouvaient être supprimés et la possibilité pour leurs auteurs d'en laisser d'autres pouvait être restreinte. De plus, les auteurs des commentaires ne pouvaient pas les modifier ou les supprimer une fois qu'ils les avaient déposés sur le portail : seule la société requérante avait les moyens techniques de le faire. À la lumière de ce qui précède et du raisonnement de la Cour d'État, la Grande Chambre conclut comme la chambre qu'il y a lieu de considérer que la société requérante exerçait un contrôle important sur les commentaires publiés sur son portail.

146. En bref, la Cour juge que la Cour d'État a suffisamment établi que le rôle joué par la société requérante dans la publication des commentaires

relatifs à ses articles paraissant sur le portail d'actualités Delfi avait dépassé celui d'un prestataire passif de services purement techniques. Elle conclut donc que la Cour d'État a fondé son raisonnement quant à cette question sur des motifs pertinents au regard de l'article 10 de la Convention.

iii. La responsabilité des auteurs des commentaires

147. En ce qui concerne la question de savoir s'il serait judicieux, dans une affaire telle que la présente espèce, de tenir les auteurs des commentaires eux-mêmes pour responsables en lieu et place du portail d'actualités sur Internet, la Cour prend en compte l'intérêt pour les internautes de ne pas dévoiler leur identité. L'anonymat est de longue date un moyen d'éviter les représailles ou l'attention non voulue. En tant que tel, il est de nature à favoriser grandement la libre circulation des informations et des idées, notamment sur Internet. Pour autant, la Cour ne perd pas de vue la facilité, l'ampleur et la vitesse avec lesquelles les informations sont diffusées sur Internet, et leur caractère persistant après leur publication sur ce média, toutes choses qui peuvent considérablement aggraver les effets des propos illicites circulant sur Internet par rapport à ceux diffusés dans les médias classiques. La Cour renvoie aussi à cet égard à l'arrêt rendu récemment par la CJUE dans l'affaire Google Spain SL et Google Inc., qui concernait, quoique dans un contexte différent, le problème de la présence sur Internet pendant une longue durée de données portant gravement atteinte à la vie privée d'une personne, et où la CJUE avait conclu que les droits fondamentaux de l'individu prévalaient, en règle générale, sur les intérêts économiques de l'exploitant du moteur de recherche et sur les intérêts des autres internautes (paragraphe 56 ci-dessus).

148. La Cour observe que différents degrés d'anonymat sont possibles sur Internet. Un internaute peut être anonyme pour le grand public tout en étant identifiable par un prestataire de services au moyen d'un compte ou de coordonnées, lesquelles peuvent ne pas être vérifiées ou faire l'objet d'une vérification plus ou moins poussée, allant d'une vérification limitée (par exemple grâce à l'activation d'un compte par une adresse électronique ou un compte de réseau social) à l'authentification sécurisée, que ce soit par l'utilisation d'une carte nationale d'identité électronique ou par des données d'authentification bancaire en ligne permettant une identification relativement sûre de l'internaute. Un prestataire de services peut aussi laisser à ses utilisateurs un degré considérable d'anonymat en ne leur demandant pas du tout de s'identifier, auquel cas on ne peut retrouver leur trace – et encore de manière limitée – qu'au moyen des informations conservées par les fournisseurs d'accès à Internet. La communication de telles informations nécessite généralement une injonction des autorités d'enquête ou des auto-

rités judiciaires, et elle est soumise à des conditions restrictives. Elle peut néanmoins être requise dans certaines affaires pour identifier et poursuivre les auteurs d'actes répréhensibles.

149. Ainsi, dans l'affaire *K.U. c. Finlande* (n° 2872/02, § 49, CEDH 2008), qui concernait une infraction de « diffamation » dans le contexte d'allégations relatives à la sexualité d'un mineur, la Cour a dit que « [m]ême si la liberté d'expression et la confidentialité des communications sont des préoccupations primordiales et si les utilisateurs des télécommunications et des services Internet doivent avoir la garantie que leur intimité et leur liberté d'expression seront respectées, cette garantie ne peut être absolue, et elle doit parfois s'effacer devant d'autres impératifs légitimes tels que la défense de l'ordre et la prévention des infractions pénales ou la protection des droits et libertés d'autrui ». La Cour a rejeté l'argument du Gouvernement consistant à dire que le requérant avait la possibilité d'obtenir des dommages et intérêts du fournisseur d'accès à Internet, jugeant que cette voie de réparation n'était pas suffisante dans les circonstances de cette affaire. Elle a précisé qu'il aurait dû y avoir un recours permettant d'identifier l'auteur des faits répréhensibles et de le traduire en justice. Or, à l'époque, le cadre réglementaire de l'État défendeur ne permettait pas d'ordonner au fournisseur d'accès à Internet de divulguer les informations requises à cette fin (*ibidem*, §§ 47 et 49). Même si l'affaire *K.U. c. Finlande* concernait des agissements constitutifs d'une infraction pénale en droit interne et une intrusion dans la vie privée de la victime plus grave que celle en jeu en l'espèce, il ressort à l'évidence du raisonnement tenu par la Cour dans cette affaire que, pour important qu'il soit, l'anonymat sur l'Internet doit néanmoins être mis en balance avec d'autres droits et intérêts.

150. En ce qui concerne l'établissement de l'identité des auteurs de commentaires dans le cadre d'une procédure civile, la Cour note que les parties ne sont pas du même avis quant à la possibilité en pratique d'y parvenir. Sur la base des informations qu'elles lui ont communiquées, elle observe que, dans le cadre de la « procédure d'administration de preuves avant le procès », prévue à l'article 244 du code de procédure civile (paragraphe 40 ci-dessus), les juridictions estoniennes ont fait droit à des demandes introduites par des justiciables qui, s'estimant diffamés, souhaitaient que des journaux en ligne ou des portails d'actualités révèlent les adresses IP des auteurs des commentaires supposément diffamatoires et que les fournisseurs d'accès à Internet des personnes auxquelles ces adresses IP avaient été attribuées divulguent les noms et adresses de ces personnes. Dans les exemples fournis par le Gouvernement, cette démarche a conduit à des résultats mitigés : il a été possible dans certains cas de retrouver l'ordinateur à partir duquel les

commentaires avaient été envoyés, mais dans d'autres cas cela s'est révélé impossible, pour différentes raisons techniques.

151. Selon l'arrêt rendu par la Cour d'État en l'espèce, la personne lésée avait le choix d'engager une action contre la société requérante ou contre les auteurs des commentaires. Les résultats inégaux des mesures visant à établir l'identité des auteurs des commentaires, joints au fait que la société requérante n'avait pas mis en place à cette fin d'instruments qui eussent permis aux éventuelles victimes de discours de haine d'introduire une action efficace contre les auteurs des commentaires, amènent la Cour à conclure que la Cour d'État a fondé son arrêt sur des motifs pertinents et suffisants. La Cour rappelle également dans ce contexte que, dans l'arrêt *Krone Verlag (n° 4)*, elle a jugé que faire peser sur l'entreprise de médias – dont la situation financière est généralement meilleure que celle de l'auteur des propos diffamatoires – le risque de devoir verser une réparation à la personne diffamée ne constituait pas en soi une ingérence disproportionnée dans l'exercice par pareille entreprise de sa liberté d'expression (*Krone Verlag GmbH & Co. KG c. Autriche (n° 4)*, n° 72331/01, § 32, 9 novembre 2006).

iv. Les mesures prises par la société requérante

152. La Cour note que la société requérante affichait sur son site web le nombre de commentaires recueillis par chaque article. Elle estime dès lors que les éditeurs du portail d'actualités ne devaient avoir aucun mal à repérer les endroits où avaient lieu les échanges les plus animés. L'article en cause en l'espèce avait recueilli 185 commentaires, soit apparemment bien plus que la moyenne. La société requérante a retiré les commentaires en question environ six semaines après leur mise en ligne sur le site, sur notification des avocats de la personne visée (paragraphes 17-19 ci-dessus).

153. La Cour observe que la Cour d'État a dit dans son arrêt que, « [e]n raison de son obligation légale de faire en sorte de ne pas porter préjudice à autrui, la [société requérante] aurait dû empêcher la publication de commentaires clairement illicites de par leur teneur », tout en déclarant par ailleurs que, « une fois les commentaires publiés, [et alors qu'elle] aurait dû être consciente de leur teneur illicite, [elle] ne les [avait] pas retirés du portail de sa propre initiative (paragraphe 16 de l'arrêt repris au paragraphe 31 ci-dessus). La haute juridiction n'a donc pas tranché expressément la question de savoir si la société requérante était dans l'obligation d'empêcher la mise en ligne des commentaires sur son site web ou s'il aurait suffi en droit interne qu'elle retirât les commentaires en question sans délai après leur publication pour que sa responsabilité ne fût pas engagée au titre de la loi sur les obligations. La Cour considère que rien dans les motifs sur lesquels la Cour d'État a fondé sa décision entraînant une ingérence dans

les droits de la société requérante garantis par la Convention ne permet de dire qu'elle entendait restreindre les droits de l'intéressée plus que cela n'était nécessaire pour parvenir à l'objectif poursuivi. Sur cette base, et eu égard à la liberté de communiquer des informations consacrée par l'article 10, la Cour partira donc du principe que l'arrêt de la Cour d'État doit être compris comme signifiant que le retrait des commentaires par la société requérante sans délai après leur publication aurait été suffisant pour lui permettre de ne pas être tenue pour responsable en droit interne. En conséquence, et au vu des conclusions qui précèdent (paragraphe 145 ci-dessus), selon lesquelles il y a lieu de considérer que la société requérante exerçait un contrôle important sur les commentaires publiés sur son portail, la Cour n'estime pas que l'imposition à l'intéressée d'une obligation de retirer de son site web, sans délai après leur publication, des commentaires constitutifs d'un discours de haine et d'incitation à la violence, dont on pouvait donc comprendre au premier coup d'œil qu'ils étaient clairement illicites, ait constitué, en principe, une ingérence disproportionnée dans l'exercice par celle-ci de sa liberté d'expression.

154. La question pertinente en l'espèce est donc celle de savoir si la conclusion des juridictions nationales selon laquelle, la société requérante n'ayant pas retiré les commentaires sans délai après leur publication, il était justifié de la tenir pour responsable, reposait sur des motifs pertinents et suffisants. À cet égard, il y a lieu de rechercher tout d'abord si la société requérante avait ou non mis en place des mécanismes aptes à filtrer les commentaires constitutifs de discours de haine ou de discours incitant à la violence.

155. La Cour note que la société requérante avait pris certaines mesures à cette fin. Il y avait sur le portail d'actualités Delfi une clause limitative indiquant que c'étaient les auteurs des commentaires – et non la société requérante – qui assumaient la responsabilité de leurs propos, et avertissant qu'il était interdit de déposer des commentaires contraires aux bonnes pratiques ou contenant des menaces, des injures, des obscénités ou des grossièretés, ou incitant à l'hostilité, à la violence ou à la commission d'actes illégaux. De plus, le portail comportait un système automatique de suppression des commentaires repérés à partir de la racine de certains mots grossiers ainsi qu'un système de retrait sur notification dans le cadre duquel toute personne pouvait porter les commentaires inappropriés à l'attention de ses administrateurs en les signalant par un simple clic sur un bouton prévu à cet effet. En outre, il arrivait que les administrateurs du portail retirent de leur propre initiative des commentaires inappropriés.

156. La Cour considère donc que l'on ne peut pas dire que la société requérante ait totalement négligé son obligation de faire en sorte de ne pas

porter préjudice à autrui. Néanmoins, et c'est là un élément plus important, le filtre automatique basé sur certains mots n'a pas permis de bloquer les propos odieux relevant du discours de haine ou de l'incitation à la violence déposés par les lecteurs et a ainsi limité la capacité de la société requérante à les retirer rapidement. La Cour rappelle que la majorité des mots et des expressions contenus dans ces commentaires n'étaient pas des métaphores sophistiquées, des tournures ayant un sens caché ou des menaces subtiles. Les propos en cause étaient des expressions manifestes de haine et des menaces flagrantes à l'intégrité physique de L. Ainsi, même si le filtre automatique a pu être utile dans certains cas, les faits de la cause démontrent qu'il n'a pas été suffisant pour détecter des commentaires dont le contenu ne constituait pas un discours protégé par l'article 10 de la Convention (paragraphe 136 ci-dessus). La Cour observe qu'en conséquence de cette défaillance du mécanisme de filtrage, ces commentaires clairement illicites sont restés en ligne pendant six semaines (paragraphes 18-19 ci-dessus).

157. La Cour note à cet égard qu'à certaines occasions, les administrateurs du portail ont effectivement retiré des commentaires inappropriés de leur propre initiative et que, apparemment quelque temps après les faits à l'origine de la présente affaire, la société requérante a mis en place une équipe de modérateurs affectés spécialement à cette tâche. Eu égard au fait que tout un chacun dispose de multiples possibilités pour faire entendre sa voix sur Internet, la Cour considère que l'obligation pour un grand portail d'actualités de prendre des mesures efficaces pour limiter la propagation de propos relevant du discours de haine ou appelant à la violence – la problématique en jeu en l'espèce – ne peut en aucun cas être assimilée à de la « censure privée ». Tout en reconnaissant que « les sites Internet contribuent grandement à améliorer l'accès du public à l'actualité et, de manière générale, à faciliter la communication de l'information » (*Ahmet Yıldırım*, précité, § 48, et *Times Newspapers Ltd*, précité, § 27), la Cour répète qu'elle est aussi consciente de ce que les communications en ligne et leur contenu risquent de porter préjudice à autrui (*Comité de rédaction de* Pravoye Delo *et Shtekel*, précité, § 63, voir aussi *Mosley*, précité, § 130).

158. De plus, en fonction des circonstances, il peut ne pas y avoir de victime individuelle identifiable, par exemple dans certains cas de discours de haine visant un groupe de personnes ou d'un discours incitant directement à la violence, comme dans plusieurs des commentaires en cause en l'espèce. Par ailleurs, même lorsqu'il y a une victime individuelle, elle peut ne pas être en mesure de notifier au prestataire de services Internet la violation alléguée de ses droits. La Cour attache du poids à la considération qu'il est plus difficile pour une victime potentielle de propos constitutifs d'un discours de haine de surveiller continuellement l'Internet que pour un

grand portail d'actualités commercial en ligne d'empêcher la publication de pareils propos ou de retirer rapidement ceux déjà publiés.

159. Enfin, la Cour relève que la société requérante la prie (paragraphe 78 ci-dessus) de tenir dûment compte du fait qu'elle avait mis en place un système de retrait sur notification. Accompagné de procédures efficaces permettant une réaction rapide, ce système peut, de l'avis de la Cour, constituer dans bien des cas un outil approprié de mise en balance des droits et des intérêts de tous les intéressés. Toutefois, dans des cas tels que celui examiné en l'espèce, où les commentaires déposés par des tiers se présentent sous la forme d'un discours de haine et de menaces directes à l'intégrité physique d'une personne, au sens de sa jurisprudence (paragraphe 136 ci-dessus), la Cour considère, comme exposé ci-dessus (paragraphe 153), que pour protéger les droits et intérêts des individus et de la société dans son ensemble, les États contractants peuvent être fondés à juger des portails d'actualités sur Internet responsables sans que cela n'emporte violation de l'article 10 de la Convention, si ces portails ne prennent pas de mesures pour retirer les commentaires clairement illicites sans délai après leur publication, et ce même en l'absence de notification par la victime alléguée ou par des tiers.

v. Les conséquences pour la société requérante

160. Enfin, pour ce qui est des conséquences que la procédure interne a eues pour la société requérante, la Grande Chambre note que celle-ci a été condamnée à verser à la partie lésée pour dommage moral une somme équivalant à 320 EUR. Elle considère comme la chambre que cette somme ne peut nullement passer pour disproportionnée à l'atteinte aux droits de la personnalité constatée par les juridictions internes, compte tenu aussi du fait que la société requérante exploitait à titre professionnel l'un des plus grands portails d'actualités sur Internet d'Estonie (paragraphe 93 de l'arrêt de la chambre). La Cour souligne à cet égard qu'elle prend aussi en compte l'issue des affaires portant sur la responsabilité des exploitants de portails d'actualités sur Internet tranchées par les juridictions nationales après l'affaire *Delfi* (paragraphe 43 ci-dessus). Elle observe que dans ces affaires les juridictions inférieures ont suivi l'arrêt rendu par la Cour d'État dans l'affaire *Delfi* mais n'ont pas octroyé de dommages et intérêts pour préjudice moral. En d'autres termes, le résultat concret pour ces exploitants dans les affaires postérieures à *Delfi* est qu'ils ont dû retirer les commentaires injurieux mais n'ont pas eu à verser d'indemnisation pour dommage moral.

161. La Cour observe aussi qu'il n'apparaît pas que la société requérante ait dû changer son modèle d'entreprise du fait de la procédure interne. Selon les informations disponibles, le portail d'actualités Delfi est demeuré l'une

des plus grandes publications sur Internet d'Estonie, et de loin le plus populaire pour ce qui est du dépôt de commentaires, dont le nombre n'a cessé d'augmenter. Le dépôt de commentaires anonymes – à côté duquel existe désormais la possibilité de laisser des commentaires en tant qu'utilisateur inscrit, qui sont montrés aux internautes en premier – demeure prédominant, et la société requérante a mis en place une équipe de modérateurs qui exerce une modération *a posteriori* des commentaires publiés sur le portail (paragraphes 32 et 83 ci-dessus). Dans ces conditions, la Cour conclut que l'atteinte portée à la liberté d'expression de la société requérante n'a pas non plus été disproportionnée pour cette raison.

vi. Conclusion

162. Sur la base de l'appréciation *in concreto* des éléments précités, et compte tenu du raisonnement de la Cour d'État en l'espèce, en particulier du caractère extrême des commentaires en cause, du fait qu'ils ont été déposés en réaction à un article publié par la société requérante sur un portail d'actualités qu'elle exploite à titre professionnel dans le cadre d'une activité commerciale, de l'insuffisance des mesures que ladite société a prises pour retirer sans délai après leur publication des commentaires constitutifs d'un discours de haine et d'une incitation à la violence et pour assurer une possibilité réaliste de tenir les auteurs des commentaires pour responsables de leurs propos, ainsi que du caractère modéré de la sanction qui lui a été imposée, la Cour juge que la décision des juridictions internes de tenir la société requérante pour responsable reposait sur des motifs pertinents et suffisants, eu égard à la marge d'appréciation dont bénéficie l'État défendeur. Dès lors, la mesure litigieuse ne constituait pas une restriction disproportionnée du droit de la société requérante à la liberté d'expression.

Partant, il n'y a pas eu violation de l'article 10 de la Convention.

PAR CES MOTIFS, LA COUR

Dit, par quinze voix contre deux, qu'il n'y a pas eu violation de l'article 10 de la Convention.

Fait en français et en anglais, puis prononcé en audience publique au Palais des droits de l'homme, à Strasbourg, le 16 juin 2015.

Johan Callewaert
Adjoint au greffier

Dean Spielmann
Président

Au présent arrêt se trouve joint, conformément aux articles 45 § 2 de la Convention et 74 § 2 du règlement, l'exposé des opinions séparées suivantes :

– opinion concordante commune aux juges Raimondi, Karakaş, De Gaetano et Kjølbro ;

– opinion concordante du juge Zupančič ;

– opinion dissidente commune aux juges Sajó et Tsotsoria.

D.S.
J.C.

OPINION CONCORDANTE COMMUNE AUX JUGES RAIMONDI, KARAKAŞ, DE GAETANO ET KJØLBRO

(Traduction)

1. Nous souscrivons à la conclusion de non-violation de l'article 10 de la Convention. Nous aimerions toutefois préciser notre position sur deux points : 1) la lecture que fait la Cour de l'arrêt de la Cour d'État, et 2) les principes sur lesquels repose l'appréciation de la Cour.

2. Premièrement, la lecture que fait la Cour de l'arrêt de la Cour d'État (paragraphes 153 et 154 de l'arrêt) est déterminante pour l'appréciation de l'affaire.

3. La haute juridiction a adopté sa décision en considérant notamment qu'il découlait de l'obligation de faire en sorte de ne pas porter préjudice à autrui que Delfi « aurait dû empêcher la publication de commentaires clairement illicites de par leur teneur ». De plus, elle a dit que, une fois les commentaires publiés, Delfi, « qui aurait dû être consciente de leur teneur illicite, ne les a[vait] pas retirés du portail de sa propre initiative ». La Cour d'État a jugé que l'« inertie » de Delfi était « illicite » et que Delfi était responsable, car cette société « n'avait pas prouvé qu'elle n'avait pas commis de faute » (extraits cités au paragraphe 31 de l'arrêt).

4. Il y a deux manières de lire l'arrêt de la Cour d'État : a) Delfi est responsable, car elle n'a pas « empêché » la publication des commentaires illicites, sa responsabilité étant aggravée par le fait qu'elle n'a pas « retiré » les commentaires par la suite, ou b) Delfi n'a pas « empêché » la publication des commentaires illicites et, comme elle ne les a ensuite pas « retirés » rapidement, elle en est responsable.

5. La Cour a décidé d'adopter la deuxième lecture de l'arrêt de la Cour d'État, évitant ainsi de trancher la délicate question de la responsabilité éventuelle d'un portail d'actualités qui n'a pas « empêché » la publication de commentaires illicites déposés par les internautes. Or si la Cour avait adopté la première lecture de cet arrêt, l'affaire aurait peut-être connu une autre issue.

6. Si on lisait l'arrêt de la Cour d'État de la première manière, cela consacrerait une interprétation de la législation interne entraînant le risque d'imposer une charge excessive à un portail d'actualités tel que Delfi. En fait, pour éviter d'être tenu pour responsable des commentaires émanant des lecteurs de ses articles, un portail d'actualités devrait empêcher la publication de tels commentaires (et devrait également retirer les commentaires de ce type déjà publiés). Cela nécessiterait probablement en pratique la mise en place d'un système de contrôle efficace, qu'il soit automatique ou manuel. En

d'autres termes, un portail d'actualités pourrait devoir exercer un contrôle préalable afin d'éviter de publier les commentaires manifestement illicites rédigés par ses lecteurs. En outre, si la responsabilité d'un portail d'actualités était étroitement liée au caractère manifestement illicite des commentaires sans qu'il soit nécessaire que le plaignant prouve que le portail savait ou aurait dû savoir que les commentaires allaient être ou avaient été publiés sur son site, le portail serait en pratique contraint de partir de l'hypothèse que les lecteurs pouvaient poster de tels commentaires et donc de prendre les mesures nécessaires pour éviter leur publication, ce qui concrètement requerrait la mise en place d'un système de contrôle préalable.

7. C'est pourquoi, à notre avis, si l'on juge un portail d'actualités responsable lorsqu'il n'a pas « empêché » la publication de commentaires déposés par les internautes, cela signifie que le portail doit exercer un contrôle préalable sur tous les commentaires émis par les internautes sans exception pour ne pas être tenu pour responsable de la présence de commentaires illicites. Or cela peut conduire à une ingérence disproportionnée dans l'exercice par le portail de son droit à la liberté d'expression garanti par l'article 10.

8. Deuxièmement, la Cour aurait dû indiquer plus clairement les principes sur lesquels elle se fonde pour conclure à la non-violation de l'article 10, au lieu de suivre un raisonnement spécifiquement adapté à l'affaire en cause, avec la conséquence que les principes pertinents devront être énoncés plus clairement dans la jurisprudence ultérieure.

9. À notre avis, la Cour aurait dû saisir cette occasion pour exposer plus clairement les principes applicables pour l'appréciation d'une affaire telle que l'espèce.

10. Un portail d'actualités comme Delfi, qui invite les lecteurs de ses articles à déposer des commentaires qu'il rend publics, assume les « devoirs et responsabilités » qui sont prévus dans la législation interne. De plus, il découle de l'article 8 de la Convention que les États membres ont l'obligation de protéger de manière effective la réputation et l'honneur des individus. Dès lors, l'article 10 de la Convention ne peut être compris comme interdisant aux États membres d'imposer des obligations à un portail d'actualités tel que Delfi qui autorise les lecteurs à déposer des commentaires qui sont rendus publics. En fait, les États membres peuvent dans certaines circonstances être tenus d'agir ainsi afin de protéger l'honneur et la réputation d'autrui. Ainsi, ils peuvent décider qu'un portail doit être considéré comme l'éditeur des commentaires en question. En outre, ils peuvent prévoir que les portails d'actualités pourront être tenus pour responsables des commentaires clairement illicites comme les insultes, les menaces et les discours de haine qui sont émis par les internautes et qu'ils rendent publics. Toutefois, lorsqu'ils exercent leur pouvoir en ce sens, les États membres doivent respecter les

obligations qui leur incombent en vertu de l'article 10 de la Convention. Partant, la législation interne ne doit pas limiter la liberté d'expression en imposant aux portails d'actualités un fardeau excessif.

11. À notre avis, les États membres peuvent tenir un portail d'actualités comme Delfi pour responsable de commentaires clairement illicites tels que des insultes, menaces et discours de haine provenant des lecteurs de ses articles si le portail savait ou aurait dû savoir que de tels commentaires avaient été ou allaient être publiés sur son site. En outre, les États membres peuvent tenir un portail d'actualités pour responsable en pareil cas si celui-ci ne prend pas rapidement de mesure dès que la publication de tels commentaires sur son site est portée à sa connaissance.

12. Pour déterminer si le portail d'actualités savait ou aurait dû savoir que des commentaires clairement illicites avaient été ou pouvaient être publiés sur son site, on peut tenir compte de toutes les circonstances particulières de l'affaire qui sont pertinentes, comme la nature des commentaires, le contexte de leur publication, l'objet de l'article qui a provoqué les commentaires, la nature du portail d'actualités, l'historique de celui-ci, le nombre de commentaires suscités par l'article, l'activité sur le portail et la durée pendant laquelle les commentaires sont restés affichés sur le portail.

13. Dès lors, tenir un portail d'actualités pour responsable de commentaires clairement illicites comme des insultes, menaces et discours de haine dans de telles circonstances est de manière générale compatible avec l'article 10 de la Convention. De surcroît, les États membres peuvent aussi tenir un portail d'actualités pour responsable s'il n'a pas pris des mesures raisonnables pour empêcher la publication de commentaires clairement illicites sur son site ou pour les en retirer une fois publiés.

14. À notre avis, la Cour aurait dû exposer ces principes avec plus de clarté dans son arrêt.

15. Eu égard au caractère clairement illicite des commentaires en question ainsi qu'au fait qu'ils sont restés sur le portail pendant six semaines avant d'être supprimés, nous ne trouvons pas qu'il soit disproportionné que la Cour d'État ait jugé Delfi responsable au motif que, alors qu'elle « aurait dû être consciente de leur teneur illicite, [elle] ne les a pas retirés du portail de sa propre initiative ». Au demeurant, le fait qu'elle n'ait pas été consciente du caractère illicite de tels commentaires pendant une période aussi longue peut presque être considéré comme de l'ignorance délibérée, ce qui ne peut être invoqué comme motif pour se soustraire à la responsabilité civile.

16. C'est pourquoi nous n'avons eu aucun problème à voter avec la majorité. Nous estimons néanmoins que la Cour aurait dû saisir cette occasion pour exposer avec clarté les principes qui sous-tendent son appréciation, même si les questions que soulève l'affaire ont un caractère sensible.

OPINION CONCORDANTE DU JUGE ZUPANČIČ

(Traduction)

De manière générale, j'approuve la conclusion donnée à cette affaire. J'aimerais néanmoins ajouter quelques considérations historiques et tout simplement éthiques.

L'affaire porte en substance sur la protection de l'intégrité personnelle, c'est-à-dire des droits de la personnalité en Estonie, et aura des répercussions sur la protection de ces droits ailleurs en Europe. Pendant de nombreuses années, les droits de la personnalité ont, si l'on peut dire, fait l'objet d'une discrimination par rapport à la liberté d'expression, en particulier la liberté de la presse. Dans mon opinion concordante jointe à l'arrêt *Von Hannover c. Allemagne* (nº 59320/00, CEDH 2004-VI), j'ai écrit que « [l]a doctrine du droit de la personnalité consacre un niveau plus élevé de civilisation dans les relations interpersonnelles ». Je pense que les faits de la présente cause confirment ce constat.

Le problème vient de la grande dissemblance entre le droit coutumier, d'une part, et le droit continental, d'autre part. La notion de vie privée en droit américain, par exemple, ne trouve son origine que dans l'article fondateur de Warren et Brandeis[1], lequel, éduqué en Allemagne, a ainsi pu étudier les droits de la personnalité en allemand. La notion de vie privée, au sens du droit à ne pas être importuné, en particulier par les médias, était jusqu'alors plus ou moins inconnue dans le domaine du droit anglo-américain. L'article lui-même traitait précisément de la question des abus commis par les médias. À l'évidence, il n'existait à l'époque que des médias écrits, mais cela était suffisant pour que le juge Brandeis montre son extrême indignation.

En revanche, la tradition du droit continental en matière de droits de la personnalité remonte à l'*actio injuriarum* du droit romain, qui protégeait contre le préjudice corporel mais aussi contre les atteintes non corporelles telles que *convicium, adtemptata pudicitia* et *infamatio*[2]. Ainsi, on peut considérer les droits de la personnalité comme les prédécesseurs des droits de l'homme et leur équivalent en droit privé. Par exemple, la protection contre la diffamation et les violations des autres droits de la personnalité procède

1. Samuel D. Warren et Louis D. Brandeis, « The Right to Privacy », 4(5) *Harvard Law Review* 193-201 (1890). On trouvera l'article complet à l'adresse suivante :
www.jstor.org/stable/1321160?origin=JSTOR-pdf&seq=1#page_scan_tab_contents (mise à jour le 23 mars 2015).

2. Voir « Personality Rights in European Torts Law », Gert Brüggemeier, Aurelia Colombi Ciacchi, Patrick O'Callaghan, Cambridge University Press, Cambridge 2010, p. 18 et note 51.

sur le continent d'une tradition longue et impérative, tandis que les notions de *libel* et de *slander* n'en sont que les pâles copies en droit anglo-américain.

D'après Jean-Christophe Saint-Paul :

« Les droits de la personnalité constituent l'ensemble des prérogatives juridiques portant sur des intérêts moraux (identité, vie privée, honneur) et le corps humain ou les moyens de leur réalisation (correspondances, domicile, image), exercés par des personnes juridiques (physiques ou morales) et qui sont sanctionnés par des actions en justice civiles (cessation du trouble, réparation des préjudices) et pénales.

Au carrefour du droit civil (personnes, contrats, biens), du droit pénal et des droits de l'homme, et aussi des procédures civile et pénale, la matière fait l'objet d'une jurisprudence foisonnante, en droit interne et en droit européen, fondée sur des sources variées nationales (Code civil, Code pénal, Loi informatique et libertés, Loi relative à la liberté de la presse) et internationales (CESDH, PIDCP, DUDH, Charte des droits fondamentaux), qui opère une balance juridictionnelle entre la protection de la personne et d'autres valeurs telles que la liberté d'expression ou les nécessités de la preuve. [3] »

La situation en Allemagne est la suivante :

> « Le droit général de la personnalité est reconnu dans la jurisprudence de la Cour fédérale de justice [*Bundesgerichtshof*] depuis 1954 comme un droit fondamental constitutionnellement garanti par les articles 1 et 2 de la Loi fondamentale et en même temps comme l'un des « autres droits » protégés en droit civil par l'article 823 § 1 du code civil allemand [*Bundesgesetzbuch* – le BGB] (jurisprudence constante depuis BGHZ [Cour fédérale de justice, affaires civiles] 13, 334, 338 (...)). Il garantit face au monde entier la protection de la dignité humaine et le droit au libre développement de la personnalité. Des formes spéciales de manifestation du droit général de la personnalité sont le droit à l'image (articles 22 et suivants de la KUG [*Kunsturhebergesetz* – loi sur les droits d'auteur]) et le droit au nom (article 12 du BGB). Ils garantissent la protection de la personnalité dans le domaine qu'ils régissent. [4] »

Ainsi, il est presque difficile de croire que ce parallèle de droit privé avec la protection des droits de la personnalité humaine assurée plus explicitement en droit constitutionnel et en droit international a été non seulement méconnu, mais souvent même supplanté par des considérations contraires.

À mon avis, il est de plus totalement inacceptable qu'un portail Internet ou toute autre sorte de média de masse soit autorisé à publier quelque forme

3. Voir « Droits de la personnalité », sous la direction de Jean-Christophe Saint-Paul, 2013 : www.boutique.lexisnexis.fr/jcshop3/355401/fiche_produit.htm (mise à jour le 23 mars 2015).

4. Voir l'affaire Marlene Dietrich, BGH 1 ZR 49/97, traduction en anglais sur le site de l'*Institute for Transnational Law – Foreign Law Translations, Texas University School of Law* : www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=726 (mise à jour le 23 mars 2015).

de commentaires anonymes que ce soit. Nous semblons avoir oublié que, jusqu'à il n'y a pas si longtemps, on vérifiait l'identité des auteurs des lettres adressées à l'éditeur avant même d'envisager de les publier dans le courrier des lecteurs. Le Gouvernement convient (paragraphe 90 de l'arrêt) que les plus grands portails d'actualités internationaux n'autorisent pas les commentaires anonymes (c'est-à-dire déposés par des internautes non inscrits) et que la tendance est à ne plus permettre l'anonymat. Il indique par ailleurs que les commentaires déposés sous le couvert de l'anonymat sont souvent plus injurieux que ceux qui le sont par des utilisateurs inscrits, et que les propos virulents attirent plus de lecteurs. Il affirme que c'est précisément pour cette raison que Delfi s'est fait connaître.

En revanche, dans l'affaire *Print Zeitungsverlag GmbH c. Autriche* (n° 26547/07, arrêt rendu le 10 octobre 2013, soit le même jour que l'arrêt de chambre dans l'affaire *Delfi*), la Cour a dit que l'octroi d'une somme de 2 000 euros (EUR) en dédommagement de la publication d'une lettre dans la presse écrite était – et ce à juste titre – compatible avec sa jurisprudence antérieure[5].

Les médias de masse étaient par le passé régis par le principe évident selon lequel la grande liberté dont jouit la presse implique un niveau proportionné de responsabilité. Il est totalement inacceptable de permettre techniquement la publication de formes extrêmement agressives de diffamation, et ce uniquement dans un but grossier d'intérêt commercial, pour s'en laver ensuite les mains au motif qu'un fournisseur Internet n'est pas responsable de ces atteintes aux droits de la personnalité d'autrui.

D'après l'ancienne tradition de protection des droits de la personnalité, qui remonte au droit romain, le montant de 300 EUR environ alloué en l'espèce à titre de réparation est manifestement insuffisant pour compenser le préjudice subi par les personnes lésées. La simple comparaison avec l'affaire *Print Zeitungsverlag GmbH* susmentionnée, qui ne concernait que deux personnes lésées et un titre de la presse écrite au tirage très limité, démontre qu'il convenait en l'occurrence d'octroyer une indemnité beaucoup plus élevée.

Je ne sais pas pourquoi les tribunaux internes hésitent à se prononcer dans ce type d'affaires et à protéger strictement les droits de la personnalité des personnes qui ont été la cible d'injures verbales aussi grossières et à leur accorder une indemnisation correcte, mais je soupçonne que notre propre jurisprudence à quelque chose à y voir.

5. Voir l'arrêt, qui n'existe qu'en anglais, sur le site de la base de données de la Cour, Hudoc : www.hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-126629 (mise à jour le 24 mars 2015).

Toutefois, la liberté d'expression, comme toute autre liberté, doit finir précisément là où commence l'atteinte à la liberté et à l'intégrité personnelle d'autrui.

OPINION DISSIDENTE COMMUNE AUX JUGES SAJÓ ET TSOTSORIA

(Traduction)

Pour expliquer notre désaccord, nous présenterons une analyse détaillée et classique de l'affaire, comme le fait usuellement la Cour. Il y a toutefois des questions plus larges qui sont plus importantes que le fait que nous ne souscrivons pas au troublant écart que fait la majorité par rapport à la jurisprudence telle qu'elle est comprise par le plus grand nombre. Ces préoccupations fondamentales seront énoncées d'abord.

I.

Censure collatérale

1. Dans le présent arrêt, la Cour a approuvé un système de responsabilité qui impose aux intermédiaires Internet actifs[1] (c'est-à-dire aux hébergeurs qui fournissent leur propre contenu et ouvrent les services intermédiaires aux tiers, auxquels ils permettent de commenter ce contenu) une connaissance présumée (*constructive knowledge*) du contenu qu'ils hébergent. Nous estimons troublantes les conséquences potentielles de la norme ainsi fixée. Ces conséquences sont faciles à prévoir. Afin d'éviter les diffamations de toutes sortes, et peut-être toutes les activités « illégales », il faudra contrôler tous les commentaires dès le moment où ils seront déposés. En conséquence, les intermédiaires actifs et les exploitants de blogs seront fortement incités à cesser d'offrir la possibilité de laisser des commentaires, et la crainte de voir leur responsabilité engagée risquera en outre de les amener à pratiquer l'autocensure. Nous nous trouvons donc face à une invitation à l'autocensure de la pire espèce.

2. Nous regrettons que la Cour n'ait pas tenu compte des avertissements prophétiques du professeur Jack Balkin[2]. Comme celui-ci l'a démontré, l'infrastructure technologique qui sous-tend les communications numériques est sujette à des formes moins visibles de contrôle de la part de régulateurs privés et publics, et la Cour vient d'ajouter une autre forme à cette panoplie. Les gouvernements n'imposent peut-être pas toujours une censure directe de l'expression, mais en exerçant une pression sur ceux qui

1. L'expression « *active Internet intermediaries* » est utilisée dans la doctrine : voir Justin Hurwitz, « Trust and online interaction », *University of Pennsylvania Law Review*, Vol. 161: 1579.
2. Jack M. Balkin, « Old-school/new-school speech regulation », *Harvard Law Review* 127, p. 2296 (2014).

contrôlent les infrastructures technologiques (fournisseurs d'accès Internet, etc.), et en leur imposant une responsabilité, ils créent un environnement qui a pour conséquence inévitable la censure collatérale ou privée. Il y a censure collatérale « lorsque l'État tient une partie privée (A) pour responsable des propos d'une autre partie privée (B), et que A a le pouvoir de bloquer ou de censurer les propos de B, ou de contrôler d'une autre manière l'accès à ces propos »[3]. Parce qu'il risque de voir sa responsabilité engagée par les propos d'un tiers, A est fortement incité à censurer exagérément ces propos, à en limiter l'accès, et à priver B de la possibilité de communiquer par l'intermédiaire de la plateforme que lui, A, contrôle. En pratique, la crainte d'être tenu pour responsable fait que A soumet les propos de B à un contrôle en amont et réprime même le discours protégé. « Ce qui apparaît comme un problème du point de vue de la liberté d'expression (...) peut apparaître comme une chance du point de vue des gouvernements qui ne peuvent pas facilement localiser les auteurs anonymes de certains propos et qui veulent s'assurer qu'un discours nuisible ou illégal ne se propage pas »[4]. Ces outils technologiques de contrôle du contenu avant mise en ligne aboutissent (entre autres choses) à des restrictions excessives en raison d'un manque de précision (*deliberate overbreadth*), à une limitation des protections procédurales (la mesure étant prise hors du contexte d'un procès), et à un transfert de la charge financière de l'erreur (l'entité chargée du filtrage privilégiera l'attitude consistant à se protéger d'une éventuelle mise en jeu de sa responsabilité plutôt que de protéger la liberté d'expression).

3. Pendant des siècles, l'imposition d'une responsabilité aux intermédiaires a été un obstacle majeur à la liberté d'expression. Ainsi, ce furent l'imprimeur Harding et sa femme que l'on arrêta pour avoir imprimé les *Lettres du drapier*, et non leur auteur anonyme (Jonathan Swift), qui continua de prêcher sans être inquiété. C'est pour cette raison que l'exonération de responsabilité des intermédiaires devint une question cruciale au moment de l'établissement du premier document durable dans l'histoire constitutionnelle européenne – la Constitution belge de 1831[5]. Telle est

3. *Ibidem*, p. 2 309.
4. *Ibidem*, p. 2 311.
5. Voir E. Chevalier Huyttens (éd.), *Discussion du Congrès national de Belgique 1830-1831* (Tome premier, 10 novembre-31 décembre 1830), Bruxelles, Société typographique belge Adolphe Wahlen et C^ie^ (1844). Voir le discours de Nothomb, pp. 651-652.
Le libellé spécifique de la Constitution de 1831 était le fruit d'un compromis et il ne reflétait pas l'approche fondée sur des principes des libéraux qui défendaient le constitutionnalisme (poussé), mais même ce compromis, reproduit aujourd'hui à l'article 25 de la Constitution belge, prévoit que « [l]orsque l'auteur est connu et domicilié en Belgique, l'éditeur, l'imprimeur ou le distributeur ne peut être poursuivi ». Retour en 1830 ?

la fière tradition humaniste de l'Europe que nous sommes appelés à faire perdurer.

Le contexte général

4. On dit souvent que la Cour est appelée à trancher le cas d'espèce, mais ce n'est là qu'une partie de notre tâche, et une telle déclaration est dangereuse de par son côté partial. Comme la Cour l'a résumé dans l'arrêt *Rantsev c. Chypre et Russie* (nº 25965/04, § 197, CEDH 2010)[6] :

> « [L]es arrêts [de la Cour] servent non seulement à trancher les cas dont elle est saisie, mais plus largement à clarifier, sauvegarder et développer les normes de la Convention et à contribuer de la sorte au respect, par les États, des engagements qu'ils ont pris en leur qualité de Parties contractantes (*Irlande c. Royaume-Uni*, 18 janvier 1978, § 154, série A nº 25, *Guzzardi c. Italie*, 6 novembre 1980, § 86, série A nº 39, et *Karner c. Autriche*, nº 40016/98, § 26, CEDH 2003-IX). Si le système mis en place par la Convention a pour objet fondamental d'offrir un recours aux particuliers, il a également pour but de trancher, dans l'intérêt général, des questions qui relèvent de l'ordre public, en élevant les normes de protection des droits de l'homme et en étendant la jurisprudence dans ce domaine à l'ensemble de la communauté des États parties à la Convention (*Karner*, précité, § 26, et *Capital Bank AD c. Bulgarie*, nº 49429/99, §§ 78-79, CEDH 2005-XII). »

5. De plus, comme la Cour l'a dit dans l'arrêt *Animal Defenders International c. Royaume-Uni* ([GC] nº 48876/08, § 108, CEDH 2013) :

> « Il ressort de cette jurisprudence que, pour déterminer la proportionnalité d'une mesure générale, la Cour doit commencer par étudier les choix législatifs à l'origine de la mesure (*James et autres*, précité, § 36). »

6. Le présent arrêt envisage expressément le contexte général (voir la section consacrée aux « remarques préliminaires », paragraphes 110 et suivants) mais sans trancher les « questions qui relèvent de l'ordre public ». Internet y est décrit comme « un outil sans précédent », et tout en indiquant qu'il présente des avantages, à peine évoqués, la majorité note que ceux-ci s'accompagnent d'un « certain nombre de risques ». Nous ne sommes pas d'accord. Internet est plus qu'une nouveauté exceptionnellement dangereuse. C'est une sphère de discours public vigoureux qui offre des possibilités nouvelles de renforcement de la démocratie. Les commentaires sont un élément crucial de ce nouveau mode, amélioré, d'échange d'idées entre les citoyens. Telle est d'ailleurs la manière dont la Cour l'a envisagé jusqu'à présent dans sa jurisprudence (*Ashby Donald et autres c. France*, nº 36769/08, § 34,

6. Confirmé tout récemment par la Grande Chambre dans l'arrêt *Konstantin Markin c. Russie* ([GC], nº 30078/06, § 89, CEDH 2012).

10 janvier 2013, et *Węgrzynowski et Smolczewski c. Pologne*, nº 33846/07, § 58, 16 juillet 2013)[7].

7. Il est à noter dans ce contexte que les treize lignes d'analyse de droit comparé de l'arrêt ne mentionnent pas de pratiques nationales spécifiques. Si de nouvelles restrictions à la publication de contenu sur Internet sont apparues récemment dans la législation d'un petit nombre de pays européens, l'approche estonienne est à peu près unique. Dans l'écrasante majorité des États membres du Conseil de l'Europe, ainsi que dans les véritables démocraties existant de par le monde, le système réglementaire repose (conformément aux exigences de l'état de droit) sur la notion de connaissance effective (*actual knowledge*). La règle de l'action sur notification (essentiellement du « retrait sur notification ») constitue une règle refuge. La Cour n'est pas connue pour développer des restrictions des droits lorsque ces restrictions vont à l'encontre des normes qui prévalent dans les États membres, sauf dans quelques cas où une faible majorité a jugé que des traditions morales profondément enracinées justifiaient une telle exception.

Conséquences

8. La Cour a souscrit à la norme appliquée par la Cour d'État estonienne, selon laquelle les intermédiaires actifs doivent retirer les commentaires « sans délai » après leur publication (paragraphe 153 de l'arrêt), et non sur notification ou pour d'autres motifs liés à la connaissance effective. Les intermédiaires actifs sont donc invités à exercer un contrôle en amont. De plus, les États membres vont se trouver contraints de suivre la même approche car autrement, selon la logique du présent arrêt, les droits des personnes se sentant diffamées par un commentaire ne seraient pas correctement protégés. Pour éviter les problèmes, les intermédiaires actifs se créeront donc leur propre règle refuge en désactivant tout simplement les commentaires[8].

9. La Cour a conscience des conséquences malheureuses de l'adoption d'une norme que l'on ne peut respecter qu'en surveillant constamment tous

7. Si le passage de *Pravoye Delo* cité dans l'arrêt (paragraphe 128) semble refléter une position neutre quant à l'équilibre entre les bons et les mauvais côtés d'Internet, il est important de noter que, dans cette affaire, les aspects négatifs ne l'ont pas emporté et que l'argument relatif au risque était suivi d'un « néanmoins » allant dans le sens des libertés sur Internet (*Comité de rédaction de* Pravoye Delo *et Shtekel c. Ukraine*, nº 33014/05, §§ 63-64, CEDH 2011).

8. Les exploitants de médias sociaux ont déjà institutionnalisé cette censure exagérée en autorisant une politique consistant à interdire les sites et les messages qui ont été « signalés », sans mener d'enquête sérieuse sur la question. La politique adoptée par Facebook est une nouvelle victoire pour la mentalité « troll ». Il est à noter que Facebook exige que (toute) la censure imposée par les internautes ait lieu dans un environnement juridique qui accorde aux prestataires de service l'immunité en vertu de l'article 230 a) de la loi sur la décence dans les communications (*Communications Decency Act*). Imaginez ce qui se passe là où il n'y a pas d'immunité.

les commentaires (et, implicitement, tout le contenu généré par les utilisateurs). Elle déclare donc que « la présente affaire ne concerne pas d'autres types de forums sur Internet (...), par exemple (...) les plateformes de médias sociaux où (...) le fournisseur de contenu peut être un particulier administrant un site ou un blog dans le cadre de ses loisirs [*hobby* dans la version anglaise] » (paragraphe 116 de l'arrêt). On voit mal quelle peut être l'utilité de cette tentative de « limiter les dégâts ». La liberté d'expression ne peut être réduite aux loisirs.

II.

Le rôle de Delfi en tant qu'intermédiaire actif

10. Pour en venir au cas d'espèce, nous estimons que la Cour d'État estonienne n'a pas avancé de motifs pertinents et suffisants à l'appui de cette très forte ingérence dans l'exercice par la société requérante de ses droits et n'a pas procédé à une mise en balance adéquate, de sorte qu'il y a eu violation de la Convention.

11. La présente affaire concerne une ingérence dans l'exercice par Delfi de sa liberté d'expression en tant qu'intermédiaire *actif*. Delfi a publié sur son portail d'actualités un article sur la destruction de routes de glace par une compagnie de transports maritimes publics et elle a laissé aux internautes la possibilité de commenter cet article. Il est incontesté qu'il n'y avait rien d'illégal dans l'article lui-même. Les juridictions nationales ont admis, et nous sommes on ne peut plus d'accord avec cela, que Delfi se livrait à des activités journalistiques et que l'espace de commentaires qu'elle avait ouvert faisait partie du portail d'actualités. Cependant, le portail n'était pas l'auteur des commentaires, qui étaient publiés tels quels. De plus, au moins de l'avis de la chambre (voir le paragraphe 86 de son arrêt), le débat concernait un sujet qui présentait « un certain degré » d'intérêt public. Nous considérons que l'article portait sur une question d'intérêt public et que les commentaires qu'il a suscités, y compris les commentaires litigieux, faisaient partie de ce débat, même s'ils étaient peut-être excessifs ou inadmissibles. Delfi a été jugée responsable de diffamation en vertu du code civil estonien à raison des commentaires publiés dans la zone de commentaires liée à l'article. Cette condamnation concernait vingt commentaires.

La nature des commentaires

12. Tout au long de l'arrêt, la description ou la qualification des commentaires varie et demeure imprécise. La Cour d'État a sa propre interprétation : elle parle d'« insulter (...) pour rabaisser » et de « porter atteinte à la dignité humaine et (...) tourner une personne en ridicule », et juge

Delfi responsable d'une atteinte à l'honneur et à la réputation de l'individu concerné. Au paragraphe 117 du présent arrêt, la Cour européenne dit que « les commentaires en cause en l'espèce (...) consistaient *principalement* en un discours de haine et en des propos appelant directement à la violence »[9] (voir aussi le paragraphe 140 de l'arrêt). Cependant, selon le paragraphe 130 (« le but légitime consistant à protéger la réputation et les droits d'autrui »), l'infraction en cause concerne la réputation et les droits d'autrui, droits qui ne sont pas spécifiés. On ne sait pas bien alors à quels commentaires s'applique cette considération. Le commentaire selon lequel « un homme bien vit longtemps, un gros nul vit un jour ou deux » (commentaire n° 9 – paragraphe 18 de l'arrêt) relève-t-il de l'appel à la violence[10] ?

13. Il est dommage que la qualification des commentaires demeure obscure. Ce qui est réellement troublant dans ces commentaires n'a jamais été dit clairement : un certain nombre d'entre eux sont racistes. Ainsi, le commentaire n° 2 est un catalogue de stéréotypes antisémites qui se termine par une référence à l'anéantissement par le feu du destinataire du commentaire, désigné comme juif.

14. Nous ne débattrons pas ici de la mesure dans laquelle certains des commentaires répondent aux exigences strictes en vertu desquelles ils seraient constitutifs d'incitation à la violence, compte tenu de la nature d'Internet. Un appel à la violence ou l'expression du souhait qu'une personne soit tuée ont-ils les mêmes effets sur Internet que les mêmes propos tenus face à face dans une situation telle que celle de l'espèce ? Il ne s'agit pas ici d'un appel aux armes lancé par un groupe extrémiste. La réponse à cette question doit être l'aboutissement d'un processus judiciaire en bonne et due forme. Il n'a pas été engagé d'action pénale contre les auteurs des commentaires, malgré la

9. L'expression « discours de haine » n'a pas été définie. « Il n'existe pas de définition universellement acceptée du discours de haine. Cette expression renvoie à une large gamme des messages de haine, qui vont des réflexions et commentaires injurieux, désobligeants, déplacés et véhiculant des stéréotypes négatifs relatifs à certaines personnes ou certains groupes, aux discours intimidants et provocateurs visant à susciter la violence à leur égard. En général, seuls les discours les plus haineux, c'est-à-dire ceux qui incitent à la discrimination, à l'hostilité et à la violence, sont considérés comme illégaux. » (Rapport de la Rapporteuse spéciale sur les questions relatives aux minorités, Rita Izsák (A/HRC/28/64), Conseil des droits de l'homme, vingt-huitième session).
Voir aussi : www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15716&LangID=E#sthash.XYM1WUqO.dpuf
L'absence de notion reconnaissable dans vingt commentaires très différents rend l'application de l'arrêt imprévisible.

10. La Cour a des exigences relativement claires quant à ce qui constitue un appel inadmissible à la violence (*Sürek c. Turquie (n° 1)* ([GC], n° 26682/95, § 62, CEDH 1999-IV), *Dağtekin c. Turquie* (n° 36215/97, 13 janvier 2005), *Erbakan c. Turquie* (n° 59405/00, § 56, 6 juillet 2006), *Lindon, Otchakovsky-Laurens et July c. France* ([GC], n°s 21279/02 et 36448/02, § 56-58, CEDH 2007-IV), *Otegi Mondragon c. Espagne* (n° 2034/07, § 54, CEDH 2011) et *Vejdeland et autres c. Suède* (n° 1813/07, § 55, 9 février 2012)).

référence au lynchage[11]. La question de la mesure dans laquelle ces commentaires constituent une véritable menace aurait mérité une analyse sérieuse. Or l'arrêt admet tout simplement les conclusions de la Cour d'État, qui a seulement dit que le caractère illégal de ces commentaires était manifeste (et qui, comme la Cour, les a qualifiés de différentes manières).

15. Nous nous abstiendrons aussi d'analyser l'impact de ces messages haineux quant à leur potentiel d'incitation à la violence imminente ou même d'instauration d'une haine durable ayant pour conséquence le harcèlement de L. ou de véritables menaces dirigées contre lui. Le racisme et la volonté de contraindre autrui à vivre dans un environnement empli de haine et de menaces réelles ne peuvent pas trouver refuge dans la liberté d'expression. Pour autant, cette préoccupation légitime ne doit pas aveugler ceux qui sont appelés à prendre des mesures, et ceux-ci doivent se voir rappeler que « les réglementations de lutte contre le discours de haine font passer les sentiments réels, souvent honorables, avant les droits abstraits – ce qui semble relever du pur bon sens. Résister à l'impulsion de réduire au silence les abrutis qui vous ont blessé demande un réel effort »[12].

L'ingérence et le droit des intermédiaires actifs

16. Nul ne conteste que l'arrêt de la Cour d'État a constitué une ingérence dans l'exercice par Delfi de sa liberté d'expression, même si la nature de ce droit demeure quelque peu floue. À notre avis, les droits concernés sont les droits de la presse. Les commentaires des internautes peuvent enrichir un article. Les droits d'un intermédiaire actif comprennent celui de permettre à autrui de communiquer et de recevoir des informations.

Légalité de l'ingérence : le problème de la prévisibilité

17. Selon la méthode qui prévaut à la Cour, la question qu'il faut se poser ensuite concerne la légalité de la mesure. Dans ce cadre, il faut vérifier si la loi était prévisible. La Cour a admis que la loi applicable était le code civil et non la loi sur les services de la société de l'information. La loi sur les services de la société de l'information semble exonérer de toute responsabilité les prestataires de service et leur offrir une « règle refuge », dans le sens où, à partir du moment où le prestataire de services, lorsqu'il prend connaissance de la présence de contenu illicite, le retire promptement, sa responsabilité ne peut être engagée à raison de ce contenu. Ni les autorités internes ni la Cour

11. Il était pertinent dans *Stoll c. Suisse* ([GC], nº 69698/01, §§ 54-56, CEDH 2007-V), aux fins de la détermination de l'intérêt du Gouvernement en jeu, qu'aucune action pénale n'eût été engagée contre le requérant ; c'est pourquoi l'argument relatif à la protection de la sécurité nationale a été jugé dénué de pertinence.

12. George Packer, « Mute Button », *The New Yorker*, 13 avril 2015.

n'ont expliqué pourquoi la disposition du droit contraignant de l'Union européenne, qui fait partie de l'ordre juridique national, est dénuée de pertinence en l'espèce, sauf à dire que la présente affaire porte sur la publication et non le stockage de données. Bien entendu, il n'appartient pas à notre Cour d'interpréter le droit de l'Union européenne en tant que tel. Cela ne veut pas dire, toutefois, que nous ne devons pas le considérer comme faisant partie du système interne et lui attribuer le poids constitutionnel qui lui revient. Quoi qu'il en soit, l'article 10 (responsabilité en cas de stockage) de la loi sur les services de la société de l'information fournit une « règle refuge » pour les prestataires d'un service de stockage. Dans ces conditions, une justification raisonnable devrait être requise si les juges choisissent d'appliquer le niveau de responsabilité plus élevé prévu par le code civil. Le choix (hautement problématique) d'imposer à la société requérante une responsabilité en tant que publicatrice (*editor*) ne traite pas la question de la suprématie du droit de l'Union européenne ni le problème de la *lex specialis.* Il est possible que lorsque le prestataire d'un service de stockage d'informations génère du contenu, la loi sur les services de la société de l'information soit inapplicable, mais cela doit alors être démontré et être prévisible. De plus, le prestataire de service n'a pas généré le contenu litigieux en l'espèce : ce contenu émanait des internautes. L'argument consistant à dire que la nature commerciale du stockage des données fait relever l'activité en cause du régime de responsabilité applicable aux publicateurs n'est pas convaincant. Le stockage est considéré comme une activité commerciale, sans que cela ait d'incidence au regard de la loi sur les services de la société de l'information, qui fournit une « règle refuge » pour cette activité.

18. L'une des exigences qui découlent de l'expression « prévue par la loi » est la prévisibilité. Ainsi, on ne peut considérer comme une « loi » au sens de l'article 10 § 2 qu'une norme énoncée avec assez de précision pour permettre au citoyen de régler sa conduite ; en s'entourant au besoin de conseils éclairés, il doit être à même de prévoir, à un degré raisonnable dans les circonstances de la cause, les conséquences qui peuvent découler d'un acte déterminé. Les conséquences n'ont pas besoin d'être prévisibles avec une certitude absolue (*Lindon, Otchakovsky-Laurens et July c. France* [GC], n^os^ 21279/02 et 36448/02, § 41, CEDH 2007-IV)[13]. Or un conseiller juri-

13. Il est remarquable que le reste de cette citation n'ait pas été pris en compte dans cet arrêt. Le paragraphe d'origine renferme une nuance importante : « Aussi beaucoup de lois se servent-elles, par la force des choses, de formules plus ou moins vagues dont l'interprétation et l'application dépendent de la pratique ». En l'espèce, en revanche, la question n'est pas celle de l'emploi de termes vagues, par exemple le fait que l'expression « prestataire de services » employée dans la directive soit elle-même vague. La problématique résidait dans le fait qu'il y avait deux lois et que la société requérante croyait que la directive était applicable en tant que norme du droit de l'Union européenne et en tant que loi spéciale, tandis que la Cour d'État a estimé que c'était l'autre loi qui était applicable, parce que le prestataire de

dique n'aurait pas pu informer Delfi de manière suffisamment certaine que la directive relative à certains aspects juridiques des services de la société de l'information ne s'appliquait pas à son cas. La réponse à la question de savoir quelle loi serait applicable n'était pas évidente, à tel point même qu'en 2013 un tribunal chypriote a jugé nécessaire de poser à la Cour de justice de l'Union européenne une question préjudicielle sur un problème connexe, celui de la responsabilité des publicateurs de portail d'actualités (voir l'affaire CJUE C-291/13, *Papasavvas*). Si une incertitude planait en 2013 dans l'Union européenne sur une question analogue mais moins compliquée – incertitude levée en 2014 –, comment les conseils d'un juriste auraient-ils pu présenter un degré suffisant de certitude en 2006 ?

19. Qui plus est, il n'était pas prévisible que la société requérante verrait sa responsabilité engagée en vertu du code civil en tant que publicatrice des commentaires. L'arrêt de la Cour d'État lui-même mentionne un autre arrêt de la même cour en date du 21 décembre 2005. Cet arrêt, qui était peut-être déjà accessible à Delfi le 24 janvier 2006 (date de l'article), a été résumé par la Cour d'État comme suit :

> « [A]ux fins de l'article 1047 de la loi sur les obligations, on devait entendre par « révélation » [*avaldamine*] la communication d'informations à des tiers, et par « révélateur » la personne qui communique des informations à des tiers (...) [D]ans le cas de la publication [*avaldamine*] d'informations dans les médias, le publicateur/révélateur [*avaldaja*] pouvait être aussi bien l'entreprise de médias que la personne qui lui avait transmis les informations en question. »

La Cour d'État a ensuite appliqué cette considération de la manière suivante :

> « La publication d'actualités et de commentaires sur un portail Internet est aussi une activité journalistique. Cependant, la nature des médias sur Internet fait que l'on ne peut raisonnablement exiger d'un exploitant de portail qu'il édite les commentaires avant de les publier comme si son site était une publication de la presse écrite. Si l'éditeur [d'une publication de la presse écrite] est, parce qu'il les soumet à un contrôle éditorial, à l'origine de la publication des commentaires, sur un portail Internet en revanche, ce sont les auteurs des commentaires qui sont à l'origine de leur publication et qui les rendent accessibles au grand public par l'intermédiaire du portail. L'exploitant du portail n'est donc pas la personne à qui l'information est révélée. Néanmoins, en raison de l'intérêt économique que représente pour eux la publication des commentaires, aussi bien l'éditeur [*väljaandja*] de publications imprimées que l'exploitant d'un portail Internet sont les publicateurs/révélateurs [*avaldajad*] de ces commentaires en qualité de professionnels. »

20. Cela – par ailleurs – pose un sérieux problème de prévisibilité du code civil tel qu'il a été appliqué en l'espèce. La Cour d'État dit clairement

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services était un éditeur.

que « l'on ne peut raisonnablement exiger d'un exploitant de portail qu'il édite les commentaires avant de les publier comme si son site était une publication de la presse écrite ». L'exploitant de portail Internet est appelé « publicateur/révélateur » dans la traduction française. Le terme employé en estonien (*avaldajad*) ne semble pas être le même que celui utilisé pour un éditeur (*väljaandja*). La société requérante arguait que les autres « révélateurs » ou diffuseurs (bibliothèques, librairies) n'étaient pas considérés comme des éditeurs dans le cadre du droit positif de la responsabilité délictuelle. Pourquoi présumerait-on qu'incombe à l'exploitant d'un site Internet le devoir de vigilance applicable au *väljaandja* plutôt que celui applicable au *avaldajad*? Il y a là une contradiction qui entrave la prévisibilité. Comme la chambre l'a bien justement reconnu (au paragraphe 75 de son arrêt), les dispositions pertinentes de la Constitution, de la loi sur les principes généraux du code civil et de la loi sur les obligations étaient « assez générales et peu détaillées ». Les dispositions de la loi sur les obligations visent toutes la personne ou l'entité qui diffame – l'*auteur du dommage*, en l'espèce les auteurs des commentaires litigieux publiés sur le site de la société requérante – et ne traitent pas directement la situation nouvelle où un intermédiaire ouvre une plateforme pour accueillir l'expression de propos dont il n'est ni l'auteur ni l'éditeur au sens traditionnel du terme. Seul un avocat prophète aurait pu être suffisamment certain que l'exploitant du portail serait tenu pour responsable d'un commentaire dont il n'avait pas connaissance, en vertu du type de responsabilité objective appliqué aux publicateurs (éditeurs) qui ont parfaitement connaissance de tout ce qu'ils publient. On observera que les trois niveaux de juridiction compétents ont appliqué trois théories différentes de la responsabilité. Les lois formulées en termes imprécis et ambigus, et donc imprévisibles, ont un effet inhibiteur sur l'exercice de la liberté d'expression. Or une incertitude troublante persiste ici[14].

21. La Cour a déjà dit par le passé que « la reproduction de matériaux tirés de la presse écrite et celle de matériaux tirés de l'Internet peuvent être soumises à un régime différent. Les règles régissant la reproduction des seconds doivent manifestement être ajustées en fonction des caractéristiques particulières de la technologie de manière à pouvoir assurer la protection et la promotion des droits et libertés en cause » (*Comité de rédaction de* Pravoye Delo *et Shtekel*, précité, § 63). Ce point de principe fournit un repère important pour l'examen de la question de savoir si l'application du droit interne en l'espèce était raisonnablement prévisible pour la société requérante en

14. Dans l'affaire *Comité de rédaction de* Pravoye Delo *et Shtekel* (précitée), qui concernait un litige lié à Internet examiné sous l'angle de l'article 10, différent toutefois de celui de la présente affaire, la Cour a conclu à la violation de l'article 10 au seul motif que l'ingérence n'était pas suffisamment prévue par la loi, compte tenu notamment des problèmes particuliers qui se posent à l'ère d'Internet.

ce qui concerne le contenu généré par les internautes qu'elle hébergeait sur son site. Dans sa recommandation CM/Rec(2011)7 sur une nouvelle conception des médias, le Comité des Ministres a relevé que « [l]es rôles des différents acteurs [pouvaient] aisément changer et évoluer de manière fluide et sans heurts », et que la situation appelait « une approche graduelle et différenciée ».

Nécessité dans une société démocratique

22. Il faut ensuite déterminer à quel point la mesure litigieuse ayant visé à bannir le discours de haine[15] (ce qui était la justification la plus probable pour l'ingérence, du moins de l'avis de la Cour, mais non de celui des autorités internes – voir le paragraphe 140 de l'arrêt) était nécessaire dans une société démocratique[16]. La référence au conflit entre les droits protégés par l'article 8 et celui protégé par l'article 10 faite au paragraphe 139 de l'arrêt renvoie à l'applicabilité d'un exercice de mise en balance dans le cadre d'une marge d'appréciation élargie.

23. La Cour dit d'abord, et nous sommes d'accord sur ce point, que *certains* des propos en cause ne sont pas protégés par la Convention. Ce constat en lui-même ne résout pas le problème, car on ne peut, dans les circonstances de l'espèce, assimiler les expressions employées par les auteurs des commentaires aux activités d'un intermédiaire actif.

Le passage à une analyse des « motifs pertinents et suffisants »

24. La Cour considère au paragraphe 142 de l'arrêt que, dans le cadre de l'analyse de la proportionnalité, sa tâche consiste à déterminer « [à] la lumière du raisonnement de la Cour d'État, (...) si la décision des juridictions internes de tenir la société requérante pour responsable reposait sur des motifs pertinents et suffisants dans les circonstances particulières de l'espèce (paragraphe 131 ci-dessus) ». Elle ne fait ici aucune référence au principe établi selon lequel, dans l'exercice de son rôle de contrôle, elle n'est pas satisfaite si l'État défendeur a usé de son pouvoir d'appréciation uniquement de bonne foi, avec soin et de façon raisonnable. Il ne suffit pas que des motifs soient raisonnables pour qu'ils soient suffisants.

15. L'incitation à la violence est aussi mentionnée quelquefois.

16. Si la mise en balance de ces deux droits par les autorités nationales s'est faite dans le respect des critères établis par la jurisprudence de la Cour, il faut des raisons sérieuses pour que celle-ci substitue son avis à celui des juridictions internes (*Axel Springer AG c. Allemagne* ([GC], n° 39954/08, § 88, 7 février 2012) et *Von Hannover c. Allemagne (n° 2)* ([GC], n°s 40660/08 et 60641/08, § 107, CEDH 2012). C'est probablement pour cette raison que l'analyse de la Cour en l'espèce se concentre sur le caractère suffisant des motifs avancés par les juridictions internes. Celles-ci n'ont toutefois examiné *que de manière sélective* les critères posés dans la jurisprudence de la Cour.

25. Surtout, le critère des « motifs pertinents et suffisants » n'est qu'une partie de l'analyse de la proportionnalité[17]. Une fois que la Cour a conclu que les motifs avancés étaient pertinents et suffisants, l'analyse de la proportionnalité commence plutôt qu'elle ne finit. Le critère des « motifs pertinents et suffisants » est une question fondamentale qui permet de déterminer si et comment il y a lieu d'appliquer la marge d'appréciation ; il est pertinent aux fins de la détermination de l'existence d'un besoin social impérieux (voir toutes les références citées au paragraphe 131 de l'arrêt). Pourquoi faut-il vérifier que les motifs invoqués par les autorités internes sont pertinents et suffisants (*et non pas seulement* raisonnables – voir ci-dessus) ? Parce que, comme la Cour l'a toujours dit, et comme elle le répète d'ailleurs dans cette affaire (paragraphe 131), « la Cour doit se convaincre que les autorités nationales ont appliqué des règles conformes aux principes consacrés à l'article 10 et ce, de surcroît, en se fondant sur une appréciation acceptable des faits pertinents » (elle ne s'est toutefois pas livrée en l'espèce à une évaluation de l'appréciation par les autorités nationales des faits pertinents, bien que cela eût probablement été utile).

26. La Cour a conclu que la Cour d'État avait effectivement avancé des motifs pertinents et suffisants à l'appui du niveau de responsabilité qu'elle avait appliqué. Elle est parvenue à cette conclusion après avoir examiné les éléments pertinents suivants : le contexte des commentaires, les mesures appliquées par la société requérante pour empêcher la publication de commentaires diffamatoires ou retirer ceux déjà publiés, la possibilité que les auteurs des commentaires soient tenus pour responsables plutôt que la société requérante, et les conséquences de la procédure interne pour la société requérante. Ces éléments sont peut-être pertinents, mais d'autres considérations peuvent l'être aussi. Nous ne traiterons que le caractère suffisant de certains de ces éléments.

Extension de la responsabilité des éditeurs : les intérêts économiques de base

27. L'arrêt de la Cour d'État repose sur la présomption qu'un intermédiaire actif est un éditeur. Jusqu'à présent, la jurisprudence de la Cour

17. Dans les principes cités dans l'arrêt, les motifs pertinents et suffisants font partie des critères d'évaluation de la marge d'appréciation. Cela a du sens, par exemple, lorsque les autorités nationales avancent des motifs quant au caractère approprié des moyens ou des buts : si ceux-ci sont pertinents, la marge d'appréciation peut s'en trouver modifiée et l'ampleur du contrôle rétrécie. En l'espèce, toutefois, l'exigence que soient donnés des motifs pertinents et suffisants est détachée de la marge d'appréciation. La restriction d'un droit protégé par la Convention est arbitraire lorsqu'aucun motif n'est avancé pour la justifier, et elle ne peut dès lors pas être tenue pour nécessaire dans une société démocratique. Il est important pour l'état de droit et l'exercice des droits que la mesure restrictive elle-même soit assortie de motifs et que ceux-ci n'y soient pas ajoutés *a posteriori*. Il serait encore moins acceptable que la Cour se permette de spéculer d'elle-même sur ce qu'auraient pu être ces motifs.

européenne allait dans le sens inverse[18]. Les textes de droit international cités par la Cour soulignent l'importance d'une différenciation, compte tenu de la nature spécifique de la technologie Internet. Comme mentionné précédemment, la pertinence de cette différenciation avait été reconnue quelques mois auparavant par la Cour d'État elle-même. Or, en l'espèce, elle a assimilé les éditeurs à des intermédiaires actifs : « en raison de l'intérêt économique que représente pour eux la publication de commentaires, aussi bien l'éditeur de publications imprimées que l'exploitant d'un portail Internet sont les publicateurs/révélateurs de ces commentaires en qualité de professionnels » (cité au paragraphe 112 de l'arrêt). La Cour dit ne pas voir de raison de remettre en question cette approche, même si elle relève ceci : « [Il y a eu] une certaine évolution en faveur de l'établissement d'une distinction entre les principes juridiques régissant les activités des médias imprimés et audiovisuels classiques, d'une part, et les activités des médias sur Internet, d'autre part (...) Dès lors, la Cour considère qu'en raison de la nature particulière de l'Internet, les « devoirs et responsabilités » que doit assumer un portail d'actualités sur Internet aux fins de l'article 10 peuvent dans une certaine mesure différer de ceux d'un éditeur traditionnel en ce qui concerne le contenu fourni par des tiers » (paragraphe 113 de l'arrêt). Nous sommes on ne peut plus d'accord, mais il nous est impossible de saisir comment la reconnaissance d'une différence peut conduire à assimiler les éditeurs et les intermédiaires actifs du seul fait de leur objectif commercial. La Cour semble estimer pertinente et suffisante la position de la Cour d'État. Selon cette approche, l'intérêt économique est suffisant pour que l'intermédiaire actif soit assimilé au publicateur, bien que les deux aient été considérés comme distincts dans la phrase précédente. La Cour n'explique nullement comment cela se concilie avec le texte auquel elle se réfère, à savoir la recommandation CM/Rec(2011)7 du Comité des Ministres (citée au paragraphe 46 de l'arrêt), qui appelle une « approche graduelle » à appliquer à l'intermédiaire. Les raisons complémentaires visées aux paragraphes 115 à 117 de l'arrêt concernent la nature des propos formulés et la taille de l'intermédiaire, éléments qui ne sont ni pertinents ni suffisamment liés à la responsabilité d'un éditeur traditionnel.

28. Juger que la responsabilité de la presse (ou, dans ce contexte, de tout auteur de propos) est accrue par l'existence d'un intérêt économique s'accorde mal avec la jurisprudence. Il est vrai que la marge d'appréciation est plus large dans la sphère commerciale (*Mouvement raëlien suisse c. Suisse* [GC], n° 16354/06, § 61, CEDH 2012). « Il y a toutefois lieu de relativiser l'ampleur de [cette marge] lorsqu'est en jeu non le discours strictement

18. *Ashby Donald et autres*, précité, § 34, et *Węgrzynowski et Smolczewski*, précité, § 58.

« commercial » de tel individu mais sa participation à un débat touchant à l'intérêt général » (*Hertel c. Suisse*, 25 août 1998, § 47, *Recueil des arrêts et décisions* 1998-VI). Le fait que l'article à l'origine des commentaires et la zone de commentaires (offerte gracieusement aux internautes !) relèvent de l'activité économique d'un exploitant de portail d'actualités ne change rien. L'article et son espace dédié aux commentaires sont protégés parce qu'ils facilitent et nourrissent un débat sur une question d'intérêt public.

29. Au cours des trois siècles passés, les idées développées dans le cadre d'activités à but lucratif n'ont jamais été perçues comme justifiant un abaissement du niveau de protection autrement offert à l'expression. Nous ne vivons pas dans le monde aristocratique de l'*auctor* romain, qui pouvait se permettre de ne pas se soucier du produit financier des idées (même s'il dépendait bien souvent du bon plaisir de l'empereur). On ne peut reprocher à un journal ou à un éditeur d'exploiter un débouché comme une entreprise commerciale. On ne peut pas s'attendre à ce que la production d'idées soit gratuite. Pour générer des idées, il faut des moyens financiers adéquats ; le bénéfice matériel et la nature commerciale de l'entreprise de presse ne sont pas (et ne peuvent pas être) des raisons de réduire le niveau de protection accordé à la presse. L'information coûte cher et une communication efficace de celle-ci est plus qu'un simple passe-temps. La même plateforme qui est comprise comme commerciale, et donc objet d'une responsabilité accrue, est aussi une plateforme permettant l'intensification et l'interactivité du discours sur une question d'intérêt public. Cet aspect n'a pas été pris en compte dans l'exercice de mise en balance.

30. Toutefois, la Cour présente au moins une considération pertinente justifiant d'étendre la responsabilité d'un intermédiaire actif. Il est vrai, certes, que l'intermédiaire actif peut exercer un contrôle sur les commentaires qui paraissent sur son site, et il est vrai également qu'en créant une zone pour les commentaires et en invitant les internautes à participer, il se livre à une activité en lien avec l'expression qui implique une responsabilité. Cependant, la nature de ce contrôle ne signifie pas que l'on puisse assimiler l'intermédiaire actif à un éditeur traditionnel.

31. Il existe d'autres différences entre celui qui publie (compris ici comme un éditeur de presse, quelqu'un qui contrôle le contenu) et un intermédiaire actif :

a) dans un journal, le journaliste est d'ordinaire un employé (bien qu'il existe de bonnes raisons de protéger un journaliste de son éditeur/employeur) ; et

b) en principe, l'éditeur est en mesure de connaître par avance le contenu d'un article à publier et possède le pouvoir décisionnel ainsi que les moyens de contrôler la publication en amont.

Contrairement à celui qui publie, l'intermédiaire actif qui, comme Delfi, héberge son propre contenu et surveille activement toutes les données (c'est-à-dire est en mesure de les lire et de les retirer après qu'elles ont été rendues accessibles), n'est qu'en partie dans une telle situation. L'intermédiaire actif n'exerce un contrôle en amont que dans la mesure où un système de filtrage le lui permet. Il a également le pouvoir de retirer un message ou de bloquer l'accès à celui-ci. Cependant, en situation normale l'intermédiaire actif n'a aucun contrôle personnel sur l'individu qui dépose le message. Le commentateur n'est pas l'employé de celui qui publie et, dans la plupart des cas, n'est pas connu de ce dernier. La publication intervient en dehors de toute décision de celui qui publie. Ainsi donc, le niveau de connaissance et de contrôle diffère sensiblement.

32. Le contrôle *présuppose* la connaissance. À cet égard, la différence entre l'éditeur/le publicateur et l'intermédiaire actif est évidente.

Le niveau de responsabilité

33. Si la société Delfi ne peut être qualifiée de société d'édition, elle offre volontairement la possibilité de déposer des commentaires et, même si cette activité relève de la liberté d'expression à caractère journalistique, elle n'est pas exonérée de toute responsabilité. La loi sur les services de la société de l'information prévoit bel et bien cette responsabilité, notamment pour le stockage, comme c'est ici le cas. Cette loi fonde la responsabilité sur la « connaissance effective » et comporte une obligation de retrait prompt. Or la Cour a jugé cela insuffisant.

34. La Cour voit une considération pertinente et suffisante dans le fait que la Cour d'État ait limité la responsabilité de la société requérante à une responsabilité *a posteriori*. Cependant, comme indiqué au paragraphe 153 de l'arrêt, la Cour d'État a déclaré que la société requérante « aurait dû *empêcher* la publication de commentaires ». Que la haute juridiction ait également estimé qu'il existait une obligation de retrait une fois les commentaires publiés ne change rien à sa première déclaration. Tant une responsabilité *a priori* qu'une responsabilité *a posteriori* sont ici évoquées, ce que l'on ne peut négliger dans l'évaluation des « motifs suffisants »[19]. C'est selon ce critère que Delfi a été jugée responsable pour avoir révélé les informations en question, ce à quoi un retrait sur demande n'aurait rien changé.

19. Nous comprenons l'appréciation faite par la Cour comme le constat d'un manque de clarté dans l'arrêt de la Cour d'État : « La haute juridiction n'a donc pas tranché expressément la question de savoir si la société requérante était dans l'obligation d'empêcher la mise en ligne des commentaires sur son site web ou s'il aurait suffi en droit interne qu'elle retirât les commentaires en question sans délai après leur publication pour que sa responsabilité ne fût pas engagée au titre de la loi sur les obligations » (paragraphe 153 de l'arrêt).

35. L'obligation de retirer des commentaires injurieux sans connaissance effective de leur existence et immédiatement après leur publication suppose que l'intermédiaire actif exerce une surveillance constante. En pratique, il s'agit là d'une responsabilité absolue et objective, qui n'est absolument pas différente du contrôle général en amont. Aucune raison n'est présentée pour expliquer en quoi seul ce niveau de responsabilité satisfait à la protection des intérêts pertinents.

36. Existe-t-il des motifs suffisants pour justifier cette responsabilité objective,[20] sous couvert des règles du code civil sur la faute ? La Cour s'est penchée sur les mesures de précaution adoptées par Delfi et les a jugées inadéquates. Il s'agissait de mesures relativement ordinaires : une clause par laquelle la société déclinait toute responsabilité en cas de contenus illégaux, un système de filtrage, une séparation entre l'article et la zone de commentaires, et un retrait immédiat sur notification. Pour la Cour, il est déterminant que le système de filtrage ait échoué. La Cour ne se penche pas sur le caractère adéquat ou non du système de filtrage (était-il à la pointe de la technologie ? peut-il y avoir une obligation d'appliquer un système de pointe ? existe-t-il une raison d'être tenu pour responsable lorsque l'on dispose d'un système de filtrage de pointe ?). La Cour estime elle-même que le filtrage aurait dû être aisé et que le système a été défaillant. Il n'y a pas d'expertise, pas de débat. On nous assure simplement que la mise en place d'une équipe de modérateurs affectés au retrait des commentaires inappropriés ne peut être assimilée à de la « censure privée ». On n'envisage pas la possibilité de mesures moins intrusives ; seul un retrait « sans délai », c'est-à-dire lors du dépôt (paragraphe 159 de l'arrêt), répond à l'objectif consistant à éliminer le discours de haine et ce qu'il engendre.[21] Cet appétit insatiable de protection préventive débouche sur un raisonnement circulaire : une société d'édition a une responsabilité similaire, donc un intermédiaire actif est comme une société d'édition.

37. Ni les juridictions nationales ni l'arrêt ne présentent de motifs suffisants et pertinents justifiant une règle de responsabilité objective *de facto*. La Cour constate qu'elle décèle des motifs pertinents et suffisants dans l'arrêt de la Cour d'État estonienne, à savoir le caractère extrême des commentaires en cause, la nature commerciale de l'activité, l'insuffisance des mesures appliquées par la société requérante, l'intérêt d'assurer une possibilité réaliste de

20. Il n'y a aucun moyen de disculper l'intermédiaire actif puisqu'il aurait dû savoir que du contenu illégal avait été déposé et aurait dû le retirer immédiatement.

21. Dans une affaire de responsabilité ordinaire, la participation de la victime est un élément à prendre en compte. Il a été reproché à Delfi d'avoir laissé le contenu illicite en ligne pendant six semaines. Pourquoi L. et son entreprise n'ont-ils pas fait suite à un article publié sur un grand portail d'actualités à propos de leurs activités économiques et signalé ces commentaires plus tôt ?

tenir les auteurs des commentaires pour responsables de leurs propos, et le caractère modéré de la sanction. Ce sont là apparemment les raisons qui obligent la Cour à souscrire à la connaissance présumée. La Cour considère que l'obligation absolue de retrait immédiat dès la publication (telle qu'appliquée à la société requérante) était proportionnée au but consistant à protéger les particuliers contre le discours de haine.

38. Nous dirions quant à nous que, selon l'ensemble des documents internationaux cités, un intermédiaire actif qui fournit un espace pour les commentaires ne peut pas avoir de responsabilité absolue – c'est-à-dire d'obligation absolue de connaissance ou, en pratique, de connaissance présumée. La protection de la liberté d'expression ne peut se muer en un exercice consistant à imposer des obligations. La clause des « devoirs et responsabilités » figurant au paragraphe 2 de l'article 10 n'est pas une disposition autonome : elle a été insérée dans cet article afin d'expliquer pourquoi l'exercice de la liberté en question peut faire l'objet de restrictions, lesquelles doivent être nécessaires dans une société démocratique. Elle n'est qu'une partie de l'équilibre requis par l'article 10 § 2.

Mise en balance (absence de)

39. Si l'on applique l'approche de la mise en balance, il faut aussi prendre en considération l'autre plateau de la balance. Selon la jurisprudence, il convient de bien tenir compte, notamment, des facteurs suivants :

– l'ingérence concerne la presse et le journalisme. Delfi se livrait à des activités journalistiques, en proposant un portail d'actualités et en liant aux articles un espace destiné aux commentaires. Le journalisme n'est pas exempt de toute responsabilité mais appelle un contrôle plus strict. « [L]a garantie que l'article 10 offre aux journalistes, en ce qui concerne les comptes rendus sur des questions d'intérêt général, est subordonnée à la condition que les intéressés agissent de bonne foi sur la base de faits exacts et fournissent des informations « fiables et précises » dans le respect de la déontologie journalistique » (*Stoll c. Suisse* [GC], nº 69698/01, § 103, CEDH 2007-V) [22]. Dans

22. La Cour n'a pas inclus cette partie de la jurisprudence constante dans l'analyse des responsabilités journalistiques qu'elle a livrée au paragraphe 132 de l'arrêt, où elle note qu'il « incombe néanmoins [à la presse] de communiquer, dans le respect de ses devoirs et de ses responsabilités, des informations et des idées sur toutes les questions d'intérêt public ». Elle examine en l'occurrence une affaire relative à un débat sur une question d'intérêt public. Ce n'est pas ici le lieu pour exprimer nos doutes concernant l'interprétation des droits de la presse en tant que devoirs, mais nous notons que d'autres formulations sont aussi employées dans notre jurisprudence : « À la fonction des médias consistant à communiquer de telles informations et idées s'ajoute le droit pour le public d'en recevoir » (*News Verlags GmbH & Co. KG c. Autriche* (nº 31457/96, § 56, CEDH 2000-I), *Dupuis et autres c. France* (nº 1914/02, § 35, 7 juin 2007) et *Campos Dâmaso c. Portugal* (nº 17107/05, § 31, 24 avril 2008)). Voir aussi *Axel Springer AG*, précité, §§ 80 et 79.

son arrêt, la Cour ne se penche pas sur la question de la bonne foi. De plus, s'agissant de journalisme en ligne et de la responsabilité d'un intermédiaire actif, il convient de tenir dûment compte du rôle de l'autorégulation de la profession ;

– la Cour a déclaré que « [s]anctionner un journaliste pour avoir aidé à la diffusion de déclarations émanant d'un tiers dans un entretien entraverait gravement la contribution de la presse aux discussions de problèmes d'intérêt général et ne saurait se concevoir sans raisons particulièrement sérieuses » (*Jersild c. Danemark*, 23 septembre 1994, § 35, série A n° 298). La Cour a jugé qu'il s'agissait là d'un principe pertinent et nous pensons nous aussi qu'il est important pour la presse, y compris pour les portails d'actualités et les intermédiaires actifs. Cependant, ce principe n'est tout simplement pas examiné dans l'arrêt ;

– ouvrir un espace pour les commentaires revient à offrir un forum permettant d'exprimer des avis sur des questions publiques. À ce titre, un tel espace contribue à un discours plus vigoureux et permet à autrui de recevoir et de communiquer des informations qui ne dépendent pas de décisions de médias centralisés. Toute restriction apportée aux moyens touche le droit de recevoir et communiquer des informations (voir, par exemple, *Öztürk c. Turquie* [GC], n° 22479/93, § 49, CEDH 1999-VI) ;

– le débat concernait une question d'intérêt public. Les commentaires portaient sur le comportement hautement controversé d'une grande entreprise.

40. La Cour se montre réticente à envisager la possibilité de moyens moins intrusifs, mais, à notre avis, quelques éléments de justification au moins s'imposent pour expliquer pourquoi seul l'équivalent d'un contrôle en amont et d'une responsabilité absolue répond aux devoirs et responsabilités mal définis des intermédiaires actifs.

41. Sans spéculer sur l'issue d'un exercice de mise en balance, nous observons que ces considérations ont été omises. Lorsqu'une partie des considérations requises n'ont pas été prises en compte dans l'exercice de mise en balance opéré par la juridiction nationale, la Cour se doit de conclure à la violation.

42. Loin de nous l'intention d'ignorer le problème du discours raciste. Le fait que l'espace réservé aux commentaires ait techniquement facilité la diffusion du racisme doit faire partie intégrante de l'analyse de la proportionnalité. En fait, la zone de commentaires facilite la diffusion de tous les points de vue de la même manière. Nous admettons toutefois, même en l'absence d'éléments spécifiques, que la probabilité que des commentaires racistes soient formulés est d'autant plus élevée qu'il y a de commentaires. Nous concédons cela, bien qu'à titre d'hypothèse uniquement, car aucun

élément en ce sens n'a été produit dans le cadre de la procédure ni été évoqué par la Cour.

43. Même à supposer qu'il y ait un accroissement de la probabilité de voir figurer des propos racistes dans les zones de commentaires (hypothèse qui reste à prouver, encore une fois), il convient de s'interroger sur ce qu'est le niveau adéquat de vigilance face à un tel risque. Peut-être que le système de filtrage était inapproprié pour répondre à cette difficulté. Telle est la position que la Cour a adoptée, sans déterminer quel aurait été le niveau adéquat de vigilance en 2006, en Estonie. Nous ne savons pas et ne pouvons pas savoir. La Cour ne peut pas remplacer l'absence d'analyse au niveau interne par sa propre analyse. De plus, il n'appartient pas à la Cour d'assumer le rôle de législateur national. Nous ne pouvons pas exclure que la nécessité de combattre le discours raciste (qui est une question à caractère public et non pas simplement un droit individuel) pourrait commander un devoir de vigilance qui imposerait des obligations allant au-delà des mesures appliquées par Delfi. Mais la tâche de la Cour est de déterminer si l'ingérence des autorités nationales reposait en fait sur des motifs adéquats et crédibles. Ceux-ci sont ici absents ; il y a donc eu violation de la Convention.

ANNEXE

Nous espérons que cette affaire n'est pas le début (ou la confirmation et l'accélération) d'un autre chapitre de « mise sous silence » et ne restreindra pas le potentiel de renforcement de la démocratie que présentent les nouveaux médias. Bien souvent, les nouvelles technologies parviennent à surmonter les barrières les plus astucieuses et récalcitrantes imposées au niveau politique ou judiciaire. Mais l'histoire nous offre des exemples décourageants – et aux effets durables – de régulation des intermédiaires au moyen de la censure. À titre de rappel, nous présentons ici un bref résumé d'une tentative de censure ayant visé les intermédiaires.

Dans l'Angleterre de la Réforme, le régime d'autorisations (*licensing*) de l'Église catholique fut repris par l'État et devint pour celui-ci un moyen de contrôler l'ensemble des publications imprimées. Le régime d'autorisations permit à la Couronne de « censurer en amont de la publication et de condamner facilement les contrevenants »[1]. Ces lois éliminaient les écrits séditieux à l'endroit où se faisait la production de masse, c'est-à-dire l'imprimerie. Le système d'autorisations, qui au début prévoyait des poursuites devant la Chambre étoilée (*Star Chamber*), châtiait tout imprimeur qui n'avait pas reçu d'autorisation pour l'ouvrage qu'il entendait imprimer (autorisation qui dépendait de l'aval du roi). Avec l'abolition de la Chambre étoilée, les lois sur le régime d'autorisations cessèrent brièvement d'exister pendant la guerre civile anglaise. Le Parlement, toutefois, n'appréciait pas la diffusion d'idées religieuses et politiques radicales. Il décida de remplacer la censure de la Couronne par sa propre censure, ce qui permettait également de protéger les intérêts commerciaux de la corporation des imprimeurs. C'est ainsi que fut adoptée l'ordonnance (*Licensing Order*) du 14 juin 1643, qui restaura au profit du Parlement le régime précédemment honni de l'ordonnance sur la Chambre étoilée (autorisation en amont de la publication ; enregistrement de tout document imprimé avec le nom de l'auteur, de l'imprimeur et de l'éditeur ; recherche, saisie et destruction de tout ouvrage offensant pour le gouvernement ; et châtiment des imprimeurs et éditeurs). Après une révolution, on observe une tendance à réinventer les instruments d'oppression contre lesquels les révolutionnaires s'étaient élevés (voir aussi la loi sur les étrangers et la sédition – *Alien and Sedition Act* – adoptée aux États-Unis d'Amérique). La Compagnie des imprimeurs (*Stationers' Company*) fut chargée d'exercer la censure, en échange d'un monopole sur le secteur de

1. Philip Hamburger, « *The Development of the Law of Seditious Libel and the Control of the Press* », *Stanford Law Review* 37, pp. 661 et 673 (1985). Voir aussi John Feather, *A History of British publishing*, Routledge, seconde édition (2002).

l'imprimerie. Le régime d'autorisations, avec les intérêts financiers de la confédération des éditeurs/imprimeurs, se révéla être un censeur plus efficace que les lois sur la diffamation séditieuse.

Ce nouveau régime d'autorisations fut ciblé par John Milton dans *Areopagitica ou De la liberté de la presse et de la censure*, paru en novembre 1644. C'est la résistance à l'autocensure imposée aux intermédiaires (les imprimeurs) qui a engendré *Areopagitica*, le premier et le plus important des manifestes pour la liberté d'expression. L'objet d'*Areopagitica* était de convaincre le Parlement que le régime d'autorisations n'avait pas sa place dans la libre quête de la vérité. L'auteur y plaidait qu'une presse non soumise à un tel régime déboucherait sur un marché d'idées où la vérité pourrait prévaloir. Cet ouvrage n'est pas parvenu à vaincre le sectarisme du Parlement. Nous espérons qu'il aura plus de succès aujourd'hui.