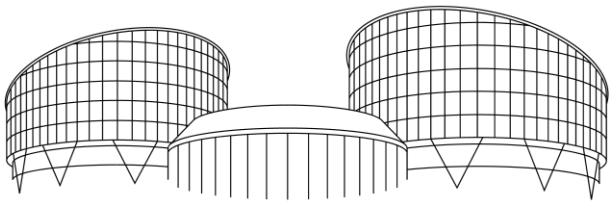

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF TONIOLO v. SAN MARINO AND ITALY

(Application no. 44853/10)

JUDGMENT

STRASBOURG

26 June 2012

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Toniolo v. San Marino and Italy,

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

Josep Casadevall, *President,*
Corneliu Bîrsan,
Ján Šikuta,
Ineta Ziemele,
Nona Tsotsoria,
Kristina Pardalos,
Guido Raimondi, *judges,*
and Santiago Quesada, *Section Registrar,*

Having deliberated in private on 29 May 2012,

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

PROCEDURE

1. The case originated in an application (no. 44853/10) against the Italian Republic and the Republic of San Marino lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Italian national, Mr Giuseppe Toniolo ("the applicant"), on 2 August 2010.

2. The applicant was represented by Mr U. Guerini, a lawyer practising in Bologna, Italy. The San Marinese Government ("the Government") were represented by their Agent, Mr Lucio L. Daniele and their Co-Agent Mr Guido Bellatti Ceccoli.

3. The applicant alleged that his preventive detention and subsequent extradition breached his rights under Article 5 § 1.

4. On 14 March 2011 the application was communicated to the Government of San Marino. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

5. The Italian Government, who had been notified by the Registrar of their right to intervene in the proceedings (Article 36 § 1 of the Convention and Rule 44), indicated that they did not intend to do so.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant, an Italian national, was born in 1949 and lives in San Marino.

A. The extradition request

7. On 10 August 2009, the Prosecutor of the Rome Tribunal informed the Italian Ministry of Justice and the San Marino Tribunal, that criminal proceedings had been instituted against the applicant (an Italian citizen resident in San Marino) for, *inter alia*, money laundering. He further informed them that by a decision of 3 July 2009 the Rome Tribunal had ordered his preventive detention. The prosecutor therefore requested the San Marino judicial authorities to extradite the applicant and place him in preventive detention on the basis of the bilateral Convention on Friendship and Good Neighbourhood between Italy and San Marino of 1939 (the 1939 Convention). At the same time he requested the Italian Ministry to authorise the extradition request.

8. By a decision of 12 August 2009 the *Commissario della Legge* (CL) accepted the request and ordered the applicant's arrest and preventive detention pending his extradition, on the basis of the 1939 Convention, noting, moreover, that San Marino had also ratified the European Convention on Extradition of 1957 (the 1957 Convention).

9. On the same day the applicant was notified of the order and arrested.

10. On 14 August 2009, pending the official request by the Italian Ministry of Justice according to Article 22 of the 1939 Convention, the CL requested the *Capitani Reggenti* (CR) to authorise the extradition, noting that the relevant requirements were fulfilled. No reply was received.

11. On 20 August 2009 the applicant and his lawyer were heard in relation to his extradition. On the same day, the CL rejected a request by the applicant for house arrest on the basis of the 1939 Convention.

12. On 26 August 2009 the Secretary of State informed the CL about a note verbal from the Italian embassy of 20 August 2009 which noted that San Marino had become a party to the 1957 Convention on 16 June 2009 and that therefore the Italian request would be submitted within the 40 days stipulated in the 1957 Convention. Moreover, the note verbal requested the extension available under the said Convention, in the event that it became necessary.

B. The subsequent proceedings

13. On 24 August 2009 the applicant complained against the decision of 12 August 2009 (paragraph 8 above) in so far as there had been no urgent reasons under the 1939 Convention, which in his view was applicable to the present extradition, justifying preventive detention.

14. On 7 September 2009 the appeal judge dismissed this complaint. The court considered that the preventive measure was to facilitate extradition. It considered the element of urgency to be linked to the risk of absconding and that one had to take account of the geographical situation of

San Marino. The court held that the basis of the detention was the arrest warrant of 12 August 2009 which it was thereby confirming, however, modifying the applicable rules in that such orders were to be governed by the 1957 Convention which had to apply to the present extradition. While it was true that the first steps of the extradition process had been in accordance with the 1939 Convention and the subsequent ones with the 1957 Convention; it was also true that San Marino had made a reservation, when ratifying the 1957 Convention, to the effect that its bilateral agreement would prevail. However, Italy had not made such a reservation or acknowledged the San Marino one.

15. On the same day, 7 September 2009, the applicant requested, under the 1939 Convention, to be released on the expiry of 30 days from his arrest, if the extradition request and relevant documents were not submitted.

16. On 11 September 2009 this request was rejected by the CL, holding that the 1957 Convention, which prevailed over the 1939 Convention, stipulated a maximum of 40 days.

C. The extradition

17. On 18 September 2009 the CL informed the CR of the extradition request and relevant documents submitted by the Italian Ministry of Justice on the same day. He confirmed that the conditions of the 1957 Convention were fulfilled and therefore requested the authorisation of the extradition. On the same day the CR gave its authorisation on the basis of the 1957 Convention and the CL ordered the applicant's extradition, which took place the following day.

18. On 19 September 2009 at 12.50 a.m. the applicant was picked up and ten minutes later notified of the extradition order which he refused to sign claiming it should be submitted to his lawyer. He was transferred to the Italian police at 2.45 p.m. and at 4.15 p.m. the extradition order was notified to one of his lawyers.

D. The ensuing parallel proceedings

1. The first set of proceedings

19. On 5 October 2009 the applicant lodged an application (*ex art 56 c.p.p.)* with the *Terza Istanza Penale* against the appeal judge's order of 7 September 2009 (confirming the order of 12 August 2009 concerning preventive detention – paragraph 14 above) and the extradition order of 18 September 2009. In relation to the former he argued that he was not a dangerous individual, there was no risk of absconding or altering evidence, no need to protect the community, that the charges brought forward by the

Italian Government were unfounded and that the extradition request had not been properly submitted. In respect of the extradition, he claimed, *inter alia*, that it had been vitiated since it had been requested on the basis of the 1939 Convention and not the 1957 Convention, which could not apply in view of the reservation by San Marino to the effect that its bilateral agreements would prevail. Moreover, the entire procedure had been tainted by illegality, the rights of the defence had been breached in that the applicant had not been heard nor were his lawyers notified or allowed access to the applicant at the time of the extradition. He also referred back to the submissions made on 24 August 2009.

20. By a judgment of 20 November 2009 (notified on 1 December 2009) the *Terza Istanza Penale* held that it could not take cognisance of the complaint against the extradition order as this was still pending before the appeal judge at second instance (see below). As to the rest, it reiterated that while it was true that the first steps of the extradition process had been in accordance with the 1939 Convention and the subsequent ones with the 1957 Convention; it was also true that San Marino had made a reservation, when ratifying the 1957 Convention, to the effect that its bilateral agreement would prevail. However, Italy had not made such a reservation or acknowledged the San Marino one. This, thus, led to a situation where for San Marino the 1939 Convention applied and for Italy the 1957 Convention applied. This was clearly unworkable. Thus, it was obvious that the reservation could only apply if both States had coinciding declarations. As to the decision to keep the applicant in preventive detention the court found that the CL's decision had been a legitimate exercise of discretion in which the CL had considered the seriousness of the offences, the evidence presented and any other conditions relevant to the aim of successfully extraditing the applicant. Therefore, the conditions for the application of such a measure were fulfilled under both Conventions. Moreover, it could not be said that the extradition process had caused the applicant prejudice at any time. The process had been in conformity with the Italian request and the relevant Conventions at different stages. This constituted a legitimate basis for the entire extradition proceedings including the duration of the detention. Thus, it further confirmed the order of arrest of 12 August 2009 and the decision of the appeal judge of 7 September 2009, which were thereby definitive.

2. The second set of proceedings

21. On 29 September 2009 (a few days before the start of the first set of proceedings mentioned above), the applicant had lodged an application (*ex art 56 c.p.p. and art 30 of Law 30/07/2009 no.104)* before the appeal judge against the extradition order of 18 September 2009. His application started by reiterating the arguments made in his submissions of 24 August 2009 (regarding preventive detention). He further argued, *inter alia*, that he had

been extradited without being heard and without being notified of the authorisations relevant to such procedure except for the order of 18 September 2009, and pointed to other irregularities which vitiated the request such as the application of two Conventions which had different formal requirements. He also reiterated other issues raised in his submissions of 24 August 2009.

22. The application was rejected on 23 November 2009 (a few days after the above mentioned final judgment of 20 November 2009). The court noted that the object of the application was the same as that made in another application. The objection to the execution of the applicant's extradition order of 18 September 2009 was identical in both proceedings. The objection against the decision of 12 August 2009 was inadmissible not quite on the basis that it was being contested in another forum, but particularly because the arguments brought forward were the same in both fora.

23. On 17 December 2009 the applicant appealed to the *Terza Istanza Penale* against this decision. The applicant stated that he was appealing the decision of 23 November 2009 which had rejected his appeal of "5 October 2009". He argued, *inter alia*, that he had been extradited without being heard and without being notified of the authorisations relevant to such procedure except for the order of 18 September 2009, and pointed to other irregularities which vitiated the request such as the application of two Conventions which had different formal requirements, and the issues raised in his submissions of 24 August 2009. In consequence he considered that the extradition had to be considered invalid.

24. By a judgment of 8 February 2010 the *Terza Istanza Penale* considered this application to refer to all the steps of the extradition proceedings, as it reiterated the same grounds aired previously in different phases of the proceedings, including those before the same judge in the *Terza Istanza Penale*. The court held that, as to the notification, both the applicant and his lawyers had been informed of the arrest order dated 12 August 2009 on the same day, and the Italian ordinance on which the arrest order was based had been notified the subsequent day. Following that, the applicant's lawyers had had full access to him while in detention and to all the relevant documents in the proceedings. The applicant had been heard in a hearing and had made use of multiple remedies in respect of every step of the proceedings. The court reiterated that all these proceedings had been governed by the 1957 Convention, as the prevailing instrument and that any order based on the 1939 Convention had not prejudiced the applicant in his right to liberty. On the substance it considered that there had been sufficient logical and juridical justification to accept the Italian request for extradition which had been submitted including all the relevant and necessary elements according to the relevant international legal texts. Lastly, the *Terza Istanza Penale* noted that the appeal judge had upheld the prosecutor's objections that there had been nothing new in this application which was therefore

inadmissible. Bearing in mind all the above, it considered the appeal manifestly ill-founded and confirmed the order of 18 September 2009 for the applicant's extradition.

E. The applicant's position after his extradition

25. On 12 February 2010 the Italian courts released the applicant following the expiration of the time-limits of detention prescribed by law.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW

A. Relevant domestic texts

26. Article 8 of the Criminal Code of San Marino, in so far as relevant, reads as follows:

> "Extradition is regulated by means of international conventions, and in the event that they do not so provide, by San Marino law. Extradition of persons found in the territory of San Marino is allowed on the fulfilment of the following conditions:
>
> 1. That the fact constitutes an offence under both the law of San Marino and the law of the requesting State.
>
> 2. That the crime, the penalty or the relevant measures are not extinct in the law of any of the two States.
>
> 3. That the criminal proceedings can be brought in the courts of both States.
>
> 4. That the request does not relate to a citizen of San Marino, unless it was so expressly allowed by international conventions.
>
> 5. That it does not concern political crimes or crimes related to the latter, or to military crimes exclusively, or that it appears that the extradition is wanted solely for political grounds (...)."

B. Relevant international texts

1. The Bilateral Convention on Friendship and Good Neighbourhood between Italy and San Marino of 1939

27. Article 22 of the 1939 Convention, in so far as relevant, reads as follows:

> "The extradition request shall be directly submitted by the competent judicial authority of the requesting state to the requested state. (...) The extradition request and

extradition order must be authorized in Italy by the Justice Ministry and in San Marino by the Reggenza (RC).” *(Summary unofficial translation).*

28. Article 23 of the 1939 Convention, in so far as relevant, reads as follows:

“When a request for extradition is submitted all the necessary measures must be taken to ensure its execution. An arrested person will be detained until a decision on the extradition is taken and if this is decided until the extradition. Provisional arrest may be ordered on the basis of a declaration (referring to certain conditions, such as existence of an arrest warrant) or on the basis of a published wanted criminals list, in cases of urgency. The provisional detainee will be set free within one month from his arrest if by then the extradition request and the relevant documents have not reached the requested party. This term may be prolonged to two months if the person to be extradited is identified as a dangerous criminal or if the arrest was based exclusively on a published wanted criminals list. The individual’s release does not prejudice his or her extradition once the relevant request and documents have been received.” *(Summary unofficial translation).*

2. The European Convention on Extradition (1957)

29. The relevant articles read as follows:

Article 12 – The request and supporting documents

“(1) The request shall be in writing and shall be communicated through the diplomatic channel. Other means of communication may be arranged by direct agreement between two or more Parties.

(2) The request shall be supported by:

a) the original or an authenticated copy of the conviction and sentence or detention order immediately enforceable or of the warrant of arrest or other order having the same effect and issued in accordance with the procedure laid down in the law of the requesting Party;

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

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

Article 16 – Provisional arrest

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

The request for provisional arrest shall state that one of the documents mentioned in Article 12, paragraph 2.a, exists and that it is intended to send a request for extradition. It shall also state for what offence extradition will be requested and when

and where such offence was committed and shall so far as possible give a description of the person sought.

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

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

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

Article 18 – Surrender of the person to be extradited

"The requested Party shall inform the requesting Party by the means mentioned in Article 12, paragraph 1, of its decision with regard to the extradition.

Reasons shall be given for any complete or partial rejection.

If the request is agreed to, the requesting Party shall be informed of the place and date of surrender and of the length of time for which the person claimed was detained with a view to surrender.

Subject to the provisions of paragraph 5 of this article, if the person claimed has not been taken over on the appointed date, he may be released after the expiry of 15 days and shall in any case be released after the expiry of 30 days. The requested Party may refuse to extradite him for the same offence.

If circumstances beyond its control prevent a Party from surrendering or taking over the person to be extradited, it shall notify the other Party. The two Parties shall agree a new date for surrender and the provisions of paragraph 4 of this article shall apply."

Article 22 – Procedure

"Except where this Convention otherwise provides, the procedure with regard to extradition and provisional arrest shall be governed solely by the law of the requested Party."

Article 26 – Reservations

"Any Contracting Party may, when signing this Convention or when depositing its instrument of ratification or accession, make a reservation in respect of any provision or provisions of the Convention.

Any Contracting Party which has made a reservation shall withdraw it as soon as circumstances permit. Such withdrawal shall be made by notification to the Secretary General of the Council of Europe.

A Contracting Party which has made a reservation in respect of a provision of the Convention may not claim application of the said provision by another Party save in so far as it has itself accepted the provision."

Article 28 – Relations between this Convention and bilateral Agreements

"This Convention shall, in respect of those countries to which it applies, supersede the provisions of any bilateral treaties, conventions or agreements governing extradition between any two Contracting Parties.

The Contracting Parties may conclude between themselves bilateral or multilateral agreements only in order to supplement the provisions of this Convention or to facilitate the application of the principles contained therein.

Where, as between two or more Contracting Parties, extradition takes place on the basis of a uniform law, the Parties shall be free to regulate their mutual relations in respect of extradition exclusively in accordance with such a system notwithstanding the provisions of this Convention. The same principle shall apply as between two or more Contracting Parties each of which has in force a law providing for the execution in its territory of warrants of arrest issued in the territory of the other Party or Parties. Contracting Parties which exclude or may in the future exclude the application of this Convention as between themselves in accordance with this paragraph shall notify the Secretary General of the Council of Europe accordingly. The Secretary General shall inform the other Contracting Parties of any notification received in accordance with this paragraph."

THE LAW

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

30. The applicant complained about the unlawfulness of his preventive detention since it had exceeded the time-limits imposed by law, namely the 1939 Convention and/or the 1957 Convention as the Italian authorities had submitted a late extradition request without requesting an extension of time. The applicant complained that the extradition request had not been submitted to the relevant authority, in that it had been submitted by the Italian Ministry to the CL and not by diplomatic channels to the CR. He invoked Article 5 § 1 of the Convention which, in so far as relevant, reads as follows:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

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

A. The complaints against San Marino

1. Admissibility

(a) Government's objection as to non compliance with the six-month rule

31. The Government of San Marino considered that the applicant's complaints were inadmissible since they were brought after the expiry of the six-month time-limit from the date on which the final internal decision had been delivered.

32. They noted that the applicant's complaints against the extradition and the provisional arrest had been reiterated a second time before the same judicial authorities and with the same identical reasons. This had been highlighted in the domestic proceedings both by the prosecuting magistrate, the judge of criminal appeals and the highest judge of appeal who had rejected the applicant's claims in the second set of proceedings on the basis that the appeal related to the same subject matter and was based on the same reasons presented in a preceding appeal, on which a decision had already been adopted. Accordingly, the last domestic decision was that of 20 November 2009, notified on 1 December 2009, and not that of 8 February 2010, notified on 22 February 2010.

33. According to the applicant the parallel proceedings undertaken constituted two different judicial processes. He maintained that the arguments of the two appeals were partly repeated in the two proceedings due to the instrumentality of the first to the other. Nevertheless, in their view the formal and substantial diversity of their subject matter made them fully autonomous and raised two distinct judgments.

34. The Court reiterates that Article 35 § 1 of the Convention requires that the only remedies to be exhausted are those that are available and sufficient to afford redress in respect of the breaches alleged. The purpose of Article 35 § 1 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those

allegations are submitted to the Court (see, *inter alia*, *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V). However, an applicant is not obliged to have recourse to remedies which are inadequate or ineffective (see *Raninen v. Finland*, 16 December 1997, § 41, *Reports of Judgments and Decisions* 1997-VIII). It follows that the pursuit of such remedies will have consequences for the identification of the "final decision" and, correspondingly, for the calculation of the starting point for the running of the six-month rule (see, for example, *Kucherenko v. Unkraine*, (dec.) no. 41974/98, 4 May 1999, and *Prystavska v. Ukraine* (dec.), no. 21287/02, 17 December 2002).

35. The Court observes that, in the present case, the applicant brought two sets of proceedings at relatively the same time.

The first initiated by an application lodged on 24 August 2009 against the decision of 12 August 2009 regarding his preventive detention. The application was dismissed by the appeal judge on 7 September 2009. On 5 October 2009 the applicant appealed this decision before the *Terza Istanza Penale*, however, his appeal also included a complaint against the supervened extradition order of 18 September 2009. The *Terza Istanza Penale* rejected his complaints on 20 November 2009. It found that the complaint regarding the extradition was premature, and that the complaint regarding the preventive detention was unfounded on the merits. Thus, the decision on the preventive detention became definitive.

The second set of proceedings was initiated by an application lodged on 29 September 2009 against the extradition order of 18 September 2009, whereby the applicant reiterated the arguments made in his previous application, namely that of 24 August 2009 in respect of his preventive detention. This application was rejected by the appeal judge on 23 November 2009 as being substantially the same as that decided on 20 November 2009 by the same judge. On 17 December 2009 the applicant appealed before the *Terza Istanza Penale* that dismissed the case as being manifestly ill-founded on 8 February 2010.

36. The Court notes a considerable element of confusion within the ambit of the domestic proceedings, both in the applications submitted by the applicant and in the decisions of the courts. Quite apart from the fact that the applicant repeatedly made the same arguments in the ambit of different proceedings, the court notes in particular, that the applicant's appeal application of 17 December 2009 stated that it was an appeal against the decision of 23 November rejecting his application of 5 October 2009. The domestic court reiterated that statement. However, the Court observes that the decision of 23 November 2009 had rejected the application of 29 September 2009 and not that of 5 October 2009. Indeed the application of 5 October 2009 had already been decided by a final judgment of the *Terza Istanza Penale* dated 20 November 2009. It is also of concern that the domestic court in the second set of proceedings omitted to take note of the

fact that in the first set of proceedings a part of the application had been rejected as being premature.

37. Nevertheless, the Court will examine the substance of the two sets of proceedings. The Court does not accept the applicant's submission as to the distinct nature of the subject matter of those proceedings. Indeed in both proceedings he reiterated the same points in respect to his two complaints, namely the preventive detention and the extradition order. It follows that the matter was brought twice before the same jurisdictions, reiterating, in substance, the same arguments. However, the Court observes that the judgment of 20 November 2009 had rejected the applicant's complaint against the extradition order as being premature, the complaint being still pending before the judge in the second set of proceedings. Thus, in respect of that complaint, the Court is of the view that the applicant had legitimate grounds to wait for the end of the second set of proceedings. Therefore, the Court considers that the second set of proceedings was repetitive and devoid of prospects of success (see *Barc Company Ltd v Malta*, (dec). no. 38478/06, 21 September 2010) only in so far as it regarded the complaint regarding the preventive detention before the extradition order which had been decided definitely in the first set of proceedings.

38. It follows that, the judgment of 8 February 2010 cannot bring the complaint relating to the applicant's preventive detention before the extradition order within the six-month time-limit laid down in Article 35 § 1 of the Convention. The "final" decision at the domestic level in that respect must be considered to be the *Terza Istanza Penale*'s decision of 20 November 2009 notified on 1 December 2009, therefore more than six months before the date of introduction of the application (2 August 2010).

39. It follows that the complaint under Article 5 § 1 about the applicant's preventive detention before the extradition is out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

40. As to the complaint regarding the detention linked to the extradition order, the Court considers the decision of 8 February 2010 as the last domestic decision. The Government's objection is therefore dismissed.

41. It follows that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

(a) The parties' submissions

42. The applicant complained against San Marino in relation to the unlawfulness of his extradition order as a result of the procedural irregularities relating to the extradition. He argued that the 1939 Convention was applicable to his extradition and not the 1957 Convention which San Marino adhered to after his extradition proceedings had initiated. He

complained that the extradition request had not been submitted to the relevant authority, in that it had been submitted by the Italian Ministry to the CL and not by diplomatic channels to the RC. It followed that his extradition and transfer to the Italian authorities had been unlawful.

43. For the reasons supported by the domestic courts, the San Marino Government considered that the 1957 Convention had been applicable to the present case, and that the applicant had been detained under Article 5 § 1(f). The law had been accessible and foreseeable. Moreover, the proceedings were covered by procedural safeguards, in that, according to San Marino case-law, safeguards which applied to internal criminal proceedings (such as the right to legal assistance, to be heard and to appeal) also applied to international requests concerning precautionary and coercive measures.

(b) The Court's assessment

i. General principles

44. The Court reiterates that on the question whether detention is "lawful", including whether it complies with "a procedure prescribed by law" within the meaning of Article 5 § 1, the Convention refers back essentially to national law, including rules of public international law applicable in the State concerned (see, *mutatis mutandis*, *Groppera Radio AG and Others v. Switzerland*, 28 March 1990, Series A no. 173, § 68; *Öcalan v. Turkey* [GC], no. 46221/99, §§ 83, 90, ECHR 2005-IV; and *Weber and Saravia v. Germany* (dec.), no. 54934/00, § 87, 29 June 2006). The Convention lays down the obligation to conform to the substantive and procedural rules of national law. However, it requires in addition that any deprivation of liberty should be consistent with the purpose of Article 5, namely to protect individuals from arbitrariness (see *Chahal v. the United Kingdom*, 15 November 1996, *Reports of Judgments and Decisions* 1996-V, § 118; *Čonka v. Belgium*, no. 51564/99, § 39, ECHR 2002-I; and *Öcalan*, cited above, § 83).

45. It is in the first place for the national authorities, notably the courts, to interpret and apply domestic law. However, since under Article 5 § 1 failure to comply with domestic law entails a breach of the Convention, it follows that the Court can and should exercise a certain power to review whether this law has been complied with (see *Bozano v. France*, 18 December 1986, Series A no. 111, § 58; and *Öcalan*, cited above, § 84).

46. The Court has previously accepted that a bilateral or international treaty being part of the domestic legal order, is capable of serving as a legal basis for extradition proceedings and for detention with a view to extradition (see *Soldatenko v. Ukraine*, no. 2440/07, § 112, 23 October 2008). Article 5 § 1 (f) of the Convention, however, also requires that the detention with a view to extradition should be effected "in accordance with a procedure prescribed by law". In laying down that any deprivation of

liberty must be effected "in accordance with a procedure prescribed by law", Article 5 § 1 also relates to the "quality of the law", requiring it to be compatible with the rule of law, a concept inherent in all the Articles of the Convention. "Quality of law" in this sense implies that where a national law authorises deprivation of liberty it must be sufficiently accessible, precise and foreseeable in its application, in order to avoid all risk of arbitrariness (see *Khudoyorov v. Russia*, no. 6847/02, § 125, ECHR 2005-X (extracts); *Ječius v. Lithuania*, no. 34578/97, § 56, ECHR 2000-IX; *Baranowski v. Poland*, no. 28358/95, §§ 50-52, ECHR 2000-III; and *Amuur*, cited above). The Court will consider whether this requirement was met, with particular reference to the safeguards provided by the national system (see *Dougoz v. Greece*, no. 40907/98, § 54, ECHR 2001-II).

ii. Application to the present case

47. The Court considers that the applicant's detention amounted to detention with a view to extradition and therefore fell under Article 5 § 1 (f) of the Convention. The Court must therefore determine whether the detention was "lawful", including whether it complied with "a procedure prescribed by law" which mainly relates to the quality of law requirement.

48. The Court notes that the 1939 Convention and the 1957 Convention were applied at different stages of the applicant's extradition procedure. There appeared to be no clear indication as to which of the relevant Conventions applied to the present case, which had been left to the discretion of the authorities and to the subsequent, first-time, interpretation of the domestic courts. Bearing in mind the uncertainty as to which of the two relevant texts was applicable, the Court finds it difficult to accept that the legal system provided a precise and foreseeable application of the law.

49. Moreover, even in the event that the Court had to accept the Government's submission that the 1957 Convention, being part of the domestic legal order, was capable of serving as a legal basis for extradition proceedings and for detention with a view to extradition (see, *mutatis mutandis*, *Soldatenko v. Ukraine*, no. 2440/07, § 112, 23 October 2008) from a certain date onwards, the Court notes that quite apart from regulating the substantive and procedural requirements for the extradition request and the time-limits of the detention, the 1957 Convention, particularly its Article 22 (see paragraph 29 above), referred back to domestic law in relation to the rules regulating the extradition procedure. Thus, the 1957 Convention did not provide for a comprehensive procedure to be followed in the requested State which could offer safeguards against arbitrariness.

50. The Court must therefore examine whether other provisions of San Marino law offered such a procedure. The Court observes that San Marino law in respect of extradition is limited to one sole substantive provision, namely, Article 8 of the Criminal Code of San Marino (see paragraph 26 above). It follows that San Marino law did not contain any provisions in

respect of the procedure to be undertaken in the context of extraditions and it did not provide for a procedure which could offer any safeguards against arbitrariness. Even accepting that certain procedural safeguards were transposed from criminal matters to extradition proceedings, as argued by the Government and acknowledged by the domestic courts, this does not suffice to conclude that there existed a national law, fulfilling the quality of the law requirements, regulating this procedure.

51. The foregoing considerations are sufficient for the Court to conclude that, at the time of the present case, San Marino legislation did not provide for a procedure that was sufficiently accessible, precise and foreseeable in its application to avoid the risk of arbitrary detention pending extradition. It follows that the applicant's detention as a result of the extradition order of 18 September 2009 in San Marino had not complied with a procedure prescribed by law.

52. There has accordingly been a violation of Article 5 § 1 (f) of the Convention.

B. The complaints against Italy

53. The applicant complained that the extradition request had not been submitted to the relevant authority. Moreover, his extradition had taken place while he was being held in detention unlawfully. It followed that his extradition, and transfer to the Italian authorities and subsequent detention had been unlawful.

54. The Court notes that the applicant's detention in Italy had its basis in the order of the Rome tribunal of 3 July 2009 and it had the purpose of bringing the applicant before the competent legal authority on reasonable suspicion of having committed an offence (Article 5 § 1 (c)). The lawfulness of that order has not been put into question by the applicant (see, *a contrario*, *Stephens v. Malta (no. 1)*, no. 11956/07, § 79, 21 April 2009).

55. It follows that, even assuming that this complaint against Italy is not inadmissible for non-exhaustion, the complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

56. In so far as the complaint against Italy may refer to the detention period in San Marino, the Court reiterates that, an act, having been instigated by a requesting country on the basis of its own domestic law and followed-up by the requested country in response to its treaty obligations, can be attributed to the requesting country (in the present case Italy) notwithstanding that the act was executed by the requested country (in the present case San Marino) (see *Stephens v. Malta (no. 1)*, cited above, § 52). However, the Court notes that, while it is true that the complaint may engage the responsibility of Italy under the Convention, and that the responsibility lay with Italy to ensure that the arrest warrant and extradition

request were valid as a matter of Italian law, both substantive and procedural, the unlawfulness in the present case, unlike in the case of *Stephens*, did not arise from the non-compliance with Italian domestic legal requirements. The unlawfulness arose as a result of the quality of San Marino law on the matter. In consequence, the Court considers that in the circumstances of the present case, Italy's responsibility cannot be engaged.

57. It follows that, even assuming that this complaint against Italy is not inadmissible for non-exhaustion of domestic remedies, or alternatively for non-compliance with the six months' rule, detention in San Marino having ended on 19 September 2009, the complaint is incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

58. The applicant complained under Article 6 and 17 of the Convention, in respect of his extradition holding that both States were responsible for the procedural irregularities (such as the delays in requesting the order and the lack of notification of the extradition order) which occurred in his extradition proceedings.

59. The Court reiterates that extradition proceedings do not concern a dispute ("*contestation"*) over an applicant's civil rights and obligations (see, *inter alia*, *RAF v. Spain* (partial dec.), no. 53652/00, ECHR 2000-XI; and *A.B. v. Poland* (dec.), no. 33878/96, 18 October 2001). It further recalls that the words "determination ... of a criminal charge" in Article 6 § 1 of the Convention relate to the full process of examining an individual's guilt or innocence in respect of a criminal offence, and not merely, as is the case in extradition proceedings, to the process of determining whether or not a person may be extradited to a foreign country (see, among others *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 82, ECHR 2005-I).

60. Therefore, Article 6 is not applicable to the present case in so far as the applicant complained about the fairness of the extradition proceedings (see, *mutatis mutandis*, *Al-Moayad v. Germany*, (dec.), 20 February 2007).

61. It follows that this part of the application is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 of the Convention and must be rejected pursuant to its Article 35 § 4.

62. As to the complaint under Article 17 of the Convention, the Court considers that this complaint does not go beyond the aforementioned allegations of breaches of other provisions of the Convention and therefore no issue arises under Article 17 proper.

63. In conclusion, the Court considers that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

64. 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."

65. The applicant did not submit a claim for just satisfaction.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint under Article 5 § 1 concerning the applicant's detention, in San Marino, linked to the extradition order admissible and the remainder of the application against San Marino and Italy inadmissible;

2. *Holds* that there has been a violation of Article 5 § 1 of the Convention.

Done in English, and notified in writing on 26 June 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
President

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

J.C.M.
S.Q.

CONCURRING OPINION OF JUDGE ZIEMELE

1. I agree with the Chamber's finding that there has been a violation of Article 5 § 1 (f) with regard to the circumstances of the applicant's detention subsequent to the extradition order of 18 September 2009. I do not, however, fully share the Chamber's reasoning, in particular that in paragraphs 48-50 of the judgment.

2. In the first place, the core of the case can be narrowed down to a simple question regulated by the rules of the international law of treaties. In 1939 San Marino and Italy concluded a Bilateral Convention on Friendship and Good Neighbourhood, Articles 22 and 23 of which set forth the procedure to be followed for extradition requests. In 2009 San Marino ratified the 1957 European Convention on Extradition. Upon accession San Marino submitted a reservation, something that the Extradition Convention allows, in relation to Article 28 of that Convention. Article 28 sets out the general principle that: "This Convention shall, in respect of those countries to which it applies, supersede the provisions of any bilateral treaties, conventions or agreements governing extradition between any two Contracting Parties". The Convention does not prohibit concluding other conventions if they facilitate the application of the principles of the 1957 Convention.

3. In its reservation San Marino stated that the 1939 Bilateral Convention between San Marino and Italy would continue to apply. Admittedly, this provided for more beneficial provisions to individuals subject to extradition requests. In any event, and apart from any analysis of the substance of the Bilateral Convention and the compatibility of San Marino's reservation with the object and purpose of the 1957 Convention, the preliminary question to be answered by the domestic authorities in San Marino in this case was whether the 1939 Convention applied in relation to the applicant following San Marino's reservation to the 1957 Convention? The 1969 Vienna Convention on the Law of Treaties contains the main rules concerning reservations to treaties and objections thereto. The main relevant rule is set forth in Article 21, which provides: "When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation". Recently the International Law Commission adopted a *Guide to Practice on Reservations to Treaties*, in which the following definition is provided:

"'Objection' means a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation formulated by another State or international organization, whereby the former State or organization purports to preclude the reservation from

having its intended effects or otherwise opposes the reservation (see *Yearbook of the International Law Commission*, 2011, vol. II, Part Two)."

It is important to know whether Italy has formally objected to San Marino's reservation. It appears from the information available on the website of the Council of Europe Treaty Office that Italy has not objected to the reservation. This means that Article 28 applies in relations between San Marino and Italy as amended by San Marino's reservation. In other words, the 1939 Convention applies to relations between those two countries in addition to the 1957 Convention.

4. I consider, therefore, that it would have been more appropriate to draw attention in the judgment to San Marino's obligation to establish clearly the scope of its international obligations in respect of extradition. Certainly, the relevant authorities should be aware of the State's practice in international relations and in such an important matter as reservations to treaties. It is also difficult to understand why, in their submissions to the Court, the Government are not clear on where they stand in relation to their own reservation to the 1957 Convention. That in itself is sufficient to find problems in the application of Article 5.

5. I do not, however, consider the entirety of the available international and domestic law provisions regulating extradition in San Marino to be problematic. Nevertheless, it is true that if there is a problem at a national level with the direct application of international law, States tend to adopt a comprehensive domestic statute instead. However, San Marino needs to settle the question of whether it wishes to maintain its reservation to Article 28 of the 1957 Convention, since this remains an important ground for legal uncertainty.