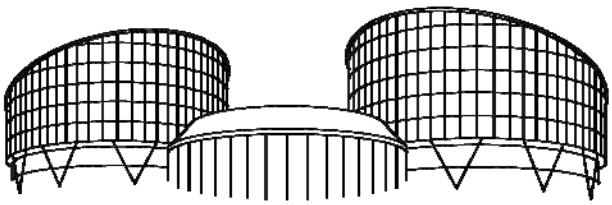

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF GUISO-GALLISAY v. ITALY

(Application no. 58858/00)

JUDGMENT
(Just satisfaction)

STRASBOURG

22 December 2009

This judgment is final but may be subject to editorial revision.

In the case of Guiso-Gallisay v. Italy,

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

Jean-Paul Costa, *President,*
Josep Casadevall,
Corneliu Bîrsan,
Karel Jungwiert,
Vladimiro Zagrebelsky,
Elisabeth Steiner,
Lech Garlicki,
Elisabet Fura,
Khanlar Hajiyev,
Dean Spielmann,
Dragoljub Popović,
Isabelle Berro-Lefèvre,
Päivi Hirvelä,
George Nicolaou,
Luis López Guerra,
Mirjana Lazarova Trajkovska,
Nona Tsotsoria, *judges,*

and Vincent Berger, *Jurisconsult*,

Having deliberated in private on 17 June 2009 and 2 December 2009,

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

PROCEDURE

1. The case originated in an application (no. 58858/00) against the Italian Republic lodged with the Court under Article 34 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by three Italian nationals, Mr Stefano Guiso-Gallisay, Mr Gian Francesco Guiso-Gallisay and Ms Antonella Guiso-Gallisay ("the applicants"), on 7 April 2000.

2. By a judgment of 8 December 2005 ("the principal judgment") the Court held that the interference in the applicants' right to the peaceful enjoyment of their possessions had not been compatible with the principle of lawfulness and that, consequently, there had been a violation of Article 1 of Protocol No. 1 (*Guiso-Gallisay* v. *Italy,* no. 58858/00, §§ 96-97 of the judgment and point 2 of the operative provisions, 8 December 2005).

3. Relying on Article 41 of the Convention, the applicants claimed a sum corresponding to the value of the land in issue, less the compensation received at national level, plus the value of the buildings erected on their

land. They also claimed an amount in reimbursement of the tax, deducted at source, payable on the sums awarded by the Nuoro District Court on 14 July 1997. They also requested compensation for non-pecuniary damage. Finally, they requested reimbursement of the costs incurred before the national courts and before the European Court.

4. As the question of the application of Article 41 of the Convention was not ready for decision, the Chamber reserved it and invited the Government and the applicants to submit, within three months of the judgment becoming final, their written observations on that issue and, in particular, to notify the Court of any agreement they might reach (ibid., § 108 and point 3 of the operative provisions).

5. The time-limit fixed to enable the parties to reach agreement passed without the conclusion of such an agreement. The applicants filed observations, which were transmitted to the Government.

6. On 9 October 2006 the President of the Chamber to which the subsequent proceedings had been assigned (point 3 (c) of the operative provisions of the principal judgment) decided to ask each party to appoint an expert to assess the pecuniary damage and to submit an expert report by 4 January 2007.

7. Those reports were submitted within the prescribed time-limit.

8. On 22 January 2008 the Chamber gave notice to the parties of its intention to relinquish jurisdiction in favour of the Grand Chamber (Rule 72 § 2 of the Rules of Court and Article 30 of the Convention).

9. On 28 February 2008 the applicants objected to relinquishment. The Government did not raise any objection.

10. On 27 May 2008, considering that the applicants' objection met the conditions set out in Rule 72 § 2 of the Rules of Court, the Chamber decided not to relinquish jurisdiction.

11. On 21 October 2008 the Chamber adopted a judgment on just satisfaction.

12. On 30 October 2008 the applicants requested that the case be referred to the Grand Chamber under Article 43 of the Convention and Rule 73. A panel of the Grand Chamber accepted this request on 26 January 2009.

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

14. The applicants and the Government each filed a memorial on the application of Article 41. Third-party comments were also received from the *Unione forense per la tutela dei diritti dell'Uomo*, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2).

15. A hearing took place in public in the Human Rights Building, Strasbourg, on 17 June 2009 (Rule 59 § 3).

There appeared:

– *for the respondent Government*
Mr Nicola LETTIERI, *co-Agent*,
Mr Giuseppe ALBENZIO, *Avvocato dello Stato*;

– *for the applicants*
Mr Nicolò PAOLETTI, *Counsel*,
Ms Alessandra MARI, *Adviser*,
Ms Ginevra PAOLETTI, *Assistant*.

The Court heard addresses by Mr Lettieri, Mr Albenzio, Mr Paoletti and Ms A. Mari and their replies to judges' questions.

I. RELEVANT DOMESTIC LAW AND PRACTICE

A. Expedited possession of land

16. Under Italian law, the expedited expropriation procedure enables the authorities to occupy a plot of land and to build on it prior to the official expropriation. Once a project has been declared to be in the public interest and the plans adopted, the authorities may issue an expedited possession order, for a limited period not exceeding five years, in respect of the land to be expropriated (section 20 of Law no. 865 of 1971). The order will lapse if physical possession of the land does not occur within three months of its adoption. A formal expropriation order must be made before the end of the authorised period of occupation.

17. The authorised occupation of land creates an entitlement to compensation for occupation. In judgment no. 470 of 1990 the Constitutional Court recognised an immediate right of access to a court for the purpose of claiming compensation for occupation as soon as physical possession of the land occurs, without having to wait for a compensation offer from the authorities.

B. The constructive-expropriation rule (“*occupazione acquisitiva*” or “*accessione invertita*”)

18. During the 1970s a number of local authorities took possession of land using the expedited procedure but failed subsequently to issue an expropriation order. The Italian courts were required to deal with cases in which the landowner had lost *de facto* use of the land, as it had been

possessed and a public works project had been undertaken. The question arose whether the mere fact that the work had been carried out meant that the owner had also lost title to the land.

1. The case-law prior to the Court of Cassation's judgment no. 1464 of 16 February 1983

19. There was substantial divergence in the Court of Cassation's decisions concerning the consequences of carrying out building works in the public interest on unlawfully occupied land. Unlawful possession is to be understood as referring to possession that is unlawful from the start, or that was initially authorised but subsequently became unlawful, either because the authority is quashed or because possession continues beyond the authorised period without an expropriation order being made.

20. Under one line of case-law, the owner of land that had been occupied by the authorities did not lose ownership after the completion of public works. However, he could not request reinstatement of the land; his only remedy was to bring an action in damages for wrongful possession. No limitation period applied to such actions, since the unlawful nature of the possession was continuing. The authorities could at any time issue a formal expropriation order. If they did so, the action in damages was transformed into a dispute over the compensation for expropriation, with damages for the loss of enjoyment of the land being due only for the period prior to the making of the expropriation order (see, among other authorities, Court of Cassation judgments nos. 2341 of 1982; 4741 of 1981; and 6452 and 6308 of 1980).

21. Under a second line, the landowner did not lose title to the land and could request its reinstatement if the authorities had acted other than in the public interest (see, for example, Court of Cassation judgments nos. 1578 of 1976 and 5679 of 1980).

22. Under a third line, an owner dispossessed by the authorities automatically lost title to the land as soon as it had been altered irreversibly, that is to say on completion of the public works. He was

entitled to claim damages (see Court of Cassation judgment no. 3243 of 1979).

2. Court of Cassation judgment no. 1464 of 16 February 1983

23. In a judgment of 16 February 1983 the Court of Cassation, sitting as a full court, resolved the conflict between the lines of case-law and adopted the third solution. In so doing, it established the constructive-expropriation rule (*accessione invertita* or *occupazione acquisitiva*). Under the rule, the public authorities acquire title to the land from the outset, without the need for formal expropriation, if, after the land is occupied and irrespective of whether such possession is lawful, public works are completed there. If the land is initially possessed without authorisation, the transfer of property occurs when the public works project is completed. If the taking of possession was authorised from the outset, property is transferred on the expiry of the authorised period of possession. In the same judgment, the Court of Cassation stated that, in all cases of constructive expropriation, the owner is entitled to compensation in full since acquisition of the land has taken place without title. However, such compensation is not paid automatically: the owner must lodge a claim for damages. In addition, the right to compensation is subject to the five-year limitation period applicable to actions in tort; the starting-point is the date the land is irreversibly altered.

3. Case-law after the Court of Cassation's judgment no. 1464 of 16 February 1983

(a) Limitation period

24. Initially, it was held that no limitation period applied, since possession of the land without title was a continuing unlawful act (see paragraph 23 above). In its judgment no. 1464 of 1983, the Court of Cassation stated that the right to compensation was subject to a five-year limitation period (see paragraph 26 above). Subsequently the First Division of the Court of Cassation held that a ten-year limitation period should apply (judgments nos. 7952 of 1991 and 10979 of 1992). On 22 November 1992 the full court of the Court of Cassation reached a final decision on the issue, holding that the limitation period is five years and begins to run from the date on which the land is irreversibly altered.

(b) Constitutional Court judgment no. 188 of 1995

25. In this judgment, the Constitutional Court held that the constructive expropriation rule was compatible with the Constitution in so far as the rule was rooted in a legislative provision, namely section 2043 of the Civil Code governing claims in tort. Under this judgment, the fact that the public

authorities became owners of the land by taking advantage of their own unlawful conduct did not pose any difficulty under the Constitution, since the public interest, namely the conservation of public works, outweighed the individual's interest and thus the latter's interest in the right of property. The Constitutional Court held that the application of the five-year limitation period for compensation claims was compatible with the Constitution.

(c) Cases where the constructive-expropriation rule does not apply

26. Developments in the case-law show that the mechanism whereby building public infrastructure results in transfer of property in the land to the authorities is subject to exceptions.

27. In its judgment no. 874 of 1996, the *Consiglio di Stato* stated that there was no constructive expropriation where decisions by the authorities and an expedited possession order had been quashed by the administrative courts.

28. In judgment no. 1907 of 1997, the Court of Cassation, sitting as a full court, held that the authorities did not acquire ownership of the land if their decisions and the public-interest declaration were deemed to have been null and void from the outset. In such cases, the owner retained title to the land and could claim *restitutio in integrum* or could seek damages. The unlawful nature of the possession in such cases was continuing and no limitation period applied.

29. In judgment no. 6515 of 1997, the Court of Cassation, sitting as a full court, held that there was no transfer of property where the public-interest declaration had been annulled by the administrative courts. In such cases, therefore, the constructive-expropriation rule did not apply. The private person, who retained ownership of the land, was entitled to claim *restitutio in integrum*. An action in damages entailed a waiver of the right to restitution. The five-year limitation period started to run from the date on which the decision of the administrative court became final.

30. In judgment no. 148 of 1998, the First Division of the Court of Cassation followed the decision of the full court and held that there was no transfer of property by constructive expropriation where the public-interest declaration regarding the public works project concerned was deemed to have been invalid from the outset.

31. In judgment no. 5902 of 2003, the Court of Cassation, sitting as a full court, reaffirmed that there was no transfer of property in the absence of a valid declaration that expropriation was in the public interest.

32. This case-law should be compared with Law no. 458 of 1988 (see paragraphs 33-34 below) and with the Code of Expropriation Laws, which entered into force on 30 June 2003 (see paragraphs 43-44 below).

4. Law no. 458 of 27 October 1988

33. Section 3 of this Law provides:

> "Any person who owns land which is used for the construction of public buildings or social housing shall be entitled to compensation for damage sustained where the expropriation has been declared unlawful by a court decision which has become final, but such person may not claim restitution of his property. Further, such a person is entitled, in addition to compensation for damage, to sums payable in respect of monetary depreciation and to any other sums mentioned in Article 1224 § 2 of the Civil Code, such amounts being calculated from the date of the unlawful taking of possession."

34. Interpreting section 3 of the 1988 Law, the Constitutional Court stated in a judgment of 12 July 1990 (no. 384):

> "In the impugned provision, the legislature has given preference, as between the owner's interest in obtaining restitution of his unlawfully-expropriated land, and the public interest - in this case the allocation of such land for building public, low cost or subsidised housing - to this latter interest."

5. Amount of compensation for constructive-expropriation

35. Under the Court of Cassation's 1983 case-law on constructive expropriation, compensation in full, in the form of damages for the deprivation of the land, was due to the owner in consideration for the loss of ownership entailed by the unlawful occupation.

36. The Finance Act of 1992 (Article 5 *bis* of Legislative Decree no. 333 of 11 July 1992) amended that case-law by providing that the compensation payable on constructive expropriations could not exceed the amount due on formal expropriations. In judgment no. 369 of 1996, the Constitutional Court declared that provision unconstitutional.

37. Under the Finance Act 1996 (Law no. 662), which amended the provision that had been declared unconstitutional, compensation in full cannot be awarded for dispossessions effected before 30 September 1996. In such cases, the compensation is equivalent to the amount of compensation that would have been payable on a formal expropriation in the most favourable scenario for the owner, plus 10 %.

38. In judgment no. 148 of 30 April 1999, the Constitutional Court held that such compensation was compatible with the Constitution. However, in the same decision, it held that compensation in full, up to the market value of the land, could be claimed where the dispossession and deprivation of the land had not been in the public interest.

6. *The case-law after the judgments of the European Court of Human Rights of 30 May 2000 in the cases of* Belvedere Alberghiera *and* Carbonara and Ventura

39. In judgments nos. 5902 and 6853 of 2003, the Court of Cassation, sitting as a full court, again addressed the question of the constructive expropriation rule, referring to the judgments *Belvedere Alberghiera S.r.l. v. Italy* (no. 31524/96, ECHR 2000-VI) and *Carbonara and Ventura v. Italy* (no. 24638/94, ECHR 2000-VI) of the European Court of Human Rights.

40. In view of the finding of a violation of Article 1 of Protocol No. 1 in the above cases, the Court of Cassation affirmed that the constructive expropriation rule played an important role in the context of the Italian legal system and that it was compatible with the Convention.

41. More specifically, the Court of Cassation – after analysing the history of the constructive expropriation rule – held that in view of the uniformity of the case-law in this area, the constructive expropriation rule should be regarded as entirely "foreseeable" as of 1983. For this reason, constructive expropriation must be considered to comply with the lawfulness requirement. The Court of Cassation stated that occupation of land having taken place without a declaration that it was in the public interest was not capable of transferring title to the State. As to compensation, it stated that, even if such compensation was lower than the damage sustained by the claimant, and, in particular, lower than the value of the land, the compensation due in the event of constructive expropriation was sufficient to guarantee a "fair balance" between the demands of the general interest of society and the requirements of the protection of the individual's fundamental rights.

42. On an appeal seeking enforcement of a final judicial decision setting aside the declaration of public interest with regard to expropriation proceedings, and in view of the claimant's request to obtain restitution of land that had in the meantime been occupied and altered, the *Consiglio di Stato*, in judgment no. 2/2005 of 29 April 2005, delivered in plenary session, ruled on whether the irreversible alteration of the said land following the construction of "public" works could constitute a legal reason preventing restitution of the land. The *Consiglio di Stato* answered this question in the negative. In so doing, it:

(a) acknowledged that the case-law rule on constructive expropriation was lacking in respect of the need for legal certainty, with regard, *inter alia*, to the issue of identifying the date on which the public works must be considered "completed" and therefore on what date title had been transferred to the State;

(b) welcomed the Court's case-law, particularly the judgment in *Belvedere Alberghiera Srl v. Italy*, by affirming that, faced with a request for restitution of property that had been unlawfully occupied and altered, the

work performed by the public authorities cannot, as such, constitute an absolute obstacle to restitution;

(c) interpreted Article 43 of the Code of Expropriation Laws (see paragraph 44 below) to mean that failure to return a plot of land could only be accepted in exceptional cases, namely where the authorities invoked a particularly strong public interest in the preservation of the construction in question;

(d) affirmed, in this context, that constructive expropriation could not be regarded as an alternative ("*una mera alternative*") to duly conducted expropriation proceedings.

7. The Code of legislative provisions and regulations on expropriation in the public interest ("the Code")

43. On 30 June 2003 Presidential Decree no. 327 of 8 June 2001, as amended by Legislative Decree no. 302 of 27 December 2002, and which governs expropriation proceedings, entered into force. It codifies the existing provisions and case-law in this area. In particular, it codifies the constructive expropriation rule. From its entry into force, the Code, which does not apply to cases of occupation which occurred prior to 1996 and is not therefore applicable to the instant case, superseded all previous legislation and case-law in the field of expropriation.

44. Article 43 of the Code provides that, in the absence of an expropriation order, or in the absence of a declaration stating that the expropriation is in the public interest, land that has been altered following the construction of public works passes into the ownership of the authorities which altered it; damages are paid in consideration. The authorities may acquire a property even where the town planning documents or the declaration that the expropriation is in the public interest have been set aside. The owner may apply to the court for restitution of the land. The authorities in question may object. Where the court decides not to order restitution of the land, the owner is entitled to compensation.

8. Constitutional Court judgments nos. 348 and 349 of 22 October 2007

45. In judgments nos. 348 and 349 of 22 October 2007, the Constitutional Court held that the national legislation must be compatible with the Convention as interpreted by the Court's case-law and, in consequence, declared unconstitutional section 5 *bis* of Legislative Decree no. 333 of 11 July 1992 as amended by Law no. 662 of 1996.

46. In judgment no. 349, the Constitutional Court noted that the insufficient level of compensation provided for by the 1996 Law was contrary to Article 1 of Protocol No. 1 and also to Article 117 of the Italian Constitution, which provides for compliance with international obligations.

Since that judgment, the provision in question may no longer be applied in the context of pending national proceedings.

9. The Finance Act (Law no. 244) of 24 December 2007

47. Section 2/89 (e) of the Finance Act (Law no. 244) of 24 December 2007 established that in cases of constructive expropriation the compensation payable must correspond to the market value of the property, with no possibility of a reduction.

48. That provision is applicable to all expropriation proceedings under way on 1 January 2008, except those in which the decision on compensation for expropriation has been accepted or has become final.

II. RELEVANT INTERNATIONAL LAW AND PRACTICE

49. According to a general rule of international law developed by the Permanent Court of International Justice in a judgment delivered on 13 September 1928 in the Chorzów factory case (*Case concerning the factory at Chorzów (Claim for indemnity) (The Merits)*, Collection of Judgments of the PCIJ, Series A no. 17), a distinction must be made between "expropriation" and "seizure" of property:

> "The action of Poland which the Court has judged to be contrary to the Geneva Convention is not an expropriation – to render which lawful only the payment of fair compensation would have been wanting; it is a seizure of property, rights and interests which could not be expropriated even against compensation, save under the exceptional conditions fixed by Article 7 of the said Convention. As the Court has expressly declared in Judgment No. 8, reparation is in this case the consequence not of the application of Articles 6 to 22 of the Geneva Convention, but of acts contrary to those articles."

50. The Iran-United States Claims Tribunal made the same distinction in the case of *Amoco International Finance Corporation* (*Amoco International Finance Corporation v. Iran*, Interlocutory Award of 14 July 1987, Iran-United States Claims Tribunal Reports (1987-II), § 192):

> "... a clear distinction must be made between lawful and unlawful expropriations, since the rules applicable to the compensation to be paid by the expropriating State differ according to the legal characterisation of the taking ..."

51. In general international law, the following principles apply in cases of "seizure" or "unlawful expropriation" of property (*Chorzów Factory Case*, ibid.):

> "It follows that the compensation due to the German Government is not necessarily limited to the value of the undertaking at the moment of dispossession, plus interest to the day of payment. This limitation would only be admissible if the Polish Government had had the right to expropriate, and if its wrongful act consisted merely in not having paid to the two Companies the just price of what was expropriated; in the present case, such a limitation might result in placing Germany and the interests

protected by the Geneva Convention, on behalf of which interests the German Government is acting, in a situation more unfavourable than that in which Germany and these interests would have been if Poland had respected the said Convention. Such a consequence would not only be unjust, but also and above all incompatible with the aim of Article 6 and following articles of the Convention - that is to say, the prohibition, in principle, of the liquidation of the property, rights and interests of German nationals and of companies controlled by German nationals in Upper Silesia - since it would be tantamount to rendering lawful liquidation and unlawful dispossession indistinguishable in so far as their financial results are concerned.

The essential principle contained in the actual notion of an illegal act - a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals - is that reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it - such are the principles which should serve to determine the amount of compensation due for an act contrary to international law."

52. The arbitral award of 19 January 1977 in the case of *California Asiatic Oil Company and Texaco Overseas Petroleum Company v. the Government of the Libyan Arab Republic ([1978] 17 International Legal Materials* 1) did not concern the taking of property in the strict sense but the termination of concessions to exploit crude oil resources granted many years earlier. The Sole Arbitrator took the view that the concessions were contractual in nature; in nationalising the plaintiff companies' interests, Libya had unlawfully reneged on the terms and conditions freely agreed by it in the exercise of its sovereignty. Finding the principle of *restitutio in integrum* to apply, he held that the Libyan Government was to perform its contractual obligations in full. The case ended in a settlement under which the plaintiff companies obtained an amount of crude oil to a certain monetary value but not the restoration of the *status quo ante*.

53. Article 35 of the Draft Articles on State Responsibility, drawn up by the International Law Commission of the United Nations, reiterates the principle of *restitutio in integrum* in the following terms:

"A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

(a) is not materially impossible;

(b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation."

54. Article 36 of the same Draft Articles provides:

> "1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
>
> ..."

THE LAW

55. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Pecuniary damage

1. The Chamber judgment

56. In its judgment of 21 October 2008 the Chamber departed from the case-law on the application of Article 41 in cases of constructive expropriation. By six votes to one, the Chamber:

– abandoned the usual method, which was to base its award on the market value of the land, adjusted for inflation and increased by the appreciation brought about by the buildings erected by the expropriating authority;

– adopted a new method, based on the market value of the property on the date on which the applicants established with legal certainty that they had lost the right of ownership, the sum thus obtained to be increased by the interest due on the date on which the judgment was adopted by the Court, less any compensation already paid.

It justified this departure from the case-law by:

– its concern to avoid bringing about unequal treatment of applicants depending on the nature of the public works constructed by the authorities, which is not necessarily related to the potential of the land in its original state;

– its wish to avoid leaving scope for arbitrary decisions;

– its refusal to assign a punitive or dissuasive role to compensation with regard to the respondent State, rather than a compensatory role with regard to the applicant;

– acknowledgement of the change in domestic legislation (the Finance Act 2007) following the Constitutional Court's judgments nos. 348 and 349

of 22 October 2007, which provided that in cases of constructive expropriation compensation was to correspond to the market value of the property, with no possibility of a reduction.

57. The Court awarded the applicants 1,803,374 euros (EUR) in respect of pecuniary damage, EUR 45,000 in respect of non-pecuniary damage and EUR 30,000 in costs and expenses.

2. Arguments of the parties

(a) The applicants

58. The applicants considered that in the area of just satisfaction the judgment of 21 October 2008 amounted to a 180-degree reversal of the case-law in all cases of constructive expropriation recently examined by the Court (they referred to *Brumărescu v. Romania* (just satisfaction) [GC], no. 28342/95, ECHR 2001-I; *Rusu and Others v. Romania*, no. 4198/04, 19 July 2007; *Vontas and Others v. Greece*, no. 43588/06, 5 February 2009; *Driza v. Albania*, no. 33771/02, ECHR 2007-XII), although the *ratio decidendi* in the principal judgment remained the same. Were the Grand Chamber to confirm the Chamber judgment, a fresh violation of Article 1 of Protocol No. 1 would be added to that already suffered by the applicants in Italy.

59. According to the applicants, the Court's new approach in the judgment of 21 October 2008 had the effect of eliminating any differences between lawful and unlawful expropriations, and even of "legalising" and "ratifying" the Italian practice of constructive expropriation, which would encourage "systemic" violations, all the more attractive to the authorities in that the proceedings to challenge such actions were excessively long (20 years at national level and 8 years before the Court). In underlining the importance of the difference between lawful and unlawful expropriations, the applicants referred not only to the Grand Chamber's case-law (*The former King of Greece and Others v. Greece* [GC], no. 25701/94, ECHR 2000-XII), but also to the case-law of other international courts and bodies, such as the Permanent Court of International Justice or the Iran-United States Claims Tribunal.

60. In this respect, the applicants submitted that the reparation which the Court orders to be paid to the victims of a violation of the Convention is, in accordance with the spirit and the letter of Article 41, subsidiary in nature. Wherever possible, the Court ought therefore to seek to restore the victim to the situation existing prior to the violation. In this connection, they pointed out that the principle of *restitutio in integrum* originated in the judgment delivered by the Permanent Court of International Justice on 13 September 1928 in the *Case concerning the Factory at Chorzów*, and has been held to constitute ideal redress in providing reparation for violations of the rules of international law. Indeed, the principle had been reaffirmed by Article 35 of

the Draft Articles on State Responsibility, drawn up by the United Nations' International Law Commission, and by the case-law of the European Court of Human Rights (the applicants referred to *Dimitrescu v. Romania*, nos. 5629/03 and 3028/04, 3 June 2008; *Fakiridou and Schina v. Greece*, no. 6789/06, 14 November 2008; *Katz v. Romania*, no. 29739/03, 20 January 2009; *Vontas and Others*, cited above; and *Bozcaada Kimisis Teodoku Rum Ortodoks Kilisesi Vakfi v. Turkey (no. 2)*, nos. 37639/03, 37655/03, 26736/04 and 42670/04, 3 March 2009).

61. The applicants also referred to Interim Resolution CM/ResDH(2007)3 of the Committee of Ministers of the Council of Europe on systemic violations of the right to the peaceful enjoyment of possessions through "indirect expropriation" by Italy, a document which required Italy to ensure *restitutio in integrum* and to adopt general measures to put an end to any ongoing situation and to avoid new similar violations.

62. They argued that the compensation method used by the Court prior to the judgment of 21 October 2008 was not a source of unequal treatment between applicants. In this connection, they submitted that the value of a plot of land depended on its classification in the detailed urban zoning plans (*piani di zona*) adopted by the authorities.

63. With regard to the Chamber's wish to avoid a situation where the former calculation method – which took account of the value of buildings constructed by the authorities subsequent to the constructive expropriation – would be perceived as introducing a practice of "punitive compensation", the applicants emphasised that it would suffice to order the Government, instead of paying monetary compensation, to restore the disputed land. The applicants pointed out that, under the Italian Civil Code as it concerned the occupation of land by individuals, where the occupant acts in good faith and the owner of the occupied plot does not oppose the occupation within three months, the occupant is considered to be the owner, in exchange for the payment of compensation that is equivalent to twice the value of the land plus damages.

64. The applicants noted that the Constitutional Court's judgment no. 349 of 22 October 2007 and the Finance Act 2007, referred to in the judgment of 21 October 2008, could make no difference to their situation, since the domestic decisions in their case had become final, as had the Court's finding of a violation.

65. The applicants also submitted that, under the new compensation system, the amounts awarded by the Court were not only lower than they would have been had the expropriation been lawful, but were also lower than those awarded in similar circumstances by the national courts: firstly, the compensation awarded by the Italian courts was not limited to the value of the property at the date of occupation, but also took into account the period of time (six years in the instant case) between the date of occupation and the date of the expropriation; secondly, in the event of lawful

expropriation, the courts could fix the compensation at 110 % of the value of the property if the owners and the authorities reached agreement on the value in question. The applicants also challenged the method of calculating interest, which – in contrast to the method used at national level – did not take account of the periodic revaluation of property.

66. According to the applicants, three options were open to the Grand Chamber:

– to confirm the Court's case-law in the Italian cases, in particular the judgment in *Scordino v. Italy (no. 3)* ((just satisfaction), no. 43662/98, ECHR 2007-III) ;

– to order the Italian State to restore the land and, at the same time, to grant it the option of belated expropriation. The State would thus be obliged to compensate the applicants until the date of expropriation and to pay them compensation for expropriation and a sum in damages for the loss of enjoyment of the land;

– to apply, in the event of non-restitution, the principle of *aestimatio dupli* under which, where the occupant is acting in good faith and the owner of the occupied plot of land raises no objection to the occupation within three months, the occupant is considered to be the owner, subject to the payment of compensation that is equivalent to twice the value of the land, plus damages.

67. Referring to the Court's consistent case-law, and in particular the judgment in *Scordino v. Italy (no. 3)*, cited above, the applicants asked the Court to order the respondent State to restore their land and to pay them EUR 2,703,849.98 for loss of enjoyment. Failing that, the applicants requested EUR 6,729,252, a sum equivalent to the value of the land in 2009 plus the construction costs of the buildings erected on the land by the State.

(b) The respondent Government

68. The Government contested the manner in which the case-law derived from *Papamichalopoulos and Others v. Greece* ((Article 50), 31 October 1995, Series A no. 330-B) had been applied to the Italian cases of constructive expropriation, for several reasons.

69. Firstly, although in the Greek case the State's occupation of the land in question lacked a legal basis from the outset, in the Italian cases constructive expropriation took place in the context of an expropriation procedure that was in itself legitimate, which subsequently became unlawful while nonetheless resulting in a transfer of ownership on the basis of well-established domestic case-law. The domestic courts recognised the unlawfulness of the authorities' conduct (under Article 2043 of the Civil Code) and declared that a transfer of ownership was to be assumed to have taken place (on account of the existence of the public works on the land in issue), and awarded the person concerned an amount in compensation. The

Government also argued that, since the intervention of the Constitutional Court (judgment no. 349/2007) and the legislature (section 2 paragraphs 89-90 of the Finance Act 2007), expropriated owners could obtain compensation corresponding to the full value of the property.

70. Secondly, in the Greek case all of the courts which examined the action for recovery of possession had acknowledged the title to property, without the State having offered even partial monetary compensation. In the instant case, however, the national courts which examined the action for compensation had declared the act unlawful while simultaneously formalising the transfer of ownership and compensating the dispossessed owners. The instant case also differed from the Greek case in that it did not concern a plot of land that had "potential for development for tourism", occupied without any legal basis during a period of military dictatorship, but rather small plots of land with no interesting features.

71. The Government further contested the distinction made by the Court between lawful expropriation and "unlawful taking", and the consequences drawn from this in evaluating the pecuniary damage. They argued that Article 1 of Protocol No. 1 did not establish a hierarchy between various forms of breach and did not therefore authorise the awarding of greater just satisfaction depending on the "unlawfulness" of the interference.

72. The adoption of a "criterion of taking" could also be prejudicial to legal certainty in the Court's case-law, as was shown by a comparison between the Italian cases on constructive expropriation and a group of Turkish cases (*I.R.S. and Others,* 20 July 2004; *Kadriye Yıldız and Others,* 10 October 2006; *Börekçioğulları (Cökmez) and Others,* 19 October 2006; and *Ari and Others,* 3 April 2007) in which pecuniary damage had been calculated in another manner, in spite of the similarities with the former cases.

73. The Government submitted that, in application of the *Papamichalopoulos* case-law (cited above), the current value of the disputed property was not the result of converting the initial value to current rates on the basis of monetary depreciation, but of applying subjective, unforeseeable, uncertain and random criteria. Adjusting the value to current prices violated the principle which required that compensation be calculated with regard to the value of the property on the date of the impugned event and that subsequent gains or losses should play no role. The method used hitherto by the Court presumed systematically that there was further prejudice as a result of the inability to enjoy the disputed property and that that damage was not sufficiently compensated by adjusting the value of the property for inflation and payment of interest, even in the absence of any prima facie evidence. The Court automatically calculated this further prejudice on the basis of the gross value of the works carried out by the State, adding this to the value of the land as adjusted for inflation. This amounted to unjust enrichment for applicants. According to the

Government, such a solution was contrary to the case-law of the Permanent Court of International Justice and the national practice of the member States, and, in addition, resulted in unequal treatment of applicants, depending on the nature of the public works carried out.

74. According to the Government, if this procedure were to be followed the owner would obtain, at no cost, the positive value of an investment made and paid for by the State in his or her stead. In the Government's view, this could not be justified in legal terms. In this connection, they also referred to the civil-law rules governing the acquisition of ownership that are in force in Italy (Articles 934 and 936 of the Italian Civil Code), and which provide, with regard to the occupation of land by individuals, that where the occupant acts in good faith and the owner of the occupied plot of land does not raise an objection within three months, the occupant is considered to be the owner, subject to payment of compensation equivalent to twice the value of the land, plus damages.

75. The Government also pointed out that the Court had held that it lacked jurisdiction in the area of prejudice arising from an under-evaluation of expropriated land or collateral losses from expropriation (they referred to *Lallement v. France* (just satisfaction), no. 46044/99, § 20, 12 June 2003).

76. The Government submitted that the applicants had altered their claims on several occasions: in their application bringing the case before the Court they had requested the difference between the market value of the property and the amount obtained at national level; in their observations on just satisfaction following the judgment on the merits, they had claimed more than fifteen million euros in pecuniary damage; before the Grand Chamber, they were claiming six million euros. In addition, the applicants, who were co-owners of the plots of land (holding a share of 29/360), had never requested restitution of the land, either at national level or in the application form to the Court.

77. The Government noted that, given that public infrastructure had been built on the land by the authorities with resources raised through taxation, restitution was no longer possible. The only problem which arose was that of the nature of the redress, bearing in mind that the compensation provided for by Law no. 662 of 1996 did not cover the full value of the property.

78. The Government considered that the new approach taken by the Court in its judgment of 21 October 2008 was compatible with the requirements of the Convention and should not be called into question. The reparation of the pecuniary damage must be equal to the market value of the property on the date of the domestic judgment declaring that the applicants had lost ownership of their property, that value being calculated on the basis of the court-ordered expert reports drawn up during the domestic proceedings. Such an approach would make it possible to restore the *Papamichalopoulos* judgment (cited above) to its position as an exceptional case, inappropriate for transposition as a general rule, to modulate

application of the criteria for determining pecuniary damage in cases where the right of ownership had been breached, to harmonise those criteria more fully with the economic basis of the law and the rules recognised in the member States, to avoid inequalities in treatment, and finally to ensure the coherence and foreseeability of the case-law.

79. The Government also disputed the arguments put forward by the third party. Firstly, they argued that a voluntary agreement for the transfer of property could be concluded following the public-interest declaration and until such time as the expropriation order was issued, and that the 10 % increase in compensation was granted even if the transfer did not take place for reasons that were not imputable to the person deprived of his or her property. Secondly, they stressed that constructive expropriation did not prevent the individual from accepting voluntary transfer of the property, given that a transfer agreement could be concluded even in the absence of an expropriation order. On the other hand, like the third party, the Government considered that the seriousness or otherwise of the violation was relevant to the calculation of non-pecuniary damage, but not to that of pecuniary damage.

80. In conclusion, the Government urged the Court to confirm the Chamber judgment of 21 October 2008. With regard to the assessment of pecuniary damage, however, they submitted that the amount arrived at by the Chamber stemmed from a calculation error. In consequence, they asked the Court to limit the award made to the applicants under this head to EUR 900,000.

(c) The third party

81. According to the third party (see paragraph 14 above), the Court's new approach, which cancelled out the differences between lawful and unlawful expropriations, was incompatible with the principles on reparation and just satisfaction established by the Court's case-law and with the other relevant rules of international law that were applicable to the relations between the parties (Article 31 § 3 (c) of the Vienna Convention of 1969). The fact of treating intrinsically different situations in an identical manner was unreasonable and amounted to a violation of the principle of equality before the law.

82. Like the applicants, the third party noted that in the event of lawful expropriation the courts in the Italian legal system had the option of fixing compensation at 110% of the value of the property where the owners and authorities reached agreement on that value. In this respect, it submitted that this advantage would not apply in the case of unlawful expropriation, to the detriment of owners whose land was illegitimately expropriated.

83. As to the entry into force of the new Finance Act 2007, providing that expropriation compensation for building land was to correspond to the market value of the property, the third party pointed out that owners of unlawfully expropriated land were required to pay tax at a rate of 20% on the amount that they received in reparation. The State thus gained an unfair advantage from an unlawful act for which it was itself responsible. The third party further submitted that the principle of subsidiarity included an obligation on the State to adapt its own legal system to the case-law of the European Court of Human Rights, and not vice versa.

84. In accordance with international case-law, the Grand Chamber ought to reaffirm the principle that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the factual and legal situation which would, in all probability, have existed if that act had not been committed.

85. The criteria to be used in assessing damages for the purposes of Article 41 should satisfy the requirements of uniformity, simplicity, clarity and foreseeability. In particular, they must be such as to create a serious and effective means of dissuasion with regard to the repetition of unlawful conduct of the same type, without however assuming a punitive function.

86. The return of the land not being possible, its pecuniary value was to be calculated having regard to the value of the property on the date of the first judgment applying the principle of constructive expropriation. This amount should be readjusted for inflation and increased by the amount of interest due. It should also be increased by the amount that the applicants were required to pay as tax under Law no. 431 of 1991.

87. With regard to further damage, the third party submitted that the applicants should receive an additional amount equivalent to 10% of the value of their land, corresponding to the amount to which they would have been entitled in the event of voluntary assignment of the property. In addition, the applicants should be reimbursed for all the costs incurred before the domestic courts.

88. In calculating the non-pecuniary damage, regard should be had to the amount of time that had elapsed between the date of occupation without title and the first judgment applying the constructive expropriation rule.

89. In conclusion, the third party asked the Grand Chamber to award a higher amount in non-pecuniary damage to victims of constructive expropriation than in respect of victims of lawful expropriation.

3. The Grand Chamber's assessment

90. As the Court has held on a number of occasions, a judgment in which the Court finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (see *Iatridis v. Greece* (just satisfaction) [GC],

no. 31107/96, § 32, ECHR 2000-XI). The Contracting States that are parties to a case are in principle free to choose the means whereby they will comply with a judgment in which the Court has found a breach. This discretion as to the manner of execution of a judgment reflects the freedom of choice attached to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed (Article 1). If the nature of the violation allows of *restitutio in integrum* it is the duty of the State held liable to effect it, the Court having neither the power nor the practical possibility of doing so itself. If, however, national law does not allow – or allows only partial – reparation to be made for the consequences of the breach, Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate (see *Brumărescu*, cited above).

91. In its principal judgment, the Court held that the interference complained of did not satisfy the condition of lawfulness (see paragraphs 93-97 of the principal judgment). The act by the respondent State that the Court found contrary to the Convention was not in the instant case an expropriation that would have been legitimate had adequate compensation been paid for it; on the contrary, it amounted to a seizure of the applicants' land by the State (see paragraphs 94-95 of the principal judgment).

92. In this connection, the Court observed that on 14 July 1997 the Nuoro District Court had taken note of the illegality of the situation and declared that the applicants had been deprived of their property in favour of the occupant (see paragraph 94 of the principal judgment). In execution of that judgment, which was confirmed on 17 July 2003, the applicants each received 970,746,447 Italian lire (about EUR 501,349) on 25 March 1998 in compensation. The Court noted with regard to compensation that the retrospective application of the Finance Act 1996 (Law no. 662) to the instant case had had the effect of depriving the applicants of full reparation for the loss sustained (see paragraph 95 of the principal judgment).

93. It is clear from these considerations that the Court granted the applicants "victim" status, in order subsequently to reach a finding of a violation of Article 1 of Protocol No. 1 (see *Eckle v. Germany*, 15 July 1982, §§ 69 et seq., Series A no. 51; *Amuur v. France*, 25 June 1996, § 36, *Reports* 1996-III; *Dalban v. Romania* [GC], no. 28114/95, § 44, ECHR 1999-VI; and *Jensen v. Denmark* (dec.), no. 48470/99, ECHR 2001-X). Furthermore, the applicants are still "victims", as their situation has remained unchanged since the delivery of the principal judgment.

94. The Court also notes that, in any event, constructive expropriation seeks to confirm a factual situation arising from unlawful acts committed by the authorities and thus permits the latter to profit from their illegal conduct.

95. Accordingly, the Court reiterates that it is impossible to equate lawful expropriation and constructive expropriation, at issue in the instant case.

96. The Court notes that, in principle, the return of the land would put the applicants as far as possible in a situation equivalent to the one in which they would have been if there had not been a breach of Article 1 of Protocol No. 1. In the instant case, however, given that the applicants have never requested restitution of the land before the national courts and that such restitution is moreover impossible, the Court considers that the applicants should be awarded compensation corresponding to the full value of the land.

97. Before examining the parties' submissions based on the application of the *Papamichalopoulos* case-law (cited above), the Court considers it appropriate to recall the background to and basis of the *Papamichalopoulos* judgment, and the manner in which this case-law has been applied in practice in the Italian cases of constructive expropriation.

1. Summary of the case-law

98. The Court "initiated" its case-law on the arbitrary deprivation of property with the judgment in *Papamichalopoulos and Others v. Greece* ((Article 50) Series A no. 330-B). It decided that the respondent State was to pay the applicants, for damage and loss of enjoyment since the "usurpation" of their land by the authorities, the current value of the land, plus the appreciation attributable to the buildings put up on it.

99. Basing its reasoning on the principles established by the Permanent Court of International Justice (see paragraph 50 above), the Court found a violation in the case of *Papamichalopoulos and Others* on account of a *de facto* illegal expropriation (occupation of land by the Greek Navy since 1967) which had lasted for more than twenty-five years on the date of the principal judgment delivered on 24 June 1993. The Court accordingly ordered the Greek State to pay the applicants, for damage and loss of enjoyment since the authorities had taken possession of the land, an amount corresponding to the current value of the land, increased by the appreciation brought about by the existence of buildings which had been erected since the land had been occupied.

100. This case-law was followed in the judgments *Belvedere Alberghiera S.r.l. v. Italy* ((just satisfaction), no. 31524/96, 30 October 2003) and *Carbonara and Ventura v. Italy* ((just satisfaction), no. 24638/94, 11 December 2003), both of which, like the instant case, concerned cases of unlawful dispossession.

Restitution of the land not being possible, the Court awarded for pecuniary damage sums that took into consideration the current value of the land in relation to the property market on the date that its judgment was delivered. In addition, it sought to compensate losses that would not be covered by payment of that amount, by taking account of the potential of the land in question, calculated, where appropriate, on the basis of the construction costs of the buildings erected by the State.

This case-law was confirmed by the Grand Chamber's judgment in the case of *Scordino v. Italy (no. 1)* ([GC], no. 36813/97, §§ 250-254, ECHR 2006-V).

101. The judgments *Scordino v. Italy (no. 3)*, cited above, and *Pasculli v. Italy* ((just satisfaction), no. 36818/97, 4 December 2007) consolidated and applied this case-law. The Court pointed out that, in the event of unlawful dispossession of property, the compensation ought to reflect the idea of a total elimination of the consequences of the impugned interference. It noted that the nature of the violation found in the principal judgment enabled it to work from the principle of *restitutio in integrum* and that, specifically, restitution of the impugned land, including the existing buildings, would have placed the applicants in the closest situation to that in which they would have found themselves had there not been a breach of the requirements of Article 1 of Protocol No. 1. The Court decided that, where restitution was impossible, the State was to pay the applicants a sum corresponding to the current value of the land, increased by an amount reflecting the appreciation brought about by the existence of buildings.

2. On the appropriateness of a change in the case-law

102. Like the Chamber, the Grand Chamber considers that the application of the *Papamichalopoulos* case-law to cases of constructive expropriation may in itself lead to anomalies. Firstly, the Court points out that, in contrast to the situation in the case of *Papamichalopoulos*, where all of the courts had recognised the applicants' title to the property (see *Papamichalopoulos*, cited above, § 33) but the State had awarded them no monetary compensation, even partial, the applicants in the instant case had lost ownership of the property in 1983 following the construction of the public works, and had not sought the return of their property in the course of the domestic proceedings.

Secondly, the above-mentioned case concerned a plot of land that had been occupied without any legal basis, while in the instant case the land was occupied under an expedited procedure and on the basis of a public-interest declaration, for the purpose of constructing low-rent housing and leisure centres on it.

103. The Court is of the opinion that the particular features of the *Papamichalopoulos* case make it inappropriate to apply the principles laid down in it to cases of constructive expropriation. While acknowledging that the applicants are entitled to receive the full value of the property, the Court considers, on the one hand, that the date to be taken into consideration in assessing the pecuniary damage should not be that on which the Court's judgment is delivered, but the date on which they lost ownership of the land. The former approach could in fact open the door to a margin of uncertainty or even arbitrary decisions.

At the same time, the Court considers that automatically assessing the losses sustained by the applicants as the equivalent of the gross value of the buildings erected by the State cannot be justified. Such a method could lead to disparities in the treatment of applicants, depending on the nature of the public works undertaken by the authorities, something that is not necessarily related to the land's original potential. In addition, such a compensation method assigns a punitive or dissuasive role to compensation for pecuniary damage vis-à-vis the respondent State, rather than a compensatory role vis-à-vis the applicants.

104. The Grand Chamber considers it appropriate to adopt a new approach, regard being had also to the developments in the domestic legislation (see paragraphs 44 and 45) and the fact that the domestic courts have taken account of the Court's case-law in the sphere of the right of property. It considers that the new principles laid down in the present judgment could be applied by the domestic courts to the disputes which are currently pending before them and to future cases.

105. In this context and for those reasons, the Court decides to reject the applicants' claims in so far as they are based on the value of the land on the date of the Court's judgment and, in assessing the pecuniary damage, to have no further regard to the construction costs of the buildings erected by the State on the land. In addition, contrary to the solution adopted by the Chamber in its judgment of 21 October 2008, the Grand Chamber considers that in order to assess the market value of the land, it is appropriate to refer to the Nuoro District Court's judgment of 14 July 1997, according to which the applicants lost their right of ownership of part of the land in 1982 and of another part in 1983 (see paragraph 16 of the principal judgment). On the basis of the court-ordered expert reports drawn up during the domestic proceedings, that value corresponds to ITL 1,298,363,349, or EUR 670,549 (an amount that was not challenged on appeal before the Italian courts).

As the adequacy of compensation is likely to be diminished if it were to be paid without reference to various circumstances liable to reduce its value, such as the lapse of a considerable period of time (see *Stran Greek Refineries and Stratis Andreadis v. Greece*, 9 December 1994, § 82, Series A no. 301-B, and, *mutatis mutandis*, *Motais de Narbonne v. France* (just satisfaction), no. 48161/99, §§ 20-21, 27 May 2003), once the amount obtained at domestic level is deducted, and the difference with the market value of the land in 1983 thus obtained, that amount will have to be converted to current value to offset the effects of inflation. Moreover, interest will have to be paid on this amount so as to offset, at least in part, the long period for which the applicants have been deprived of the land. In the Court's opinion the interest should take the form of simple statutory interest applied to the capital progressively adjusted.

106. Having regard to those factors, and ruling on an equitable basis, the Court considers it reasonable to award the applicants EUR 2,100,000.00 plus any tax that may be chargeable on that amount.

107. The loss of opportunities sustained by the applicants following the expropriation remains to be assessed. The Court considers that it must have regard to the damage occasioned by the unavailability of the land during the period from the beginning of the lawful occupation (1977) until the date of loss of ownership (1983). The sum already paid to the applicants at national level as compensation for occupation is to be deducted from the resulting amount. Ruling on an equitable basis, the Court awards the three applicants EUR 45,000 jointly for loss of opportunities.

B. Non-pecuniary damage

108. The applicants asked the Court to confirm the Chamber judgment on this point.

109. The Government left the matter to the Court's discretion, while contending that the sum claimed by the applicants was excessive.

110. The Court considers that the feelings of powerlessness and frustration arising from the unlawful dispossession of their property has caused the applicants considerable non-pecuniary damage that should be compensated in an appropriate manner. Ruling on an equitable basis, as required by Article 41 of the Convention, it decides to award EUR 15,000 to each of the applicants under this head, or EUR 45,000 in total.

C. Costs and expenses

111. The applicants requested EUR 251,513.31 for reimbursement of the costs incurred before the Nuoro District Court, and EUR 48,190, plus value-added tax (VAT), for the costs incurred before the Court.

112. With regard to the costs of the proceedings before the Nuoro District Court, the Government alleged that the applicants had already been reimbursed at national level and, in any event, they claimed that the decision on reimbursement of those costs was a matter for the domestic courts alone. As to the costs of the proceedings before the Court, the Government considered this claim exaggerated.

113. The Court confirms the awards made by the Chamber, which must be increased to reflect the supplementary costs and expenses incurred by the proceedings before the Grand Chamber. Having regard to the foregoing and ruling on an equitable basis, it awards the applicants jointly EUR 35,000, plus VAT, for all of the costs incurred.

D. Default interest

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

FOR THESE REASONS, THE COURT

1. *Holds*
   (a) that the respondent State is to pay the applicants jointly, within three months, the following amounts:
      i. by sixteen votes to one EUR 2,145,000 (two million one hundred and forty-five thousand euros), plus any tax that may be chargeable, in respect of pecuniary damage;
      ii. unanimously EUR 45,000 (forty-five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      iii. unanimously EUR 35,000 (thirty-five thousand euros) for costs and expenses, plus any tax that may be chargeable to the applicants;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

2. *Dismisses* by sixteen votes to one the remainder of the claim for just satisfaction.

Done in English and in French, and notified in writing on 22 December 2009, in application of Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent Berger Jurisconsult	Jean-Paul Costa President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly dissenting opinion of Judge Spielmann is annexed to this judgment.

J.-P.C
V.B

DISSENTING OPINION OF JUDGE SPIELMANN

1. I disagree with the majority. Through its judgment in this case the Court has departed from its settled case-law, a case-law that, moreover, is in conformity with the principles of international law on reparation, initiated more than eighty years ago by the Permanent Court of International Justice in its judgment in the Case concerning the Factory at *Chorzów*[1] and confirmed by our Court in its judgment in the case of *Papamichalopoulos v. Greece*[2]. I refer to the principle of *restitutio in integrum*. This principle enshrines the obligation on a State that is guilty of a violation to make reparation for the consequences of the violation found. In the case concerning the factory at *Chorzów* (judgment of 13 September 1928), the Permanent Court of International Justice held as follows:

> "The essential principle contained in the actual notion of an illegal act - a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals - is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it - such are the principles which should serve to determine the amount of compensation due for an act contrary to international law."[3]

2. As my colleague Françoise Tulkens pointed out in her dissenting opinion, annexed to the judgment of 21 October 2008, the subject of the present referral to the Grand Chamber:

> "It is not disputed that the situation in the instant case is that of an *arbitrary deprivation of possessions*... [and that] the act of the respondent State which the Court has held to be contrary to the Convention was not an expropriation that would have been legitimate but for the failure to pay reasonable compensation; on the contrary, it was an unlawful taking by the State of the applicants' land (see paragraphs 94-95 of the principal judgment of 8 December 2005)."

3. Where there is unlawful taking, there is a violation of international law and, consequently, a corresponding obligation to compensate for the loss sustained in its entirety. Indeed, in this Grand Chamber judgment, the

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[1] C.P.J.I., 13 September 1928, *Case concerning the Factory at Chorzów (Claim for Indemnity) (merits)*, Series A no. 17.

[2] *Papamichalopoulos and Others v. Greece* (Article 50), 31 October 1995, Series A no. 330-B.

[3] See page 47 of the judgment. On the scope of the principle, see Bin Cheng, *General Principles of Law as Applied by International Tribunals* (Preface by Georg Schwarzenberger)**,** London, Stevens & Sons, 1953, reprinted Cambridge, Cambridge University Press, 2006.

Court "reiterates that it is impossible to equate lawful expropriation and constructive expropriation, at issue in the instant case" (see paragraph 95 of the judgment) and that constructive expropriation "seeks to confirm a factual situation arising from unlawful acts committed by the authorities and thus permits the latter to profit from their illegal conduct" (see paragraph 94 of the judgment).

4. I have already drawn attention on several occasions to the importance of the principle of *restitutio in integrum*[1] as enshrined in the case-law of international and arbitration courts (referred to in paragraphs 49 to 52 of the judgment), and even in the Draft Articles on State Responsibility, drawn up by the International Law Commission of the United Nations (mentioned in paragraphs 53 and 54 of the judgment)[2]. There is no need to return to the arguments here.

5. Until now, our case-law has been in perfect harmony with these principles.

6. In the Court's case-law, as in general international law, the question of whether expropriation is "lawful" or "unlawful" is relevant in calculating compensation. The Court has held on numerous occasions that the issue of

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[1] See, in the following cases, the opinions that I prepared alone or with colleagues: *Vladimir Romanov v. Russia*, no. 41461/02, 24 July 2008 (joint concurring opinion of Judges Spielmann and Malinverni); *Polufakin and Chernyshev v. Russia*, no. 30997/02 (concurring opinion of Judge Spielmann), 25 September 2008; *Fakiridou and Schina v. Greece*, no. 6789/06, 14 November 2008 (concurring opinion of Judges Spielmann and Malinverni); *Salduz v. Turkey* [GC], no. 36391/02, 27 November 2008 (concurring opinion of Judges Rozakis, Spielmann, Ziemele and Lazarova Trajkovska); *Panovits v. Cyprus*, no. 4268/04, 11 December 2008 (joint concurring opinion of Judges Spielmann and Jebens); *Pishchalnikov v. Russia,* no. 7025/04, 24 September 2009 (concurring opinion of Judge Spielmann); *Varnava and Others v. Turkey* [GC]**,** 18 September 2009 (concurring opinion of Judge Spielmann, joined by Judges Ziemele and Kalaydjieva); *Prezec v. Croatia*, no. 48185/07, 15 October 2009 (partly dissenting opinion of Judges Spielmann and Malinverni).

[2] Article 35 of the Draft Articles on State Responsibility provides:
"A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:
(a) is not materially impossible;
(b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation."
Article 36 of the same Draft Articles provides:
"1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution."
See J. Crawford, *The International Law Commission's Articles on State Responsibility*. Introduction, Text and Commentaries, Cambridge, Cambridge University Press, 2002.

whether a fair balance has been struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights becomes relevant only once it has been established that the interference in question satisfied the requirement of lawfulness and was not arbitrary[1].

7. To date, the Court has always applied the principle set out in the *Chorzów Factory* judgment[2], notably in the *Papamichalopoulos* case[3], where it held:

> "34. The Court points out that by Article 53 (art. 53) of the Convention the High Contracting Parties undertook to abide by the decision of the Court in any case to which they were parties; furthermore, Article 54 (art. 54) provides that the judgment of the Court shall be transmitted to the Committee of Ministers which shall supervise its execution. It follows that a judgment in which the Court finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach.
>
> The Contracting States that are parties to a case are in principle free to choose the means whereby they will comply with a judgment in which the Court has found a breach. This discretion as to the manner of execution of a judgment reflects the freedom of choice attaching to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed (Article 1) (art. 1). If the nature of the breach allows of restitutio in integrum, it is for the respondent State to effect it, the Court having neither the power nor the practical possibility of doing so itself. If, on the other hand, national law does not allow - or allows only partial - reparation to be made for the consequences of the breach, Article 50 (art. 50) empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate".
>
> ...
>
> 36. The act of the Greek Government which the Court held to be contrary to the Convention was not an expropriation that would have been legitimate but for the failure to pay fair compensation; it was a taking by the State of land belonging to private individuals, which has lasted twenty-eight years, the authorities ignoring the decisions of national courts and their own promises to the applicants to redress the injustice committed in 1967 by the dictatorial regime.

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[1] The principle was laid down in the judgment in *Iatridis v. Greece* [GC], no. 31107/96, § 58, ECHR 1999-II, and reaffirmed in *Beyeler v. Italy* [GC], no. 33202/96, § 107, ECHR 2000-I. See also *Belvedere Alberghieri* (principal judgment), § 55; *Carbonara and Ventura* (principal judgment), § 62; *Pasculli v. Italy*, no. 36818/97, § 81; *Carletta v. Italy*, no. 63861/00, § 72, 15 July 2005; *Scordino v. Italy (no. 3)*, cited above, § 83; and *Guiso-Gallisay* (principal judgment), § 80**.**

[2] Cited above.

[3] *Papamichalopoulos and Others v. Greece*, cited above.

> The unlawfulness of such a dispossession inevitably affects the criteria to be used for determining the reparation owed by the respondent State, since the pecuniary consequences of a lawful expropriation cannot be assimilated to those of an unlawful dispossession. In this connection, international case-law, of courts or arbitration tribunals, affords the Court a precious source of inspiration; although that case-law concerns more particularly the expropriation of industrial and commercial undertakings, the principles identified in that field are valid for situations such as the one in the instant case."[1]

8. In the case of *Papamichalopoulos*, the Court decided on the compensation to be awarded on the basis of the "fundamental principle" set out in the *Chorzów* Factory judgment[2] and held that the applicants were entitled to restitution of their land and to compensation for loss of enjoyment of the property or, if that were impossible, to damages corresponding to the current value of their land, plus an amount in respect of indirect damage. The Court thus took into consideration the current value of the disputed land[3].

9. The rule laid down in that judgment is applicable to *unlawful* expropriations. It can be found, in particular, in the judgments *Belvedere Alberghiera S.r.l. v. Italy*[4] and *Carbonara and Ventura v. Italy*[5]. This position was endorsed by the Grand Chamber – albeit as an *obiter dictum*, in the judgment on just satisfaction in the case of *The former King of*

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[1] The *Papamichalopoulos and Others* (Article 50) judgment is the most frequently cited in this area, but it was based on a principle that had been laid down in earlier case-law. In its judgment in *Hentrich v. France* (22 September 1994, Series A no. 296-A), the old Court found a twofold violation of Article 1 of Protocol No. 1 – firstly in that the legal basis of the impugned dispossession, resulting from a pre-emption decision, did not offer sufficient guarantees against arbitrary conduct (§ 42), and also because the amount of compensation due in that respect rendered the impugned interference disproportionate (§§ 47-49) – and held that, failing restitution of the disputed land, the compensation due was to be calculated on the basis of the current market value of the land (§ 71). It should be noted that the value of the land had not been altered by the buildings erected on it. The old Court subsequently "assessed on an equitable basis" … "the damage flowing from the loss of the property and of the enjoyment of it" (*Hentrich v. France* ((Article 50), 3 July 1995, Series A no. 320-A).

[2] Cited above. For the application of the principle in the area of human rights, see Loukis G. Loucaides, "Reparation for Violations of Human Rights under the European Convention and *Restitutio in integrum*", *European Human Rights Law Review*, 2008, pp. 182-192; A. Orakhelashvili, "The European Convention on Human Rights and International Public Order", (2002-2003) 5 *Cambridge Yearbook of European Legal Studies*, p. 237, particularly p. 260.

[3] See M. Van Brutsem and E. Van Brutsem, "Les hésitations de la Cour européenne des droits de l'homme : à propos du revirement de jurisprudence en matière de satisfaction équitable applicable aux expropriations illicites", *Revue française de droit administratif*, 2009, pp. 285-293, particularly p. 289.

[4] (just satisfaction), no. 31524/96 §§ 34-36, 30 October 2003.

[5] (just satisfaction), no. 24638/94, §§ 39-40, 11 December 2003.

Greece and Others v. Greece [1] and, more recently, – again in an *obiter dictum* – in paragraphs 250 to 254 of the *Scordino (no. 1)* judgment[2]. Even more recently, a Section of the Court adopted it as the *ratio decidendi* in the case of *Scordino v. Italy (no. 3)*[3].

10. To sum up, in the case of *unlawful* expropriation, the basic principle is that of *restitutio in integrum*: the consequences of the violation must be totally eliminated, either by the restoration of the *status quo ante*, or by compensation for the dispossession and of all indirect loss.

11. The Grand Chamber's judgment in the instant case confirms the Chamber judgment with regard to the reversal of the case-law, thus breaking with an approach that had been in perfect harmony with the rules and principles of international law[4]. At the same time, it differs from the Chamber judgment in taking the years 1982 and 1983 as the critical dates (see paragraph 105 of the judgment), thus adopting a position that is even more restrictive than that of the Chamber.

12. The total elimination of the consequences of the impugned interference implies that the applicants ought to have been placed in a situation that was equivalent to that in which they would have found themselves had there not been a breach of the State's obligations under Article 1 of Protocol No. 1. In retaining the date of the loss of ownership of the land as the key date, the majority has not taken account of the land's economic potential, which is of relevance in the context of full compensation for the damage sustained. In the instant case, the violation is a *de facto* expropriation, one that was unlawful irrespective of the lack of compensation. In international case-law, such a situation entails an obligation to pay compensation not only for the direct loss, but also for any derived loss. In the instant case, the expropriation has resulted in continued and adverse consequences on the right of property of the applicants, who have lived in a state of uncertainty with regard to the fate of their property.

13. The Grand Chamber's decision, however, has the effect of setting aside the distinction between unlawful taking and lawful expropriation.

14. This new approach is justified, notably in paragraphs 103 and 104, by:

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[1] *The former King of Greece and Others v. Greece* [GC] (just satisfaction), no. 25701/94, 28 November 2002.
[2] *Scordino v. Italy (no. 1)* [GC], no. 36813/97, ECHR 2006-V.
[3] (just satisfaction), no. 43662/98, §§ 32 et seq., ECHR 2007-III.
[4] For a critique of the Chamber judgment, see M. Van Brutsem and E. Van Brutsem, *op. cit.*, pp. 285-293.

(1) the concern to avoid unequal treatment of applicants depending on the nature of the public works constructed by the authorities;

(2) the wish to avoid assigning a punitive or dissuasive role to the compensation;

(3) developments in the domestic legislation.

15. I find none of these three arguments, which the Grand Chamber has essentially adopted from the Chamber judgment, convincing.

As my colleague Françoise Tulkens pointed out in her dissenting opinion, already referred to, with regard to the first argument (a fear of causing unequal treatment of applicants depending on the nature of the public works constructed by the authorities, which is not necessarily related to the potential of the land in its original state),

> "It is, to say the least, odd to wish to correct an inequality of treatment, more virtual than real in the instant case, by *reducing*, in an arbitrary fashion, the compensation applicable to all the persons concerned by an unlawful dispossession. Further, in seeking to correct a possible inequality in treatment, the majority merely reintroduces another, that which now affects the applicants in this case with regard to the true state of affairs and to other applicants whose cases were dealt with previously. Finally, and more fundamentally, the very practice of "constructive expropriation", a euphemism to describe what is in fact unlawful expropriation, leads to unpredictable and arbitrary results which deprive the individuals concerned of effective protection of their rights."

Further, with regard to the second argument (a refusal to assign a punitive or dissuasive role to compensation with regard to the respondent State), my colleague Françoise Tulkens stated:

> "The second argument is the refusal to assign a punitive or dissuasive goal with regard to the respondent State to compensation for pecuniary damage. This is not the issue. Pecuniary damage would have such an aim or quality if the amount awarded had no link or relationship to the damage found. Yet this is not the case here, in that the compensatory function of the alleged damage is clearly established. Had they remained in possession of their land, the applicants could clearly have used or developed it in one way or another."

Finally, with regard to the third argument (developments in the domestic legislation), Judge Tulkens correctly noted that:

> "... although this was not decisive for the purposes of their decision, the majority considers that it must take into consideration a "new fact" in the national system. In judgments nos. 348 and 349 of 22 October 2007, the Constitutional Court held that the domestic legislation had to be compatible with the Convention, as interpreted by the Court's case-law; in consequence, it declared unconstitutional section 5 *bis* of Legislative Decree no. 333 du 11 July 1992, as amended by Law no. 662 of 1996. Subsequently, the Finance Act (Law no. 244) of 24 December 2007 established that expropriation compensation for building land must correspond to the property's

market value. Nothing in this case-law, which seems to concern primarily the place of the European Convention on Human Rights in the Italian constitutional system, or in the new law contradicts the Court's method of calculating compensation with regard to constructive expropriation in that, in both cases, the other types of damages are not taken into account."

16. For my part I consider that, through this judgment, the level of compensation applicable to all those affected by an unlawful dispossession has been reduced in an arbitrary fashion. The decision by which a domestic court takes note of the unlawful occupation of a plot of land and declares that there has been constructive expropriation does not have the effect of regularising the situation complained of, but merely confirms an illegal situation, which cannot subsequently be remedied in the absence of compensation that complies with the criteria applicable to cases of illegal deprivation of property.

17. In accordance with the Court's case-law, if the expropriation is without title, then failing *restitutio in integrum* the compensation must reflect the idea of a total elimination of the consequences of the impugned interference and represent the full value of the property (either by the restoration of the *status quo ante* or by compensation for the dispossession and all indirect damage). If, on the contrary, the expropriation is legal and not justified by legitimate "public interest" objectives, only compensation in full (that is, the full market value of the expropriated property at the date of expropriation) can be regarded as reasonably related to the value of the property[1]. Legitimate objectives of "public interest", such as pursued in measures of economic reform or measures designed to achieve greater social justice, may however call for less than reimbursement of the full market value.

18. In the event of constructive expropriation, the compensatory function of the alleged damage had been clearly established. Had the applicants maintained ownership of their plots of land, they would have been at liberty to use or develop them.

19. The criteria laid down in the *Papamichalopoulos* case-law ought to have been applied in the instant case, which concerns constructive - and thus illegal - expropriation. I should like to add that the fact that the applicants in this case did not request the restoration of the land before the domestic courts cannot be a decisive factor for the purposes of the Court's decision, given that restoration was impossible once public infrastructure had been constructed on the site.

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[1] See *Former King of Greece and Others v. Greece* [GC] (just satisfaction), no. 25701/94, 28 November 2002.

20. In sum, I consider that the compensation payable to the applicants ought to have reflected the idea of a total elimination of the consequences of the impugned interference and also reflected the full value of the property.

21. In accordance with its own case-law, the Court, in order to fully compensate the damage incurred, ought to have awarded amounts that took into account the loss sustained which would not be covered by restitution in kind or payment in place of it. Accordingly, it is to be regretted that "the Court has departed from its case-law in this way, the consequence of which is to attenuate the dichotomy between the compensation policies applied to cases of lawful and unlawful dispossession"[1].

22. In 2007 Professor Paul Tavernier, in an article published in the *Revue trimestrielle des droits de l'homme*, expressed the hope that, with regard to pecuniary damage, "the Court... [would] refine its *Papamichalopoulos* case-law"[2]. In the instant judgment, the Court has departed from that case-law instead of refining it. It has now substantially modulated "the refusal to endorse the policy of fait accompli"[3]. This is to be regretted. After all, the principles of international responsibility underlie Article 41 of the Convention[4], and this judgment represents a dangerous precedent which has the potential to water down those principles.

[1] M. Van Brutsem and E. Van Brutsem, *op. cit.*, p. 293.
[2] P. Tavernier, "La contribution de la jurisprudence de la Cour européenne des droits de l'homme relative au droit de la responsabilité internationale en matière de réparation – Une remise en cause nécessaire", *Revue trimestrielle des droits de l'homme*, 2007, pp. 945-966, pp. 965-966.
[3] M. Van Brutsem and E. Van Brutsem, *op. cit.* et *loc. cit.*
[4] P. Tavernier, *op. cit.* et *loc. cit.*