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

COURT (PLENARY)

CASE OF BARBERÀ, MESSEGUÉ AND JABARDO v. SPAIN

(Application no. 10590/83)

JUDGMENT

STRASBOURG

6 December 1988

In the case of Barberà, Messegué and Jabardo*,

The European Court of Human Rights, sitting in plenary session pursuant to Rule 50 of the Rules of Court and composed of the following judges:

Mr R. RYSSDAL, President,
Mr J. CREMONA,
Mr Thór VILHJÁLMSSON,
Mrs D. BINDSCHEDLER-ROBERT,
Mr G. LAGERGREN,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr J. PINHEIRO FARINHA,
Mr L.-E. PETTITI,
Mr B. WALSH,
Sir Vincent EVANS,
Mr R. MACDONALD,
Mr C. RUSSO,
Mr R. BERNHARDT,
Mr A. SPIELMANN,
Mr J. DE MEYER,
Mr N. VALTICOS,
Mr L. TORRES BOURSAULT, *ad hoc judge*,

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

Having deliberated in private on 28-29 January, 21-22 June and 26-27 October 1988,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") and by the Spanish Government ("the Government") on 12 December 1986 and 29 January 1987 respectively, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in three

* Note by the Registrar: The case is numbered 24/1986/122/171-173. The second figure indicates the year in which the case was referred to the Court and the first figure indicates its place on the list of cases referred in that year; the last two figures indicate, respectively, the case's order on the list of cases and of originating applications (to the Commission) referred to the Court since its creation.

applications (nos. 10588/83 - 10590/83) against the Kingdom of Spain lodged with the Commission under Article 25 (art. 25) by three nationals of that State, Mr Francesc-Xavier Barberà, Mr Antonino Messegué and Mr Ferrán Jabardo, on 22 July 1983.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to Spain's declaration recognising the compulsory jurisdiction of the Court (Article 46) (art. 46); the Government's application referred to Article 48 (art. 48). The object of the request and of the application was to obtain a decision as to whether the facts of the case disclosed a failure by the respondent State to comply with the requirements of Article 6 para. 1 (art. 6-1).

2. In response to the enquiry made under Rule 33 para. 3 (d) of the Rules of Court, the applicants stated that they wished to take part in the proceedings before the Court and designated the lawyers who would represent them (Rule 30).

3. The Chamber to be constituted included ex officio Mr J.A. Carrillo Salcedo, the elected judge of Spanish nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 3 February 1987, in the presence of the Registrar, the President drew by lot the names of the other five members, namely Mr L.-E. Pettiti, Mr B. Walsh, Mr R. Macdonald, Mr A. Donner and Mr N. Valticos (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

By a letter of 8 January to the President, Mr Carrillo Salcedo had withdrawn under Rule 24 para. 2 because he had been a member of the Commission when it made its decision on the admissibility of the application (11 October 1985). On 10 February, the Government informed the Registrar of the appointment of Mr Leopoldo Torres Boursault, abogado at the Supreme Court, as an ad hoc judge (Article 43 of the Convention and Rule 23) (art. 43).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the Government, the Delegate of the Commission and the lawyers for the applicants on the need for a written procedure (Rule 37 para. 1). In accordance with the orders made in consequence, the Registrar received memorials from the applicants and from the Government on 6 May and 10 June 1987 respectively. On 17 July, the Secretary to the Commission informed him that the Delegate would submit his observations at the hearing.

5. On 23 September, the Chamber decided to relinquish jurisdiction forthwith in favour of the plenary Court (Rule 50).

6. On the next day, having consulted - through the Registrar - those who would be appearing before the Court, the President directed that the oral proceedings should open on 1 December 1987 (Rule 38). He had earlier given the Government's delegation leave to address the Court in Spanish,

but subsequently he decided not to grant an application by counsel for the applicants for leave to speak in Catalan (Rule 27 paras. 2 and 3).

On 4 and 16 November, the Commission filed a number of documents which the President had instructed the Registrar to obtain from it.

7. The hearing took place in public on the appointed day in the Human Rights Building, Strasbourg. The Court had held a preparatory meeting immediately beforehand.

There appeared before the Court:

- for the Government

Mr José Luis FUERTES SUÁREZ, Legal Adviser,
Ministry of Justice, *Agent*,
Mr Manuel PERIS GÓMEZ, Vice-Chairman
of the General Judicial Council,
Mr Cándido CONDE-PUMPIDO FERREIRO, Deputy Principal Crown
Counsel at the Supreme Court, *Advisers*;

- for the Commission

Mr J.A. FROWEIN, *Delegate*;

- for the applicants

Mr C. ETELIN, avocat,
Mr A. GIL MATAMALA, abogado,
Mr I. DOÑATE SANGLAS, abogado,
Mr S. MIGUEL ROÉ, abogado, *Counsel*,
Mr G. DE CELIS BERNAT, abogado,
Mr I. FORTUNY RIBAS, abogado, *Assistants*.

The Court heard addresses and submissions by Mr Peris Gómez and Mr Conde-Pumpido Ferreiro for the Government, by Mr Frowein for the Commission and by Mr Etelin and Mr Gil Matamala for the applicants, and also their replies to its questions.

AS TO THE FACTS

8. The three applicants are Spanish nationals born in 1951, 1947 and 1955, respectively. Mr Francesc-Xavier Barberà Chamarro and Mr Antonino Messegué Mas are serving long sentences at Lérida Prison no. 2 (Lleida-2) and Barcelona Prison respectively and have the benefits of the open system. Mr Ferrán Jabardo García is at present living in Gironella in Barcelona Province.

I. THE CIRCUMSTANCES OF THE CASE

A. Origin of the proceedings against the applicants

1. Killing of Mr Bultó

At about 3 p.m. on 9 May 1977, Mr José María Bultó Marqués, a 77-year-old Catalan businessman, was at his brother-in-law's house in Barcelona in the company of his brother-in-law and his own sister, Mrs Pilar Bultó Marqués, when two men entered the flat under the pretext of being gas-board employees. They seized and held the maid, thus enabling other persons to enter.

The latter threatened Mr Bultó with guns and shut him in a room, where they fixed an explosive device to his chest. They demanded a ransom of five hundred million pesetas from him, to be handed over within twenty-five days, and gave him instructions on how to pay it, saying that on payment he would be told how to remove the device safely. They then left the premises and departed in waiting cars.

10. Mr Bultó returned home in his car. Shortly before 5 p.m., the device exploded, killing him instantly.

2. Criminal proceedings following the killing

11. On the same day, Barcelona investigating judge no. 13 commenced a preliminary investigation (diligencias previas - no. 1373/77) into these events. On 11 May, he placed the relevant documents in investigation file (sumario) no. 61/1977 but later relinquished jurisdiction on the ground that the crime was a terrorist act which came within the jurisdiction of the Audiencia Nacional in Madrid (see paragraph 45 below). The case was accordingly sent to central investigating judge no. 1 of that court (juez central de instrucción), who opened file no. 46/1977.

12. The police investigation led to the arrest on 1 July 1977 of four persons (not including any of the applicants) who were members of the E.PO.CA. (Catalan Peoples' Army) and one of whom had been recognised by witnesses. On 29 July, they were charged with murder, with a terrorist act causing death and with possession of explosives.

On 10 November 1977, however, the Audiencia Nacional decided to apply the amnesty law (no. 46 of 15 October 1977) to the accused owing to the political nature of their motives. They were at once released.

13. On an appeal by the public prosecutor, the Supreme Court set this decision aside on 28 February 1978 on the ground that by that stage of the proceedings it had not been established that the crime was politically motivated and not carried out for pecuniary gain. This judgment meant that

investigation file no. 46/1977 was reopened. As the four accused did not appear, however, the judge ordered them to be sought by the police, and in July 1978 he provisionally suspended the proceedings.

3. Arrest of Mr Martínez Vendrell and proceedings against him

14. In the course of their investigations into the killing of Mr Bultó, the police arrested Mr Jaime Martínez Vendrell, aged 63, and four other persons on 4 March 1979. They were placed in police custody and held incommunicado, in accordance with the anti-terrorist legislation then in force (see paragraph 46 below).

Unassisted by a lawyer, Mr Martínez Vendrell was questioned at the police station during his custody there and on 11 March 1979 made a statement containing, in substance, the following:

Until 1974 he had been a leading member of a Catalan nationalist organisation, the "Front Nacional de Catalunya", and from 1967 on had taken part in the creation and training of armed groups, with the object of fighting for the independence of the Catalan nation.

In 1968, he had met three young men including a certain "Thomas", whom he identified as the applicant Messegué, and in late 1969 had begun their theoretical and practical military training. In 1973, he had established another group of young men, one of whom he identified as the applicant Barberà.

Subsequently, several people, including "Thomas", had purchased weapons in Germany; they had brought them into Spain via France and hidden them in dumps known to them alone.

In 1976, three groups had been established, one of which was commanded by "Thomas". The group members gave up all outside activities and were paid by the organisation. A network of flats and radio transmitters had been created later to allow contact between the groups.

In February 1977, Mr Martínez Vendrell had been informed that an explosive device had been produced, which could be attached to a person’s body and subsequently defused on payment of an agreed ransom. The mechanical part of this device could have been designed by "Thomas" (Messegué) and another activist, and the electronic part by Mr Barberà and another person. "Thomas" and someone else had later shown the device to Mr Martínez Vendrell.

In April 1977, they had revealed to him that the first victim chosen was Mr José María Bultó.

Two days after the killing, he had met the commando leaders and had learned that eleven people had taken part in the operation and that Mr Barberà and Mr Messegué had attached the device to the victim’s chest.

15. When Mr Martínez Vendrell was brought before Barcelona investigating judge no. 6, in the presence and with the assistance of counsel, he amended his statement. In particular, he said that the bomb "might have"

been made by the persons stated, but that he did not know the names of those who had carried out the attack on Mr Bultó.

16. These statements were sent to central investigating judge no. 1 in Madrid, who reopened file no. 46/1977 on 15 March 1979. On the next day he charged Mr Martínez Vendrell with murder and with possession of arms and explosives, and ordered him to be held in custody on remand.

In a further decision on the same day he charged six others, including Mr Barberà and Mr Messegué, with murder, criminal damage and uttering forged documents, and issued a warrant for their arrest. As none of the six could be found, the proceedings continued solely against the co-defendants in custody.

17. During the investigation and again at the hearing, Mr Martínez Vendrell retracted his statement to the investigating judge as far as the identification of Barberà and Messegué was concerned.

On 17 June 1980, the first section of the Criminal Division of the Audiencia Nacional sentenced him to one year and three months' imprisonment for assisting armed gangs. It set aside the original charges, however, noting among other things that he had expressed disapproval when at the end of April 1977 he had been told of the proposed operation against Mr Bultó; that the preparations had occurred without his knowledge; and that he had only learned of the victim's death through press reports. It also ordered his immediate release because the period of the sentence had already been spent in custody on remand.

18. Following an appeal on points of law by Mr Bultó's son, acting both as a "private prosecutor" and as a party claiming civil damages, the Supreme Court quashed the judgment of the Audiencia Nacional on 10 April 1981. On the same day, it sentenced Mr Martínez Vendrell to twelve years and one day's imprisonment for aiding and abetting a murder and ordered him to pay five million pesetas in damages to the victim's heirs. It held that the influence he exerted on those who committed the crime was sufficiently great to amount to aiding and abetting and went far beyond merely assisting armed gangs; admittedly, he had made it clear that he was opposed to the crime, but he had done nothing to prevent it.

A warrant was consequently issued - on 24 April 1981, according to the applicants - for Mr Martínez Vendrell's arrest. Mr Martínez Vendrell has not so far been found by the police and has therefore not yet served his sentence.

B. Arrest of the applicants and criminal proceedings against them

19. The three applicants were arrested with other persons on 14 October 1980 and charged with belonging to the terrorist organisation E.PO.CA. Among items found at their homes were radio transmitters and receivers, a variety of implements, electronic equipment, publications of left-wing

nationalist parties, files on leading politicians and businessmen, and books on topography, electronics and the chemistry of explosives.

Section 2 of Law no. 56 of 4 December 1978 on the suppression of terrorism, as renewed by Royal Legislative Decree no. 19 of 23 November 1979, was applied to their case (see paragraph 46 below). This authorised the police to hold suspects in custody for longer than the normal period of seventy-two hours, with leave from the investigating judge. The applicants were moreover held incommunicado and not allowed to have the assistance of a lawyer.

While in custody they signed a statement in which they admitted having taken part in Mr Bultó's murder either as principals or as accessories; their account differed from Mr Martínez Vendrell's, however. Furthermore, the police discovered stocks of arms and explosives at places indicated by Mr Barberà and Mr Messegué.

20. On 23 October 1980, the persons held in custody appeared before Barcelona investigating judge no. 8, who questioned them - without any defence lawyer being present in the case of Mr Barberà and Mr Jabardo. They retracted their confessions to the police and two of them - Jabardo and Messegué - complained of being subjected to physical and psychological torture while in police custody.

By an order (auto) of the same day the judge directed that they should be held in custody on remand, and they were transferred to Barcelona Prison.

21. On 24 October 1980, the resulting documents were sent to central investigating judge no. 1 for inclusion in file no. 46/1977.

On 12 January 1981, the latter judge charged the applicants and two other persons with murder and assisting armed gangs. He then sent letters rogatory to Barcelona for further inquiries to be made. Barcelona investigating judge no. 10 served the charges on the applicants and examined them on 22 January; they confirmed the statements they had made to investigating judge no. 8 and again alleged that their confessions had been obtained by means of torture.

They were not, however, confronted with the prosecution witnesses or Mr Martínez Vendrell, who was then at liberty.

Mr Barberà instructed an advocate and an attorney in Barcelona on 22 December 1980, but the central investigating judge in Madrid did not record these appointments until 20 January 1981. Mr Messegué and Mr Jabardo did not instruct lawyers until 21 February 1981; the investigation had been completed on 16 February.

1. The proceedings before the Audiencia Nacional

22. The case was then committed for trial to the first section of the Criminal Division of the Audiencia Nacional.

By an order of 13 March 1981, the court instructed the public prosecutor and the private prosecutor to make their interim submissions. They argued

that the facts amounted to murder, possession of arms and explosives and forging identity documents; as evidence they offered the examination of the defendants, the hearing of eye-witnesses and the production of the entire case-file; no mention was made of Mr Martínez Vendrell.

The file was sent to the attorney acting for Mr Jabardo on 27 May and to the ones acting for Mr Barberà and Mr Messegué on 1 June. Each of the defendants conducted his defence separately with counsel of his own choosing. All the defendants declared their innocence and offered to produce similar evidence, including, in Barberà and Messegué's case, the statement made by Mr Martínez Vendrell retracting the one he had made to the police implicating Mr Barberà and Mr Messegué in the murder.

Mr Messegué had been transferred to Madrid but he and his counsel managed to get him returned to Barcelona in order to prepare his defence.

23. By an order made on 27 October 1981, the court - on this occasion composed of Mr de la Concha (the presiding judge), Mr Barnuevo and Mr Infante - admitted the evidence offered and set the case down for trial on 12 January 1982. It also ordered that the accused should be brought to Madrid and appointed Mr Obregón Barreda and Mr Martínez Valbuena of the third section as additional judges to bring the number in the first section to five in view of the heavy sentences being sought (Article 145 para. 2 of the Code of Criminal Procedure).

On 10 December 1981, defence counsel (all of whom were members of the Barcelona Bar) applied for the trial to take place in Barcelona on account of the needs of the defence and witnesses' travel difficulties. Subsequently, a Catalan senator wrote to the court requesting it to at least postpone the transfer to Madrid until after Christmas. On 18 December 1981, the Audiencia Nacional, presided over by Mr Pérez Lemaur, who was sitting with Mr Barnuevo and Mr Bermúdez de la Fuente, refused the first application and confirmed that the hearing would be held in Madrid on 12 January 1982.

24. On the day before the trial, counsel for the defendants met the presiding judge of the first section of the Criminal Division (Mr de la Concha), in order to prepare for the hearing and discuss the possibility of an adjournment, as the applicants were still in prison in Barcelona. The presiding judge assured them that the defendants' transfer was imminent and that the trial could therefore go ahead.

The applicants stated that they left Barcelona on the evening of 11 January and arrived in Madrid at four o'clock the following morning, when the hearing was due to commence at 10.30; they said that they were in very poor shape after travelling more than 600 kilometres in a prison van. According to the Government, the journey took ten hours at most.

That same morning of 12 January 1982, the presiding judge had to leave Madrid suddenly as his brother-in-law had been taken ill. As senior judge of the Division, Mr Pérez Lemaur took his place. In accordance with the

legislation in force, so the Government asserted, the parties were not warned either of this substitution or of the replacement of Mr Infante - who no longer belonged to the first section - by Mr Bermúdez de la Fuente.

25. The trial was held on the appointed day in a high-security courtroom; in particular, the defendants appeared in a glass cage and were kept in handcuffs for most of the time. The record makes no mention of any protest by them, except as regards certain exhibits which were not produced in court.

The court agreed to admit in evidence a number of documents submitted by the defence. When examined by the private prosecutor in regard to matters in their statements to the police, the accused again denied any participation in the murder and again complained of being subjected to torture while they were in custody.

26. The public prosecutor offered for examination the three witnesses who had been present at the time of the crime: the sister and brother-in-law of Mr Bultó, and their housemaid. The sister and the maid were very old and could not come to Madrid but the prosecutor asked that their statements to the police on the day after the crime should be taken into account. Mr Bultó's brother-in-law gave evidence in court but did not recognise any of the applicants. The only documentary evidence produced by the public prosecutor was a copy of the file on the investigation.

27. For its part, the defence, with the court's leave, called ten witnesses; some of them, who were arrested at the same time as the defendants, alleged that they too had been subjected to brutality while in police custody.

All the parties agreed to treat the documentary evidence as if it had been produced (por reproducida - see paragraph 40 below).

28. The public prosecutor and the private prosecutor then confirmed their interim submissions; counsel for the defendants, on the other hand, amended theirs and submitted that the amnesty law should be applied (see paragraph 12 above).

The hearing was adjourned until 4.30 p.m. and resumed with addresses by the three parties. The presiding judge finally asked the defendants if they had anything to add, and they answered in the negative. The hearing ended in the evening.

29. On 15 January 1982, the first section of the Criminal Division of the Audiencia Nacional sentenced Mr Barberà and Mr Messegué to thirty years' imprisonment for murdering Mr Bultó; it also sentenced Mr Barberà to six years and one day's imprisonment for unlawful possession of arms and to three months' imprisonment and a fine of thirty thousand pesetas for uttering forged documents, and Mr Messegué to six years and one day's imprisonment for possessing explosives. Mr Jabardo was sentenced to twelve years and one day's imprisonment for aiding and abetting a murder.

The court held it to have been proved that Mr Barberà and Mr Messegué had directly participated in fixing the device to the victim's body and

switching on the electric mechanism, after which they had given Mr Bultó instructions for the payment of a ransom, which was the condition on which he would be able to remove the device safely. The device had subsequently exploded for reasons that had never been properly established. Mr Jabardo had assisted the operation by gathering information about public figures in Catalonia, including Mr Bultó.

In the same judgment the court refused to apply the amnesty law of 15 October 1977 to the applicants. Even if they had been acting from a political motive, that motive was the independence (and not merely the autonomy) of the Catalan nation and so did not fall within the scope of the amnesty.

2. Proceedings in the Supreme Court

30. The applicants appealed on points of law, relying on Articles 14 (right of all Spaniards to equality before the law), 17 (right to liberty and security of person) and 24 (right to effective judicial protection) of the Constitution. They described the circumstances of their arrest and custody and pointed out that when they were questioned by the police they did not have the assistance of lawyers and had not been informed of their rights; they had made confessions only because use had been made of coercion, threats and ill-treatment (see paragraphs 19-20 above).

They also claimed that there was no evidence to rebut the presumption that they were innocent of Mr Bultó's murder, as the physical violence to which they had been subjected rendered their confessions invalid. Moreover, there was no connection between the facts found by the Audiencia Nacional and the evidence adduced before it, and its judgment did not explain how it had arrived at its decision.

The applicants also criticised the Audiencia Nacional for not having determined all the issues raised in the defence submissions (Article 851 para. 3 of the Code of Criminal Procedure - see paragraph 43 below): it had ignored their allegations that their statements to the police were invalid and had given no indication of the evidential value it attached to those statements, having regard to the material produced during the trial. Mr Messegué submitted, moreover, that he was implicated solely by confessions extracted by force from Mr Martínez Vendrell, who had later retracted them before the judge; the Audiencia Nacional had again not expressed an opinion as to their validity.

Furthermore, the Audiencia Nacional had made an error of fact in assessing the evidence (Article 849 para. 2 of the Code of Criminal Procedure - see paragraph 42 below), because there was no conclusive evidence to refute their protestations of innocence before the judge. Referring to Article 24 para. 2 of the Constitution (see paragraph 36 below), which enshrines the principle of the presumption of innocence, and to the Supreme Court's case-law on the subject, the applicants asserted that not

only had the evidence been wrongly evaluated but no such evidence in fact existed.

They further submitted that the Audiencia Nacional had not indicated its reasons for holding that the facts had been established, as required by Supreme Court precedents, even though the main defence submission had been that there was no evidence. There could only be one explanation for this, namely that the court had allowed itself to be influenced by the defendants' alleged confessions to the police, which had been obtained in clear breach of the fundamental rights guaranteed in Articles 3 and 17 of the Constitution.

Mr Jabardo also criticised the Audiencia Nacional for not having sought during the hearing to inquire further into the facts. He said that the only prosecution witness who had given evidence in court had not recognised the defendants and that important evidence was lacking, such as identification and the confrontation of witnesses and accused or a reconstruction of the events. Lastly, he pointed to a discrepancy between the judgment of 17 June 1980 convicting Mr Martínez Vendrell (see paragraph 17 above) and the judgment given in the instant case on 15 January 1982 (see paragraph 29 above); in his submission, this discrepancy showed that he, Mr Jabardo, could not have taken part directly in the attack on Mr Bultó.

31. On 27 December 1982, the Supreme Court dismissed the appeals of Mr Barberà and Mr Messegué.

As to the validity of the confessions obtained by the police, including Mr Martínez Vendrell's, it noted that the alleged defects related solely to the findings of fact and accordingly did not give rise to the procedural irregularity complained of, which related only to points of law.

The court said the following about the presumption of innocence (translated from the French translation provided by the Government):

> "The evidence offered by the public prosecutor, the private prosecutor and the defence includes, as written evidence, the complete file on the investigation, containing: (a) the statement made to the judge by Mr Jaime Martínez Vendrell, assisted by his lawyer (doc. no. 572 in the file), in which he confirmed the following facts from his first statement to the police: the defendants Barberà Chamarro and Messegué Mas were members of an armed group designed to be the nucleus of a revolutionary army to free the Catalan nation; they were very closely associated with Mr Martínez Vendrell, particularly Mr Messegué; they had been thoroughly trained in urban guerrilla tactics; they lived 'freed from all external obligations', being paid by the organisation to devote all their energies to its work, in accommodation provided by the organisation; they communicated with each other by means of transmitters and used false identity documents and assumed names; Mr Messegué was in charge of one of the direct-action groups which, together with others, formed an organised unit or brigade; both men had important positions in the organisation and had received training such that they 'might have' constructed the explosive device (Mr Barberà the electronic component and Mr Messegué the mechanical component) used for the 'business operations and in particular the one of which Mr Bultó Marqués was the victim - Mr Martínez Vendrell did not know the identity of or the methods used by the persons forming the groups which took part in that operation'; (b) finding of fact in

the Audiencia Nacional's judgment of 17 June 1980 in the same case (doc. no. 138 in the file), confirmed unchanged in the Supreme Court's judgment of 10 April 1981 convicting Mr Jaime Martínez Vendrell: 'At an unspecified date at the beginning of that year (he is referring to 1977) three of the young men whom he saw most frequently and whom the defendant (Mr Martínez Vendrell) knew to be heads of armed groups told him they considered that the time had come to go into action and that they were contemplating operations to finance the members of the groups. They told him that they had adjustable explosive devices which could be fixed to the skin of selected victims so that the latter would be obliged to pay the money asked for in order to avoid the risk of an explosion entailed by removing a device without the instructions and equipment in the possession of those who had put it in place. At the end of April, two of these group leaders told him that they were thinking of a businessman, Mr José María Bultó Marqués, on whom to use this device for the first time'; (c) the statement made to the judge by Mr Francisco Javier Barberà Chamarro, assisted by his lawyer (doc. no. 903): he admitted being a member of the Catalan National Liberation Army, working together with Mr Martínez Vendrell, being in possession of arms and knowing of the existence of stocks of arms; (d) the statement made to the judge by Mr Antonino Messegué Mas, assisted by his lawyer (doc. no. 906): he belonged to the armed organisation, had been trained in urban guerrilla tactics by Mr Martínez Vendrell and knew of the existence of a stock of explosives; (e) the official report on a search of the flat at no. 1 Pinos Street, Hospitalet de Llobregat (doc. no. 890), and from the file on the investigation a statement by Mrs Dolores Tubau Molas (doc. no. 904) to the effect that the defendant Barberà Chamarro lived in the flat with other activists and that there were found there (inter alia) a transmitter, electronic equipment, lathes, tools and files containing press cuttings and information about a number of prominent people, and books on topography, the chemistry of explosives, and electronics; (f) the official report on a search of the flat at no. 27 Parlamento Street, Barcelona (doc. no. 892), occupied by Mr Antonino Messegué Mas and Mrs Concepción Durán Freixa (statement in doc. no. 908) and where a transmitter and receiver, medicines, wigs and stiff paper of the type used for national identity cards and for driving licences were seized; (g) the official report on the discovery of an arms dump and two radio transmitters at three places indicated by the defendant Barberà (doc. no. 882); (h) the official report on the discovery of an explosives dump indicated by Mr Messegué and the destruction of the explosives on the spot (docs. nos. 833 and 899). The mere existence of this evidence, irrespective of its implications and the way in which it is assessed, is sufficient to rebut the presumption of innocence relied on by the defendants Barberà Chamarro and Messegué Mas, and we therefore reject grounds five and four respectively of their appeals; the facts established in paragraph 1 of the recital finding that they were directly and immediately involved in the homicidal operation must consequently be confirmed in toto. The description of the facts as murder under Article 406 para. 3 of the Criminal Code with an aggravating circumstance under Article 10 para. 6, which was allegedly incorrectly applied according to Barberà's sixth ground of appeal and Messegué's fifth ground of appeal, was therefore correct and their appeals under section 849(1) of the Procedure Act must therefore be dismissed."

On the other hand, the Supreme Court quashed the Audiencia Nacional's judgment in respect of Mr Jabardo, holding that the established facts amounted not to the crime of aiding and abetting murder but to the lesser offence of assisting armed gangs. It accordingly delivered another judgment on the same day acquitting him on the first charge but sentencing him to six years' imprisonment on the second charge. Lastly, it confirmed that the

applicants were not covered by the amnesty law and it ordered an inquiry into their allegations of ill-treatment.

This inquiry was begun in 1984 by investigating judge no. 13 in Barcelona and led in 1985 to a discharge order being made by the Audiencia Provincial.

3. Proceedings in the Constitutional Court

32. The three convicted men appealed to the Constitutional Court alleging a violation of Articles 17 para. 3 (right of everyone arrested to be informed of the reasons for his arrest and to be assisted by a lawyer), 24 para. 2 (right to a fair trial and to be presumed innocent) and 14 (right of all Spaniards to equality before the law) of the Constitution (see paragraphs 30 above and 36 below).

As regards the factors taken into account by the Supreme Court, they made the following submissions.

1. Mr Martínez Vendrell's statement could be regarded only as witness evidence, yet it had not been offered as such nor had it been confirmed at the hearing. If one accepted that it had been produced by means of the phrase "por reproducida", the unacceptable consequence followed that all the actions and confessions contained in the police report would likewise have to be admitted as evidence, since they too appeared in the file on the investigation. In any case, the material statement did not provide any indication that the defendants had had any involvement in the murder.

2. The Audiencia Nacional's judgment of 17 June 1980 merely stated, in its second recital, that Mr Martínez Vendrell did not know the actual course of the relevant events.

3. Mr Barberà's statement to the investigating judge should not have been admitted in evidence, since he had made it without counsel's assistance; furthermore, he merely denied that he had participated in the crime.

4. Similarly, Mr Messegué had declared to the investigating judge that he was innocent.

5. The items found at the homes of Mr Barberà and Mr Messegué and the statements by their female companions had no connection with the murder. The items, moreover, had never amounted to real evidence as it did not appear from the file that they had been given to the judge or assessed by the court - one of the defence counsel had indeed protested at this during the trial; as to the documents, these had never been appended to the police report nor placed elsewhere in the file on the investigation, so the court could not take them into account.

6. The discovery of arms and explosives at the places indicated by Mr Barberà and Mr Messegué was relevant to the offences of unlawful possession of weapons and explosives but not to the murder.

In sum, none of the factors listed by the Supreme Court could rebut the presumption of innocence in respect of the main charge, the attack on Mr Bultó.

For the rest, the applicants repeated in substance the submissions they had made before the Supreme Court.

33. On 20 April 1983, the Constitutional Court declared the appeal (recurso de amparo) inadmissible as being manifestly ill-founded. As regards the presumption of innocence it gave the following reasons for its order (auto):

> "As the assessment of the evidence lies within the exclusive jurisdiction of the judges and courts, the Constitutional Court cannot find a violation of this provision unless there has been a failure to produce a minimum of evidence against the accused.
>
> In the instant case, however, this minimum of evidence was produced, namely in the statements made with the assistance of a lawyer to the investigating judge, the official reports on the searches made and on the real evidence discovered and in the facts as established in another judgment. The Constitutional Court cannot therefore review the criminal courts' assessment of the evidence."

34. In March 1984, the applicants were transferred from Carabanchel Prison in Madrid to Lérida Prison (Lleida-2). In September, the Audiencia Nacional granted Mr Jabardo parole. Since January 1987, Mr Barberà and Mr Messegué have been held in an open prison.

C. Further developments in the criminal proceedings relating to the killing of Mr Bultó

35. The police rearrested two of the persons originally prosecuted (see paragraph 12 above), Mr S and Mrs T, and the investigation was resumed on 8 February 1985.

Mr S was sentenced to thirty years' imprisonment as being responsible for Mr Bultó's murder together with the applicants Barberà and Messegué. He appealed on points of law to the Supreme Court, which dismissed his appeal on 28 November 1986, holding that the evidence produced was sufficient to rebut the presumption of innocence. His subsequent appeal to the Constitutional Court was declared inadmissible on 1 April 1987.

As for Mrs T, she was sentenced to four years' imprisonment for assisting armed gangs.

II. THE APPLICABLE SPANISH LEGISLATION

A. Spanish Constitution

36. By Article 24 of the Spanish Constitution,

"1. Everyone has the right to effective protection by the judges and courts in the exercise of his legitimate rights and interests, and in no case may the right to a defence be curtailed.

2. Everyone, further, has the right to be heard by the tribunal established by law, the right to a defence and to the assistance of a lawyer, the right to be informed of any charges against him, the right to a public trial without undue delay and attended by all safeguards, the right to make use of evidence relevant to his defence, the right not to make statements against himself and not to confess himself guilty, and the right to be presumed innocent.

..."

37. In view of the Constitutional Court's case-law in this area, the Supreme Court has extended the scope of proceedings in appeals on points of law. It has held that the presumption of innocence can be relied upon before it in respect of an infringement of the law resulting from an error made by the trial court when assessing the evidence (see paragraph 42 below), or on some other ground.

According to a judgment of 3 November 1982, the Supreme Court's review of the evidence is directed only to the question whether or not evidence was produced and taken and not to the criminal court's final, unappealable assessment of that evidence.

38. Article 53 para. 2 of the Constitution provides for an appeal (recurso de amparo) whereby the protection of the rights laid down in Articles 14 to 30 may be secured.

B. Code of Criminal Procedure

1. The file on the judicial investigation

39. According to the preamble to the Code of Criminal Procedure, the file on the judicial investigation is "the corner-stone of the hearing and the judgment". It is not a substitute for the hearing but a preparation for it.

Since the reform of 4 December 1978 (Law no. 53/1978), the adversarial nature of criminal proceedings applies to the investigation stage; this enables the accused, assisted by his advocate, to intervene in respect of steps concerning him (Articles 118 and 302). In order to exercise this right, the accused must appoint an advocate (abogado) and an attorney (procurador).

The investigating judge has to build up his file under the direct supervision of the appropriate public prosecutor's office (Article 306). He includes the evidence put forward by the public prosecutor and the other parties if he considers it relevant. He can also order evidence to be produced of his own motion, but in that case he adds to the file only such evidence as proves to be of value (Article 315).

Once the investigation is concluded, the judge forwards the documents to the relevant court (Article 622 para. 1), which takes the final decision to close the investigation after it has heard the public prosecutor and the private prosecutor (Article 627).

2. The hearing

40. Before the hearing, the public prosecutor and the private prosecutor make their interim submissions - in writing and in numbered paragraphs - on the punishable offences disclosed by the case-file, on their classification in criminal law, on the circumstances that may affect the accused's responsibility and on the penalty which he may incur. The defence, in its turn, presents its view of the classification in law of the facts disclosed by the case-file (which is placed at its disposal) and must reply by indicating, likewise in numbered paragraphs corresponding to the prosecution's submissions, whether it accepts or rejects each of them; in the latter case, it makes its own alternative submissions (Articles 650, 651 and 652). The prosecution and the defence must, when making their interim submissions, indicate the evidence they propose to adduce (Articles 656 and 657), and this evidence is scrutinised by the reporting judge and admitted or rejected by the court (Articles 658 and 659).

The hearing takes place in public, failing which it will be null and void (Article 680). It cannot begin or be continued unless the accused is present. For this purpose, the law allows the accused to be transferred, if necessary, to the town in which the hearing is to be held.

Evidence is taken in the order in which the parties have offered it. The court may also take such evidence as it considers necessary for the discovery of the truth (Article 729 para. 2). Furthermore, "at the request of any of the parties, documents relating to evidence which, for reasons beyond the parties' control, cannot be produced at the hearing may be read out" (Article 730). Where all or part of the file on the judicial investigation is adduced in evidence, there is an established practice that it will be regarded as having been produced (por reproducida) without having been read out if all those concerned so agree.

Immediately after the evidence has been taken, the parties may make written amendments to their interim submissions or else make them final. The presiding judge calls the representatives of the public prosecutor and of the private prosecutor (Article 732). In their pleadings, these representatives must set out the facts they consider proved at the hearing, their classification in criminal law, the part played in them by the accused and the civil liability flowing from them (Article 734). The presiding judge then immediately calls the defence; its pleadings must be consistent with its final written submissions (Articles 736 and 737). Lastly, the presiding judge gives the accused the opportunity of addressing the court in case he wishes to add

anything in his defence (Article 739). After that, the presiding judge declares the hearing closed.

3. The judgment

41. The judges deliberate immediately after the hearing, or at the latest on the following day (Article 149), and a reporting judge (magistrado ponente) is designated for the purposes, inter alia, of informing the court, examining the evidence and preparing a draft judgment (Articles 146-147 of the Code of Criminal Procedure). The final decision is written and signed within three days (Article 203). In drawing it up, the court has to assess in all conscience the evidence adduced during the hearing, the submissions of the prosecution and the defence, and the statements of the defendants (Article 741).

4. Appeal on points of law

42. An ordinary appeal does not lie against judgments of the Audiencia Nacional; only the special remedy of an appeal on points of law or procedure is available.

By Article 849, the law is deemed to have been violated

(1) where, having regard to the facts declared proved in the judgment appealed against, there has been an infringement of a substantive provision of criminal law or any other legal rule of the same kind which has to be complied with when the criminal law is being applied; or

(2) where an error of fact has been made in assessing the evidence and this appears clearly from authentic documents not contradicted by other evidence.

It has been held by the Supreme Court that in the second of these two eventualities the principle of the presumption of innocence can be prayed in aid (see paragraph 37 above).

43. Non-compliance with procedural requirements includes cases in which:

(a) the judgment appealed against does not clearly state the facts deemed to have been established or discloses a manifest discrepancy between them or else mentions as proved facts "concepts" which, by their legal nature, prejudge the decision to be taken (Article 851 para. 1);

(b) the judgment does not dispose of all the issues raised by the prosecution and the defence (Article 851 para. 3); and

(c) one of the judges who participated in the judgment was challenged but without success, although the challenge was made within time, in the proper manner and for a legally valid reason (Article 851 para. 6).

5. Membership of the court and right of challenge

44. The Audiencia Nacional and the Supreme Court both comprise several divisions with specific jurisdictions (civil, criminal, administrative), each of which is in turn divided into three-judge sections if the number of judges allows. Members of each division are always available to replace fellow members, and the president of a division can be replaced by the presiding judge of a section or by the senior judge.

Section 648 of the Judicature Act 1870 (Ley orgánica del Poder Judicial) provides that where the judges designated to complete a section do not come from the Criminal Division, the parties must be informed of their identity at least twenty-four hours before the public hearing begins.

By the same section of the Act, no challenge may normally be made after the hearing has begun. Under Article 56 of the Code of Criminal Procedure, however, a challenge may be made at any stage of the proceedings but in no circumstances after the beginning of the oral stage unless on the ground of subsequent events. A judge may be challenged on the following legal grounds among others: that he is related by blood or marriage to one of the parties; that one of the parties has either lodged a complaint or brought a prosecution against him or once did so in the past; that the judge has himself lodged a complaint or brought a private prosecution against the person making the challenge, or once did so in the past; that he is involved in litigation with the person making the challenge; that he is or has been the guardian or ward of one of the parties or has had custody of him; that he has taken part in the proceedings as advocate, legal adviser, member of the public prosecutor's office, expert, witness or investigating judge; that he has a direct or indirect interest in the proceedings; that he is a close friend or else obviously hostile (Article 54).

C. Legislation on terrorism

45. The Audiencia Nacional was given jurisdiction in terrorist cases on 4 January 1977 (Royal Legislative Decree no. 3/77). The court, which was created by legislative decree on the same date (no. 1/77), sits at Madrid and its criminal jurisdiction also extends to organised crime, business crime and offences whose effects reach beyond the territory of a single province. The judicial investigation of such offences is carried out by specialist judges (jueces centrales de instrucción).

46. At the time the applicants and Mr Martínez Vendrell were arrested, Law no. 56 of 4 December 1978 provided for a range of measures not permitted by the ordinary law in respect of terrorist acts committed by armed groups. This Law, which was originally intended to be in force for a year, was renewed by Royal Legislative Decree no. 19 of 23 November 1979.

Section 2 of the Law makes provision for holding people in police custody for up to ten days (instead of seventy-two hours). Furthermore, the

judicial authority which has ordered detention can also order that the person concerned be held incommunicado for the length of time needed to complete the judicial investigation, without prejudice to the rights of the defence (same section). There are also special provisions on searches and the monitoring of correspondence, including communications by telegraph and telephone (section 3).

PROCEEDINGS BEFORE THE COMMISSION

47. In their applications of 22 July 1983 to the Commission (nos. 10588/83-10590/83) Mr Barberà, Mr Messegué and Mr Jabardo complained that they had not had a fair trial before an independent and impartial tribunal; they alleged in particular that they were convicted on no evidence except their confessions, which had been extracted by torture, and they relied on Article 6 paras. 1 and 2 (art. 6-1, art. 6-2) of the Convention.

They also alleged that while in police custody they had been subjected to treatment incompatible with Article 3 (art. 3); in this connection they complained also of violations of Articles 5 para. 1, 8 para. 1 and 9 para. 1 (art. 5-1, art. 8-1, art. 9-1). Lastly, they claimed to be victims of discrimination contrary to Article 14 taken together with Article 9 para. 1 (art. 14+9-1), because when applying the amnesty law of 15 October 1977 (see paragraph 12 above), the relevant courts were allegedly more favourable to Basque nationalists than to Catalan nationalists.

48. After ordering the joinder of the applications on 14 March 1984, the Commission held them to be admissible on 11 October 1985 with regard to the complaints based on Article 6 paras. 1 and 2 (art. 6-1, art. 6-2) but declared them inadmissible for the rest.

In its report of 16 October 1986 (made under Article 31) (art. 31), it expressed the opinion that there had been a violation of Article 6 para. 1 (art. 6-1) (unanimously) and that there was no need for a separate examination of the complaints of the applicants Barberà and Messegué under Article 6 para. 2 (art. 6-2) (by twelve votes to none, with one abstention). The full text of the Commission’s opinion is reproduced as an annex to this judgment.

FINAL SUBMISSIONS TO THE COURT

49. In their memorial of 6 May 1987, the applicants asked the Court "to declare that Spain [had] violated Article 6 para. 1 (art. 6-1) of the Convention inasmuch as [their] right to a fair trial was infringed in the instant case". In the event of the Court not so holding, they also asked it to

"rule on a violation of Article 6 para. 2 (art. 6-2) on the ground that they [had been] convicted without any evidence".

50. The Government, in their memorial of 4 June 1987, requested the Court "to examine the proceedings leading to the applicants' conviction in their entirety or each of the steps in the proceedings separately; to rule on the objections that domestic remedies [had] not been exhausted; and to declare that the provisions of Article 6 paras. 1 and 2 (art. 6-1, art. 6-2) of the European Convention on Human Rights [had] not been violated in the instant case and that consequently the facts which [had given] rise to the proceedings [did] not disclose any violation by Spain of its obligations under the Convention".

AS TO THE LAW

51. The applicants claimed that they were the victims of breaches of Article 6 (art. 6), which provides:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal ...
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> (a) ...
>
> (b) to have adequate time and facilities for the preparation of his defence;
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> (e) ...".

The Government submitted that there had not been any such violations: they also pleaded non-exhaustion of domestic remedies in respect of some of the complaints.

The Commission, on the other hand, to a large extent accepted the applicants' arguments.

52. From the record it appears that the issues raised in this case can be grouped as follows:

(a) the impartiality of the Audiencia Nacional, which tried the applicants;

(b) the fairness of their trial; and
(c) adherence to the presumption of innocence.

I. ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 (art. 6-1)

A. The impartiality of the Audiencia Nacional

53. Mr Barberà, Mr Messegué and Mr Jabardo regarded the change in the membership of the bench without notice, the political persuasion of the substitute presiding judge, Mr Pérez Lemaur, and his attitude during the hearing as all being factors which made the Audiencia Nacional's impartiality open to doubt.

They had originally also contended that the Audiencia Nacional was a special court, but they did not repeat this argument before the Court. The Commission considered that the Audiencia Nacional was an ordinary court (see paragraph 94 of its report). The Court shares this opinion.

1. The change of membership of the bench without notice

54. The Court notes that in an order dated 27 October 1981 the appropriate section of the Audiencia Nacional had directed that the oral proceedings should commence on 12 January 1982 and had appointed the judges who would sit as additional members (see paragraph 23 above). The presiding judge of the section, Mr de la Concha, had a preparatory meeting with counsel for the defendants on the day before the trial, but the following morning had to leave Madrid for family reasons. Another judge, Mr Pérez Lemaur, took his place. Counsel were not warned of this, but they did not make any objection on this point at the hearing (see paragraphs 24-25 above).

(a) Preliminary objection

55. The Government contended that domestic remedies had not been exhausted in respect of this issue.

Before the Commission they pointed out merely that the membership had been changed in accordance with current legislation and practice and that the defence had not made any protest; they did not indicate on what legal basis such a protest could have been made, given the lawfulness of the change concerned. In its decision on admissibility the Commission noted that the Government did not mention any specific remedy.

Before the Court, on the other hand, the Government stated that the applicants could have had their protest against the failure to notify the identity of the judges as required by section 648 of the Judicature Act 1870 (see paragraph 44 above) entered in the record of the hearing and could then

have applied to the Supreme Court to quash the subsequent proceedings for non-compliance with a mandatory legal rule and, if necessary, could, lastly, have complained to the Constitutional Court that the defence rights guaranteed in Article 24 of the Constitution had been infringed.

56. It is not apparent from the material before the Court that the Government had previously referred to the said section 648 before the Commission, other than to state that it was inapplicable in the instant case. It was incumbent on them, however, to indicate sufficiently clearly the remedies to which they were alluding and to prove that they existed; in this area, it is not for the Convention bodies to cure of their own motion any shortcomings or lack of precision in respondent States' arguments (see, as the most recent authority, the Bozano judgment of 18 December 1986, Series A no. 111, p. 19, para. 46). There is therefore an estoppel in respect of the preliminary objection.

Furthermore, the Government raised this objection for the first time at the hearing on 1 December 1987. Rule 47 of the Rules of Court, however, required them to file it before the expiry of the time-limit laid down for the filing of their memorial, with the result that it must also be rejected as being out of time (see the Olsson judgment of 24 March 1988, Series A no. 130, p. 28, para. 56).

(b) The merits of the complaint

57. In the Court's view, the circumstances surrounding the impugned change in the membership of the Audiencia Nacional do not appear to be such as to make its impartiality open to doubt. On the other hand, the change does have to be considered as regards its possible consequences for the fairness of the trial and notably of the hearing of 12 January 1982 (see paragraphs 71-72 below).

2. The admissibility of the complaints concerning the substitute presiding judge

58. With regard to the complaints concerning Mr Pérez Lemaur, the Government pointed out firstly that counsel for the applicants did not seek to challenge the substitute presiding judge, so as to make it possible, if their challenge was rejected, to lodge an appeal on points of law based on failure to comply with formal requirements (Article 851 para. 6 of the Code of Criminal Procedure - see paragraph 43 above); and, secondly, that they did not complain, either, to the Constitutional Court that the Audiencia Nacional was biased (Article 24 para. 1 of the Constitution).

There is no estoppel here nor is the submission out of time, because the Government had raised this objection in substance before the Commission at the stage of the examination of admissibility (see, inter alia, the Bozano judgment previously cited, Series A no. 111, p. 19, para. 44) and reiterated

the objection in their memorial to the Court (Rule 47 para. 1 of the Rules of Court).

59. The Court notes first of all that the substitute presiding judge had already taken part in the proceedings on 18 December 1981, when the application to have the trial held in Barcelona was dismissed (see paragraph 23 above). Counsel for the defence could therefore have challenged him at that juncture.

Obviously, they did not at that time have any reason to think that Mr Pérez Lemaur would subsequently be called upon to try their clients. They had no more reason to envisage such an eventuality after they had had a meeting with the titular presiding judge of the section, Mr de la Concha, on the day before the hearing (see paragraph 24 above). It nonetheless remains a fact that when they noticed Mr de la Concha's absence the following morning, they did not manifest any disquiet regarding the new membership.

Admittedly, it is possible under Spanish law to challenge a judge only on certain grounds, which are laid down by law and relate, among other things, to the judge's personality or his connections with the parties; furthermore, once the trial has begun, a judge can be challenged only in respect of subsequent events (see paragraph 44 above). But since counsel for the defence did not know in advance the name or personality of the substitute presiding judge, they could not, a priori, adduce any legal ground for a challenge. They claimed, however, that once the sitting had begun, they noticed that Mr Pérez Lemaur had Francoist insignia on his tie and cuff-links; he allegedly also showed hostility towards the defendants and some of the witnesses. They did not specify what form the hostility took. If such behaviour did in fact occur, it should at the very least have elicited from the applicants a protest on grounds of obvious hostility (see paragraph 44 above); yet no such protest was made during the trial.

On this issue, therefore, they did not exhaust the domestic remedies.

B. The right to a fair trial

60. In the applicants' submission, the change in the membership of the trial court was not an isolated incident but was closely bound up with and was to be taken into account in regard to the way the trial at first instance was conducted, in particular the circumstances of the defendants' transfer to Madrid, the security measures taken during the hearing, the "surprising" rapidity of the trial and the passive attitude of the public prosecutor. These, they claimed, were all factors which justified the conclusion that the court was already convinced of the applicants' guilt and regarded the hearing of 12 January 1982 as a pure formality. At the time, however, the court - they submitted - could only have reached such a view on the basis of confessions extracted by the police, because the investigating judge had not made any attempt to clarify the facts. The applicants also criticised the way in which

the evidence was presented to the court, alleging that the principles of adversarial proceedings and of equality of arms had not been observed. They complained, among other things, that they had not been able to have the witness Mr Martínez Vendrell examined.

Mr Barberà and Mr Jabardo said additionally that they had not been assisted by a lawyer during their first appearance before the investigating judge.

61. Spain's declaration recognising the right of individual petition (Article 25 of the Convention) (art. 25) took effect on 1 July 1981. The terms of that declaration prevent the Court from examining the phase prior to 1 July 1981 in itself but not from looking at the proceedings as a whole in order to assess their fairness (see, in particular and mutatis mutandis, the Milasi judgment of 25 June 1987, Series A no. 119, p. 37, para. 31).

1. The Government's preliminary objection

62. The Government raised an objection to the various complaints at issue, contending on several grounds that domestic remedies had not been exhausted.

63. They argued firstly that if, on account of the night-time journey to Madrid, the applicants' physical and mental condition impaired their ability to conduct their defence, they ought to have applied for an adjournment of the hearing under Article 746 para. 5 of the Code of Criminal Procedure. During the hearing before the Court, the Government further contended that the applicants could also have relied on Articles 745 and 393 of that Code.

The Government did not mention any of these three provisions before the Commission, although the latter had sent them a summary of the facts which included the allegation concerning the circumstances and consequences of the applicants' transfer from Barcelona to Madrid. There is therefore estoppel.

Inasmuch as Articles 745 and 393 of the Code of Criminal Procedure are concerned, the plea also fails by reason of Rule 47 of the Rules of Court, since the Government raised it only during the oral proceedings.

Besides, Article 746 para. 5 could hardly provide a remedy for the complaint: while it does authorise an adjournment if defendants are ill, it does not appear to apply to fatigue caused by a long journey only a few hours before the opening of the trial. According to one of the counsel present at the meeting with the presiding judge, Mr de la Concha, on 11 January 1982, the defence in fact proposed an adjournment as the applicants were then still in Barcelona (see paragraph 24 above).

64. As regards the applicants' complaint relating to the brevity of their trial, the Government objected that in their appeals on points of law to the Supreme Court the applicants failed to rely on paragraphs 1, 3 and 4 of Article 850 of the Code of Criminal Procedure. The Court notes, however, that these provisions deal with eventualities which did not occur in the

instant case - refusal of procedural orders needed to establish the facts and refusal to hear a witness's reply to relevant questions or to allow such questions to be put.

Moreover, the Government submitted before the Commission, and again before the Court, that counsel for the accused should have formally objected to the allegedly humiliating treatment of their clients and to any other alleged irregularity during the trial. They did not, however, state what legal basis there was for such an objection; accordingly, they have failed to indicate sufficiently clearly the existing remedies which the applicants failed to exhaust (see, inter alia, the Bozano judgment previously cited, Series A no. 111, p. 19, para. 46, and paragraph 56 above).

65. As regards the complaints relating to the taking of evidence, the Court agrees with the Commission (decision of 11 October 1985 on admissibility) that the applicants validly raised them in substance in the national courts; they relied in particular on Article 24 of the Spanish Constitution, which essentially corresponds to Article 6 (art. 6) of the Convention (see paragraphs 30, 32 and 36 above).

66. Each ground of the preliminary objection must therefore be rejected.

2. The merits of the complaints at issue

67. The applicants claimed to be victims of a clear violation of paragraph 1 of Article 6 taken in conjunction with paragraphs 2 and 3 (d) (art. 6-1, art. 6-2, art. 6-3-d).

The Court recalls that the guarantees in paragraphs 2 and 3 (d) (art. 6-2, art. 6-3-d) are specific aspects of the right to a fair trial set forth in paragraph 1 (art. 6-1) (see, inter alia, the Unterpertinger judgment of 24 November 1986, Series A no. 110, p. 14, para. 29); it will therefore have regard to them when examining the facts under paragraph 1 (art. 6-1).

68. As a general rule, it is for the national courts, and in particular the court of first instance, to assess the evidence before them as well as the relevance of the evidence which the accused seeks to adduce (see the same judgment, p. 15, para. 33, second paragraph in fine). The Court must, however, determine - and in this it agrees with the Commission - whether the proceedings considered as a whole, including the way in which prosecution and defence evidence was taken, were fair as required by Article 6 para. 1 (art. 6-1). For this purpose it will consider in turn the various grounds of complaint before it (see paragraph 60 above).

(a) Transfer of the accused to Madrid

69. On 11 January 1982, that is to say the day before the opening of the hearing before the Audiencia Nacional, the applicants were still in Barcelona Prison. They did not leave for Madrid until the evening of 11 January. They arrived early in the morning of the following day after a

journey of more than 600 kilometres in a prison van, although the hearing was due to start at 10.30 a.m. (see paragraph 24 above).

The fact, relied on by the Government, that the applicants had asked to be in Barcelona with their families and friends for Christmas (see paragraph 23 above) cannot justify such a late transfer, because the Christmas festivities end on 6 January in Spain.

70. Mr Barberà, Mr Messegué and Mr Jabardo thus had to face a trial that was vitally important for them, in view of the seriousness of the charges against them and the sentences that might be passed, in a state which must have been one of lowered physical and mental resistance.

Despite the assistance of their lawyers, who had the opportunity to make submissions, this circumstance, regrettable in itself, undoubtedly weakened their position at a vital moment when they needed all their resources to defend themselves and, in particular, to face up to questioning at the very start of the trial and to consult effectively with their counsel.

(b) Replacement of the presiding judge and another judge

71. On the very day of the hearing, Mr de la Concha, the presiding judge of the first section of the Criminal Division of the Audiencia Nacional, had to leave because his brother-in-law had been taken ill; and one of the other judges mentioned in the order of 27 October 1981 (see paragraph 23 above), Mr Infante, was also unable to sit as he was no longer a member of the relevant section of the court. They were replaced by Mr Pérez Lemaur, the presiding judge of the third section, and by Mr Bermúdez de la Fuente, a member of the first section (see paragraph 24 above).

72. Neither the applicants nor their lawyers were given notice of these changes, particularly the change of presiding judge (see paragraph 24 above). Mr Pérez Lemaur, together with Mr Barnuevo and Mr Bermúdez de la Fuente, had admittedly taken a purely procedural decision on 18 December 1981 (see paragraph 23 above), but the defence lawyers could not infer from that that he would also be sitting on the trial court, bearing in mind in particular the preparatory meeting which they had had with Mr de la Concha on the previous day (see paragraphs 24 and 59 above). They were therefore taken by surprise. They could legitimately fear that the new presiding judge was unfamiliar with an unquestionably complex case, in which the investigation file - which was of crucial importance for the final result - ran to 1,600 pages. This is so even though Mr Barnuevo, the reporting judge (see paragraphs 23 and 41 above), remained in his post throughout the entire proceedings: Mr Pérez Lemaur had not taken part in the preparatory meeting on 11 January 1982; the case in fact proceeded without a full hearing of the evidence; the deliberations were due to take place immediately after the hearing, or at the latest on the following day (see paragraph 41 above); and the Audiencia Nacional had to give its

decision - and did in fact do so - within three days (see paragraphs 25, 29 and 41 above).

(c) Conduct of the trial of 12 January 1982 and taking of evidence

73. The hearing, with the five accused present, began on the morning of 12 January 1982 and ended the same evening. The Commission was surprised at its brevity in view of the complexity of the case, the considerable time that had elapsed since the occurrence of the facts and the protestations of innocence made by the defendants to the judges concerned.

The applicants emphasised the public prosecutor's passive attitude.

The Government contended that the length of a hearing depended on the nature and circumstances of the case, and on the attitude of the parties; in the instant case, the length was determined by the time needed to take evidence and to hear argument. There were two reasons why this whole procedure took only one day: the hearing was the last stage of proceedings after two earlier stages of investigation and interim submissions; and then, by adopting the "por reproducida" procedure, the prosecution and the defence agreed to admit the file on the investigation in evidence without requiring the 1,600 pages to be read out in court.

74. The Court concludes from these submissions that there was in the instant case a direct link between the length of the trial and the more important problem of taking evidence during the trial. It will accordingly look at them together.

75. It should be noted firstly that although under Spanish legislation it is to a certain extent left to the initiative of the parties to offer and present evidence, this does not absolve the court of first instance from its duty of ensuring that the requirements of Article 6 (art. 6) of the Convention are complied with (see, inter alia and mutatis mutandis, the Goddi judgment of 9 April 1984, Series A no. 76, p. 12, para. 31). Indeed, Articles 315 and 729 para. 2 of the Code of Criminal Procedure authorise both the investigating judge and the trial court to obtain of their own motion evidence which they consider will assist in establishing the truth (see paragraphs 39-40 above).

76. In criminal cases, the whole matter of the taking and presentation of evidence must be looked at in the light of paragraphs 2 and 3 of Article 6 (art. 6-2, art. 6-3) of the Convention (see paragraph 67 above).

77. Paragraph 2 (art. 6-2) embodies the principle of the presumption of innocence. It requires, inter alia, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused. It also follows that it is for the prosecution to inform the accused of the case that will be made against him, so that he may prepare and present his defence accordingly, and to adduce evidence sufficient to convict him.

According to the Government, this is the purpose of the intermediate stage of the proceedings when parties make their interim submissions and indicate the evidence which they propose to tender (see paragraph 40 above). In its interim submissions in the instant case, the public prosecutor gave his version of the facts and defined them in legal terms. He also listed the evidence he sought to have admitted, including the 1,600 page investigation file, the bulk of which did not concern the defendants; however, he did not specify in detail the particular evidence on which he based his account of the facts in relation to the defendants (see paragraph 22 above), and this made the defence's task more difficult.

78. Paragraph 1 of Article 6 taken together with paragraph 3 (art. 6-1, art. 6-3), also requires the Contracting States to take positive steps, in particular to inform the accused promptly of the nature and cause of the accusation against him, to allow him adequate time and facilities for the preparation of his defence, to secure him the right to defend himself in person or with legal assistance, and to enable him to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. The latter right not only entails equal treatment of the prosecution and the defence in this matter (see, mutatis mutandis, the Bönisch judgment of 6 May 1985, Series A no. 92, p. 15, para. 32), but also means that the hearing of witnesses must in general be adversarial.

In addition, the object and purpose of Article 6 (art. 6), and the wording of some of the sub-paragraphs in paragraph 3 (art. 6-3), show that a person charged with a criminal offence "is entitled to take part in the hearing and to have his case heard" in his presence by a "tribunal" (see the Colozza judgment of 12 February 1985, Series A no. 89, p. 14, para. 27, and p. 16, para. 32). The Court infers, as the Commission did, that all the evidence must in principle be produced in the presence of the accused at a public hearing with a view to adversarial argument. It will ascertain whether this was done in the instant case.

(i) Questioning of the accused

79. The hearing of 12 January 1982 began with the questioning of the applicants. In reply to questions from the public prosecutor, the private prosecutor and the defence lawyers, they denied any part in the murder of Mr Bultó. In doing so, they challenged all the evidence to the contrary, including their own confessions to the police, which they said were obtained by means of torture (see paragraph 25 above).

(ii) Examination of witnesses

80. Only one of the three eye-witnesses summoned to appear by the prosecution, Mr Bultó's brother-in-law, actually gave evidence at the trial, and he did not recognise the applicants. The public prosecutor asked,

however, that account should be taken of the statements made to the police by the other two (see paragraph 26 above); as these statements did not incriminate the accused, the defence raised no objection.

The ten witnesses called by the defence were meant to establish that the defendants had been ill-treated, so that the confessions obtained by the police would be declared inadmissible, and to testify to the good civic behaviour of Mr Barberà, Mr Messegué and Mr Jabardo (see paragraph 27 above).

The evidence of the various witnesses was heard in circumstances that complied with the requirements of Article 6 para. 1 taken in conjunction with paragraph 3 (d) (art. 6-1, art. 6-3-d), because the witnesses were examined at a public hearing under an adversarial procedure (see paragraph 78 above).

(iii) Documentary evidence

81. In their interim submissions the prosecution (public and private) and the defence had requested that, respectively, all or some of the documents in the investigation file should be read out at the trial. Mr Barberà and Mr Messegué sought also to have read out Mr Martínez Vendrell's statements withdrawing or modifying parts of his previous statement to the police implicating them in the murder (see paragraphs 15 and 17 above).

During the hearing, however, the parties agreed to dispense with having the file read out. The use of the "por reproducida" procedure had the consequence that much of the evidence was admitted without being exposed to public scrutiny.

82. The Government stated that there was nothing to prevent counsel for the applicants from requesting that certain documents from the investigation file or indeed the whole file should be read out at the trial (see paragraph 40 above). As they had not done this, they had waived their right to do so.

According to the Court's established case-law, waiver of the exercise of a right guaranteed by the Convention - in so far as it is permissible - must be established in an unequivocal manner (see, inter alia, the Colozza judgment previously cited, Series A no. 89, p. 14, para. 28). While the use of the "por reproducida" procedure showed that the defence accepted that the contents of the file need not be read out in public, it cannot be inferred from this that it agreed not to challenge the said contents even where the prosecution relied on them and, in particular, on the statements of certain witnesses; the grounds subsequently relied on by the defence before the Supreme Court and the Constitutional Court confirm this (see paragraphs 30 and 32 above).

83. By means of the "por reproducida" procedure, all the documents in the investigation file were included in the proceedings at the trial. The Court must, however, have regard to those evidential elements which were

relevant to the proceedings against the applicants in order to determine whether they had been procured in such a way as to guarantee a fair trial.

84. In Spain the adversarial nature of criminal proceedings extends, as the Government pointed out, to the investigation stage: the Code of Criminal Procedure enables an accused, with the assistance of his advocate, to intervene in respect of steps affecting him, as regards both his own and the prosecution's evidence or measures taken by the investigating judge (see paragraph 39 above).

The Court notes, however, that in this case the investigation had commenced well before the applicants' arrest on 14 October 1980. They obviously could not have played any part in it before then. On 22 December 1980, in Barcelona, Mr Barberà appointed an advocate and an attorney in order to take part in the proceedings, but the appropriate judge in Madrid did not record this until 20 January 1981, after the applicants had been charged and less than a month before the completion of the investigation on 16 February 1981; as for Mr Messegué and Mr Jabardo, they instructed defence lawyers five days after the latter date (see paragraphs 21-22 above). Other than when their evidence was taken in Barcelona on 22 January 1981 (see paragraph 21 above), the applicants did not intervene at any stage of the investigation. In addition, the short time left prevented them in practice from submitting evidence on the basis of a proper understanding of the case before the investigation was completed. The public prosecutor did not submit any evidence at the time either.

Furthermore, the accused and their lawyers were in Barcelona, the city where the killing had taken place and where the witnesses lived, whereas the investigating judge performed his duties in Madrid. This caused real practical problems both for the witnesses and for the judge. In particular, almost all the procedural steps had to be carried out by letters rogatory in Barcelona (see paragraphs 11, 15, 20 and 21 above).

Thus the deficiencies at the trial stage were not compensated by procedural safeguards during the investigation stage.

85. The evidence in the file included firstly (in chronological order) the statements made by Mr Martínez Vendrell, who was the first person to incriminate the applicants (see paragraph 14 above) and was referred to as the principal indirect witness by the Delegate of the Commission. It may seem regrettable that it was not possible to ensure his presence at the trial on 12 January 1982, when the defence could have examined him on an adversarial basis. The respondent State cannot, however, be held responsible for that failure, as, when Mr Martínez Vendrell was searched for by the police after the Supreme Court had upheld his conviction on 10 April 1981 (the relevant warrant was issued on 24 April 1981), he could not be found (see paragraph 18 above).

Accordingly, the Audiencia Nacional had before it only the written text of Mr Martínez Vendrell's statements. The first statement implicated the

applicants directly in the murder of Mr Bultó (see paragraph 14 above), but, as the Government themselves accepted, was not admissible evidence under Spanish law because it had been obtained by the police during his ten days in custody and without even a minimum of constitutional safeguards. Nevertheless, it appeared in the file. It was in fact the basis for the second statement, which was entered in the file by an investigating judge in Barcelona in the presence of an advocate and in which Mr Martínez Vendrell withdrew part of his previous confession (see paragraph 15 above). Mr Barberà and Mr Messegué were charged only on 16 March 1979, after the investigating judge in Madrid had been sent the statements (see paragraph 16 above). Before that, they had no standing to intervene in the proceedings against Mr Martínez Vendrell and therefore could not examine him or have him examined; the same applied subsequently during the latter's trial, since they could not then be found (see paragraph 17 above).

86. The evidence of Mr Martínez Vendrell, who had been set free on 17 June 1980, would have been of crucial importance, as was noted by the Supreme Court in its judgment of 27 December 1982 (see paragraph 31 above). The Court observes that the central investigating judge did not even attempt to hear Mr Martínez Vendrell's evidence after the arrest of the applicants on 14 October 1980, not only to confirm his identification of them but also to compare his successive statements with theirs and arrange a confrontation with the applicants. Admittedly, the latter could also have requested an opportunity to examine him; but this does not exonerate the judge, having regard in particular to the specific circumstances referred to in paragraph 84 above. In the end, the applicants never had an opportunity to examine a person whose evidence - which was vital, as is clear from the Supreme Court's judgment of 27 December 1982 (see paragraph 31 above) - had been taken in their absence and was deemed to have been read out at the trial (see, mutatis mutandis, the Unterpertinger judgment previously cited, Series A no. 110, p. 15, para. 31): by the time the file was forwarded to the defence on 27 May 1981 for it to propose its evidence, Mr Martínez Vendrell had absconded (see paragraphs 18 and 22 above).

87. The statements made by the accused themselves constituted another important item of evidence.

When they made their confessions to the police, they had already been charged (see paragraph 16 above) but did not have the assistance of a lawyer, although they do not appear to have waived their right to one. Accordingly, these confessions, which were moreover obtained during a long period of custody in which they were held incommunicado (see paragraph 19 above), give rise to reservations on the part of the Court. They were nevertheless appended to the police report and were pivotal in the questioning of the defendants by the investigating judges in Barcelona and by the private prosecutor at the hearing on 12 January 1982. The defence,

however, tried to challenge them by claiming that the police had extracted them by torture.

When Mr Barberà and Mr Jabardo made their first statements to the investigating judge in Barcelona, they likewise did not have any legal assistance - whether of their own choosing or assigned by the court (Article 6 para. 3 (c) of the Convention) (art. 6-3-c) - and the file does not show that they had agreed to do without it. The appointment of counsel was not recorded until 20 January 1981 for Mr Barberà, after he had been charged for the second time, and not until 21 February for Mr Messegué and Mr Jabardo, after the investigation had been completed (see paragraphs 16 and 21 above).

The Court also notes that the central investigating judge in Madrid never heard evidence from the defendants in person - even after the temporary transfer of one of them to the capital - despite the obvious contradictions in their successive statements (see paragraphs 21-22 above); he proceeded by way of letters rogatory.

88. The weapons, other items and documents found at the applicants' homes, and subsequently at the places indicated by Mr Barberà and Mr Messegué, were not produced in court at the trial, although they were relied upon by the prosecution as evidence. That being so, the defence was unable to challenge their identification or relevance in a fully effective manner; after entering an objection on this point before the Audiencia Nacional, counsel for the defence appealed to the Supreme Court and the Constitutional Court (see paragraphs 25, 30 and 32 above).

(d) Conclusion

89. Having regard to the belated transfer of the applicants from Barcelona to Madrid, the unexpected change in the court's membership immediately before the hearing opened, the brevity of the trial and, above all, the fact that very important pieces of evidence were not adequately adduced and discussed at the trial in the applicants' presence and under the watchful eye of the public, the Court concludes that the proceedings in question, taken as a whole, did not satisfy the requirements of a fair and public hearing. Consequently, there was a violation of Article 6 para. 1 (art. 6-1).

II. ARTICLE 6 PARA. 2 (art. 6-2) OF THE CONVENTION

90. Mr Barberà and Mr Messegué also claimed to be victims of a failure to apply the presumption of innocence, stating that they were convicted solely on the basis of their confessions to the police and that the Audiencia Nacional showed signs of bias against them.

Relying on the terms of the judgments of the Supreme Court and the Constitutional Court, the Government stated that the Audiencia Nacional had in fact had other evidence before it.

91. The presumption of innocence will be violated if, without the accused's having previously been proved guilty according to law, a judicial decision concerning him reflects an opinion that he is guilty. In this case, it does not appear from the evidence that during the proceedings, and in particular the trial, the Audiencia Nacional or the presiding judge had taken decisions or attitudes reflecting such an opinion. The Court therefore does not find a violation of Article 6 para. 2 (art. 6-2) of the Convention.

III. THE APPLICATION OF ARTICLE 50 (art. 50)

92. The applicants made various claims under Article 50 (art. 50), which provides as follows:

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

At the hearing, the Government pointed out that if the Court were to find a violation, the applicants could bring an action for damages in Spain. They added that the judgment of the Court would constitute adequate compensation for the alleged non-pecuniary damage and that the costs and expenses claimed by the applicants had not been adequately proved.

93. In the circumstances of the case, the Court considers that the question of the application of Article 50 (art. 50) is not yet ready for decision. It is therefore necessary to reserve the matter, taking due account of the possibility of an agreement between the respondent State and the applicants (Rule 53 paras. 1 and 4 of the Rules of Court).

FOR THESE REASONS, THE COURT

1. Rejects unanimously, on the ground of estoppel and because it was raised out of time, the Government's objection that domestic remedies had not been exhausted in respect of the complaint concerning the change of membership of the Audiencia Nacional without notice;

2. Holds unanimously that the applicants have not exhausted domestic remedies in respect of their complaints concerning the substitute presiding judge of the Audiencia Nacional;

3. Rejects unanimously, on the ground of estoppel and, in part, because it was raised out of time and was unfounded, the Government's objection that domestic remedies had not been exhausted in that the applicants did not apply to the Audiencia Nacional for an adjournment of the trial;

4. Rejects by seventeen votes to one, as unfounded, the remainder of the Government's objection that domestic remedies had not been exhausted;

5. Holds by ten votes to eight that there has been a breach of Article 6 para. 1 (art. 6-1);

6. Holds unanimously that there has been no breach of Article 6 para. 2 (art. 6-2);

7. Holds unanimously that the question of the application of Article 50 (art. 50) is not yet ready for decision;

accordingly,

(a) reserves the whole of the said question;

(b) invites the Government and the applicants to submit, within the next three months, their further observations on the matter and, in particular, to notify the Court of any agreement they may reach;

(c) reserves the further procedure and delegates to the President of the Court the power to fix the same if need be.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 6 December 1988.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 52 para. 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) joint dissenting opinion of Mr Thór Vilhjálmsson, Mrs Bindschedler-Robert, Mr Gölcüklü, Mr Matscher, Mr Walsh, Mr Russo, Mr Valticos and Mr Torres Boursault;

(b) joint concurring opinion of Mr Lagergren, Mr Pettiti and Mr Macdonald.

R.R.
M.-A.E.

JOINT DISSENTING OPINION OF JUDGES BINDSCHEDLER-ROBERT, THÓR VILHJALMSSON, GÖLCÜKLÜ, MATSCHER, WALSH, RUSSO, VALTICOS AND TORRES BOURSAULT

(Translation)

We cannot share the opinion of the majority of the Court, who have held in the instant case that there was a violation of Article 6 para. 1 (art. 6-1) of the Convention on the ground that "the proceedings in question, taken as a whole, did not satisfy the requirements of a fair and public hearing".

We shall examine below the three main points which prompted that conclusion, and in respect of each of them we shall set out the arguments which lead us to the contrary result.

We think it important, however, to preface this detailed examination with a few general considerations.

We are fully aware that in several respects - as regards some of the principles on which the rules of Spanish criminal procedure as such are based, and more particularly as regards the way the rules were applied in the instant case - the impugned proceedings may give rise to misgivings.

However, the existing system of criminal procedure does allow a trial to be conducted with the procedural safeguards required by Article 6 (art. 6). It is of course up to the defence - the accused themselves and their counsel - to actually make use of the opportunities afforded by the system.

In the instant case, however, it is apparent from the file that this did not happen. Neither in the final stages of the investigation nor when the interim submissions were made nor at the trial do the accused seem to have exhausted these resources.

That being so, we consider that it is not for the Court to retry the case, like a court of appeal, and substitute its own assessment of the evidence for the one underlying the decision in issue. Its only task is to review whether the procedural requirements of Article 6 (art. 6) of the Convention were complied with.

The majority of the court have highlighted a number of weaknesses in the proceedings which, taken together, resulted in the trial’s not satisfying the requirements of Article 6 (art. 6); this implies that in the majority’s view, none of these weaknesses on its own is such as to justify a finding of a violation. We should like to express our disagreement with this reasoning. Resorting to the argument of a combination of factors is not, of course, anything new, and in other circumstances it may be fully justified and even natural. It is plain, for instance, that the overall length of given proceedings is the combined length of each phase of the proceedings, even if none of

these phases taken in isolation is open to criticism. The combination method has to be based on specific premisses in each case in which it is applicable, and it does not seem appropriate simply to transfer it to cases of an entirely different nature.

The majority singled out the following complaints:

(a) The belated transfer of the defendants to Madrid

This allegedly weakened the defendants' position at a crucial moment when they would have needed all their resources to defend themselves, and in particular to face their examination at the very beginning of the trial and to consult effectively with their counsel.

In our view, although the belated transfer was regrettable, it does not appear to have appreciably hindered the defence or to have flawed the proceedings to the point of depriving the defendants of adequate means of defence. Furthermore, the defendants had the assistance of their lawyers, who had an opportunity to intervene orally and make their submissions without any restriction. In any case, as is apparent from the file, the defendants had done no more than deny their responsibility. Nor did the defence apply for an adjournment of the trial.

(b) The change in the membership of the bench immediately before the beginning of the trial

The majority has held that in these circumstances the defendants could legitimately have feared that the new presiding judge would be unfamiliar with what was a complex case.

This argument overlooks the important role of the reporting judge, who is responsible for keeping the court informed and preparing the draft judgment, and who, after all, had been at his post throughout the proceedings. Besides, the new presiding judge belonged to the same division (the Criminal Division) of the court and had already dealt with the case. It must again be emphasised that the defence did not raise any objection.

(c) The brevity of the trial

The majority argued from the brevity of the trial and, above all, from the fact that very important evidence was not produced or adequately discussed at the hearing, in the presence of the defendants and under the watchful eye of the public.

In this connection we note that while the trial took only a day, there were two reasons for this: the hearing was the last stage of proceedings after two earlier stages of investigation and interim submissions; and then, by adopting the "por reproducida" procedure, the prosecution and the defence

agreed to admit the investigation file in evidence without requiring the 1,600 pages to be read out in court.

The majority of the Court seemed to question the use of the "por reproducida" procedure in view of the requirements of Article 6 para. 1 (art. 6-1) of the Convention.

Yet by means of this procedure all the documents in the investigation file - some of which did not concern the defendants - were included in the proceedings at the trial and nothing prevented the defendants from analysing and impugning them during the hearing. But they did not do so, and thus waived the opportunity of having any weaknesses or omissions in the investigation remedied.

Admittedly, the use of the "por reproducida" procedure had the consequence that much of the evidence was admitted without being exposed to public scrutiny. In this connection, and without in any way underestimating the importance, as a procedural safeguard, of requiring proceedings to be public, we do not consider that this makes it necessary for all the documents in a trial to be communicated to the public. In the instant case the public had free access to the courtroom and they were able to follow the entire trial, including the parties' submissions, the evidence offered and admitted at the hearing and, lastly, counsel's addresses to the court, which put before them analysis and criticism of the documents in the file; in particular they had an opportunity to hear the defence consent to the use of the "por reproducida" procedure and they were able to grasp the fact that it had thereby deliberately waived having most of the file read out at the hearing.

In the circumstances, we are of the opinion that the proceedings in question also complied with the requirements of a public hearing within the meaning of Article 6 para. 1 (art. 6-1).

In conclusion, we consider that there was no violation of Article 6 para. 1 (art. 6-1) of the Convention.

JOINT CONCURRING OPINION OF JUDGES LAGERGREN, PETTITI AND MACDONALD

Whilst we agree with the findings of the Court in the present case, we would like to add the following observations regarding the reasoning of the judgment of 15 January 1982 of the Audiencia Nacional.

Having deliberated on the basis of the evidence adduced, the Audiencia Nacional gave its decision three days after the hearing. After briefly setting out the facts, the parties' submissions and the relevant law, the judgment imposed heavy sentences on the applicants. It contained no analysis of the evidence that had been taken or of its connection with the facts deemed to have been established (see paragraph 107 of the Commission's report).

The Government submitted that short reasoning was now common practice in systems based on the judge's personal belief, such as Spain's; moreover, in its judgment of 27 December 1982 the Supreme Court listed evidence in the investigation file on which the Audiencia Nacional could have founded its decision.

In the absence of any clarification in the judgment of 15 January 1982, it may be regarded as having been based on all the evidence and submissions of the parties, whether debated during the trial or merely entered in the investigation file. In a system where the possibility of appealing on a point of law against the establishment of the facts by the trial court is very limited (Articles 849 and 851 para. 1 of the Spanish Code of Criminal Procedure; see paragraphs 42 and 43 of the Court's judgment), it seems reasonable, in order to enable the defence to set forth its arguments effectively in such an appeal, that the trial court should have given an adequate indication of the evidence on which it had relied to convict the applicants (see paragraph 53 in fine of, and our joint concurring opinion annexed to, the Court's H v. Belgium judgment of 30 November 1987, Series A no. 127, pp. 35-36 and 43).