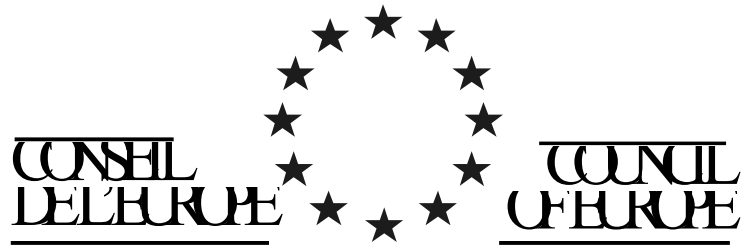

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

GRAND CHAMBER

CASE OF SAADI v. ITALY

(*Application no. 37201/06*)

JUDGMENT

STRASBOURG

28 February 2008

This judgment is final but may be subject to editorial revision

In the case of Saadi v. Italy,

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

Jean-Paul Costa, *President,*
Christos Rozakis,
Nicolas Bratza,
Boštjan M. Zupančič,
Peer Lorenzen,
Françoise Tulkens,
Loukis Loucaides,
Corneliu Bîrsan,
Nina Vajić,
Vladimiro Zagrebelsky,
Alvina Gyulumyan,
Khanlar Hajiyev,
Dean Spielmann,
Egbert Myjer,
Sverre Erik Jebens,
Ineta Ziemele,
Isabelle Berro-Lefèvre, *judges,*

and V. BERGER, *Jurisconsult*,

Having deliberated in private on 11 July 2007 and 23 January 2008,

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

PROCEDURE

…..

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

1. The applicant was born in 1974 and lives in Milan.

2. The applicant, who entered Italy at some unspecified time between 1996 and 1999, held a residence permit issued for "family reasons" by the Bologna police authority (*questura*) on 29 December 2001. This permit was due to expire on 11 October 2002.

A. The criminal proceedings against the applicant in Italy and Tunisia

3. On 9 October 2002 the applicant, was arrested on suspicion of involvement in international terrorism (Article 270 *bis* of the Criminal Code), among other offences, and placed in pre-trial detention. He and five others were subsequently committed for trial in the Milan Assize Court.

4. The applicant faced four charges. The first of these was conspiracy to commit acts of violence (including attacks with explosive devices) in States other than Italy with the aim of spreading terror. It was alleged that between December 2001 and September 2002 the applicant had been one of the organisers and leaders of the conspiracy, had laid down its

ideological doctrine and given the necessary orders for its objectives to be met. The second charge concerned falsification "of a large number of documents such as passports, driving licences and residence permits". The applicant was also accused of receiving stolen goods and of attempting to aid and abet the entry into Italian territory of an unknown number of aliens in breach of the immigration legislation.

5. At his trial the prosecution called for the applicant to be sentenced to thirteen years' imprisonment. The applicant's lawyer asked the Assize Court to acquit his client of international terrorism and left determination of the other charges to the court's discretion.

6. In a judgment of 9 May 2005 the Milan Assize Court altered the legal classification of the first offence charged. It took the view that the acts of which he stood accused did not constitute international terrorism but criminal conspiracy. It sentenced the applicant to four years and six months' imprisonment for that offence, for the forgery and receiving offences. It acquitted the applicant of aiding and abetting clandestine immigration, ruling that the acts he stood accused of had not been committed.

7. As a secondary penalty the Assize Court banned the applicant from exercising public office for a period of five years and ordered that after serving his sentence he was to be deported.

8. In the reasons for its judgment, which ran to 331 pages, the Assize Court observed that the evidence against the applicant included intercepts of telephone and radio communications, witness statements and numerous false documents that had been seized. Taken together, this evidence proved that the applicant had been engaged in a conspiracy to receive and falsify stolen documents, an activity from which he derived his means of subsistence. On the other hand, it had not been established that the documents in question had been used by the persons in whose names they had been falsely made out to enter Italian territory illegally.

9. As regards the charge of international terrorism, the Assize Court first noted that a conspiracy was "terrorist" in nature where its aim was to commit violent acts against civilians or persons not actively participating in armed conflict with the intention of spreading terror or obliging a government or international organisation to perform or refrain from performing any act, or where the motive was political, ideological or religious in nature. In the present case it was not known whether the violent acts which the applicant and his accomplices were preparing to commit, according to the prosecution submissions, were to be part of an armed conflict or not.

10. In addition, the evidence taken during the investigation and trial was not capable of proving beyond a reasonable doubt that the accused had begun to put into practice their plan of committing acts of violence, or that they had provided logistical or financial support to other persons or organisations having terrorist aims. In particular, such evidence was not provided by the telephone and radio intercepts. These proved only that the applicant and his accomplices had links with persons and organisations belonging to Islamic fundamentalist circles, that they were hostile to "infidels" (and particularly those present in territories considered to be Muslim) and that their relational world was made up of "brothers" united by identical religious and ideological beliefs.

11. Using coded language the defendants and their correspondents had repeatedly mentioned a "football match", intended to strengthen their faith in God. For the Assize Court it was quite obvious that this was not a reference to some sporting event but to an action applying the principles of the most radical form of Islam. However, it had not been possible to ascertain what particular "action" was meant or where it was intended to take place.

12. Moreover, the applicant had left Milan on 17 January 2002 and, after a stopover in Amsterdam, made his way to Iran, from where he had returned to Italy on 14 February 2002.

He had also spoken of a "leader of the brothers" who was in Iran. Some members of the group to which the applicant belonged had travelled to "training camps" in Afghanistan and had procured weapons, explosives and observation and video recording equipment. In the applicant's flat and those of his co-defendants the police had seized propaganda about jihad – or holy war – on behalf of Islam. In addition, in telephone calls to members of his family in Tunisia made from the place where he was being detained in Italy, the applicant had referred to the "martyrdom" of his brother Fadhal Saadi; in other conversations he had mentioned his intention to take part in holy war.

13. However, no further evidence capable of proving the existence and aim of a terrorist organisation had been found. In particular, there was no evidence that the applicant and his accomplices had decided to channel their fundamentalist faith into violent action covered by the definition of a terrorist act. Their desire to join a jihad and eliminate the enemies of Islam could very well be satisfied through acts of war in the context of an armed conflict, that is, acts not covered by the concept of "terrorism". It had not been established whether the applicant's brother had really died in a suicide bombing or whether that event had been the "football match" which the defendants had repeatedly referred to.

14. The applicant and the prosecution appealed. The applicant asked to be acquitted of all the charges, while the prosecution wanted him to be convicted of international terrorism and aiding and abetting clandestine immigration too.

15. In the prosecution's appeal it was submitted that, according to the case-law of the Court of Cassation, the constituent elements of the crime of international terrorism were made out even where no act of violence had occurred, the existence of a plan to commit such an act being sufficient. In addition, an action could be terrorist in nature even if it was intended to be carried out in the context of an armed conflict, provided that the perpetrators were not members of the "armed forces of a State" or an "insurrectionary group". In the present case, it was apparent from the documents in the file that the applicant and his associates had procured for themselves and others false documents, weapons, explosives and money in order to commit violent acts intended to affirm the ideological values of fundamentalist Islam. In addition, the accused had maintained contacts with persons and organisations belonging to the sphere of international terrorism and had planned a violent and unlawful action, due to be carried out in October 2002 as part of a "holy war" and in a country other than Italy. Only the defendants' arrest had prevented the plan being implemented. Furthermore, at that time the armed conflict in Afghanistan had ended and the one in Iraq had not yet started.

16. The prosecution further submitted that the applicant's brother, Mr Fadhal Saadi, had been detained in Iran; the applicant had visited him there in either January or February 2002. After his release Mr Fadhal Saadi had settled in France and stayed in contact with the applicant. He had then died in a suicide bombing, a fact which was a source of pride for the applicant and the other members of his family. That was revealed by the content of the telephone conversations intercepted in the prison where the applicant was being held.

….

17. The first hearing before the Milan Assize Court of Appeal was set down for 10 October 2007.

18. In the meantime, on 11 May 2005, two days after delivery of the Milan Assize Court's judgment, a military court in Tunis had sentenced the applicant in his absence to twenty years' imprisonment for membership of a terrorist organisation operating abroad in time of peace and for incitement to terrorism. He was also deprived of his civil rights and made subject to administrative supervision for a period of five years. The applicant asserted that he had not

learned of his conviction until, the judgment having become final, its operative part was served on his father on 2 July 2005.

19. The applicant alleged that his family and his lawyer were not able to obtain a copy of the judgment by which the applicant had been convicted by the Tunis military court. In a letter of 22 May 2007 to the President of Tunisia and the Tunisian Minister of Justice and Human Rights, his representatives before the Court asked to be sent a copy of the judgment in question. The result of their request is not known.

B. The order for the applicant's deportation and his appeals against its enforcement and for the issue of a residence permit and/or the granting of refugee status

20. On 4 August 2006, after being imprisoned uninterruptedly since 9 October 2002, the applicant was released.

21. On 8 August 2006 the Minister of the Interior ordered him to be deported to Tunisia, applying the provisions of Legislative decree no. 144 of 27 July 2005 (entitled "urgent measures to combat international terrorism" and later converted to statute law in the form of Law no. 155 of 31 July 2005). He observed that "it was apparent from the documents in the file" that the applicant had played an "active role" in an organisation responsible for providing logistical and financial support to persons belonging to fundamentalist Islamist cells in Italy and abroad. Consequently, his conduct was disturbing public order and threatening national security.

22. The Minister made it clear that the applicant could not return to Italy except on the basis of an *ad hoc* ministerial authorisation.

23. The applicant was taken to a temporary holding centre (*centro di permanenza temporanea*) in Milan. On 11 August 2006, the deportation order was confirmed by the Milan justice of the peace.

24. On 11 August 2006 the applicant requested political asylum. He alleged that he had been sentenced in his absence in Tunisia for political reasons and that he feared he would be subjected to torture and "political and religious reprisals". By a decision of 16 August 2006 the head of the Milan police authority (*questore*) declared the request inadmissible on the ground that the applicant was a danger to national security.

25. On 6 September 2006 the director of a non-governmental organisation, the World Organisation Against Torture (known by its French initials – OMCT), wrote to the Italian Prime Minister to tell him the OMCT was "extremely concerned" about the applicant's situation, and that it feared that, if deported to Tunisia, he would be tried again for the same offences he stood accused of in Italy. The OMCT also pointed out that, under the terms of Article 3 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, "No State Party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture".

26. On 12 September 2006 the president of another non-governmental organisation, the Collective of the Tunisian community in Europe, appealed to the Italian Government to "end its policy of mass deportation of Tunisian immigrants [who were] practising adherents of religious faiths". He alleged that the Italian authorities were using inhuman methods and had grounded a number of decisions against Tunisians on their religious convictions. He went on to say that it was "obvious" that on arrival in Tunisia the persons concerned would be "tortured and sentenced to lengthy terms of imprisonment, on account of the fact that the Italian authorities falsely suspect them of terrorism". The applicant's name appeared in a list

of persons at imminent risk of expulsion to Tunisia which was appended to the letter of 12 September 2006.

27. The chief constable's decision of 16 August 2006 (see paragraph 35 above) was served on the applicant on 14 September 2006. The applicant did not appeal. However, on 12 September 2006 he had produced documents, including the OMCT's letter of 6 September 2006 and the reports on Tunisia by Amnesty International and the US State Department, requesting that these be passed on to the local refugee status board. On 15 September 2006 the Milan police authority informed the applicant orally that as his asylum request had been refused the documents in question could not be taken into consideration.

28. On 14 September 2006, pleading Rule 39 of the Rules of Court, the applicant asked the Court to suspend or annul the decision to deport him to Tunisia. On 15 September 2006 the Court decided to ask the Italian Government to provide it with information, covering in particular the question whether the applicant's conviction by the Tunis military court was final and also whether in Tunisian law there was a remedy whereby it was possible to obtain the reopening of proceedings or a retrial.

29. The Government's reply was received at the Registry on 2 October 2006. According to the Italian authorities, in the event of a conviction in the absence of the accused, Tunisian law gave the person convicted the right to have the proceedings reopened. The Government referred in particular to a fax of 29 September 2006 from the Italian ambassador in Tunis stating that, according to the information supplied by the Director of International Cooperation at the Tunisian Ministry of Justice, the applicant's conviction was not final since a person convicted in his absence could appeal against the relevant judgment.

30. On 5 October 2006 the Court decided to apply Rule 39. It asked the Government to stay the applicant's expulsion until further notice.

31. The maximum time allowed for the applicant's detention with a view to expulsion expired on 7 October 2006 and he was released on that date. However, on 6 October 2006 a new deportation order had been issued against him. On 7 October 2006 this order was served on the applicant, who was then taken back to the Milan temporary holding centre. As the applicant had stated that he had entered Italy from France, the new deportation order named France as the receiving country, not Tunisia. On 10 October 2006 the new deportation order was confirmed by the Milan justice of the peace.

32. On 3 November 2006 the applicant was released because fresh information indicated that it was impossible to deport him to France. On the same day the Milan Assize Court of Appeal ordered precautionary measures, to take effect immediately after the applicant's release: he was forbidden to leave Italian territory and required to report to a police station on Mondays, Wednesdays and Fridays.

33. In the meantime, on 27 September 2006, the applicant had applied for a residence permit. On 4 December 2006 the Milan police authority replied that this application could not be allowed. It was explained that a residence permit could be issued “in the interests of justice” only at the request of the judicial authorities, where the latter considered that the presence of an alien in Italy was necessary for the proper conduct of a criminal investigation. The applicant had in any case been forbidden to leave Italian territory and was therefore obliged to stay in Italy. Moreover, to obtain a residence permit it was necessary to produce a passport or similar document.

34. Before the Court the applicant alleged that the Tunisian authorities had refused to renew his passport, so that all his further attempts to regularise his situation had come to nothing.

35. On a date which has not been specified the applicant also asked the Lombardy Regional Administrative Court ("the RAC") to set aside the deportation order of 6 October 2006 and stay its execution.

36. In a decision of 9 November 2006 the Lombardy RAC held that there was no cause to rule on the application for a stay of execution and ordered the file to be transmitted to the Lazio RAC, which had the appropriate territorial jurisdiction.

37. The Lombardy RAC pointed out among other observations that the European Court of Human Rights had already requested a stay of execution of the deportation order and had consequently provided redress for any prejudice the applicant might allege.

38. According to the information supplied by the applicant on 29 May 2007, the proceedings in the Lazio RAC were still pending on that date.

39. On 18 January 2007 the applicant sent a memorial to the Milan police authority pointing out that the European Court of Human Rights had requested a stay of execution of his deportation on account of a real risk that he would be subjected to treatment contrary to Article 3 of the Convention. He therefore asked for a hearing before the local refugee status board with a view to being granted political asylum. According to the information supplied by the applicant on 11 July 2007, there had been no reply to his memorial by that date. In a memorandum of 20 July 2007 the Italian Ministry of the Interior stated that the memorial of 18 January 2007 could not be regarded as a new asylum request or as an appeal against the refusal given by the Milan chief constable on 16 August 2006 (see paragraph 35 above).

C. The diplomatic assurances requested by Italy from Tunisia

40. On 29 May 2007 the Italian embassy in Tunis sent a note verbale to the Tunisian Government requesting diplomatic assurances that if the applicant were to be deported to Tunisia he would not be subjected to treatment contrary to Article 3 of the Convention and would not suffer a flagrant denial of justice.

…

41. On 4 July 2007 the Tunisian Ministry of Foreign Affairs sent a note verbale to the Italian embassy in Tunis. Its content was as follows:

> "The Minister of Foreign Affairs presents his compliments to the Italian ambassador in Tunis and, referring to the ambassador's note verbale no. 2533 of 2 July 2007 concerning Nassim Saadi, currently imprisoned in Italy, has the honour to inform the ambassador that the Tunisian Government confirm that they are prepared to accept the transfer to Tunisia of Tunisians imprisoned abroad once their identity has been confirmed, in strict conformity with the national legislation in force and under the sole safeguard of the relevant Tunisian statutes.
>
> The Minister of Foreign Affairs seizes this opportunity of expressing once again to the Italian ambassador in Tunis the assurance of his high regard."

42. A second note verbale, dated 10 July 2007, was worded as follows:

> "The Minister of Foreign Affairs presents his compliments to the Italian ambassador in Tunis and, referring to his note verbale no. 2588 of 5 July 2007, has the honour to confirm to him the content of the Ministry's note verbale no. 511 of 4 July 2007.
>
> The Minister of Foreign Affairs hereby confirms that the Tunisian laws in force guarantee and protect the rights of prisoners in Tunisia and secure to them the right to a fair trial. The Minister would point out that Tunisia has voluntarily acceded to the relevant international treaties and conventions.

The Minister of Foreign Affairs seizes this opportunity of expressing once again to the Italian ambassador in Tunis the assurance of his high regard."

D. The applicant's family situation

43. According to the applicant, in Italy he lives with an Italian national, Mrs V., whom he married in a Muslim marriage ceremony. They have an eight-year-old child (born on 22 July 1999), an Italian national, who attends school in Italy. Mrs V. is unemployed and is not at present in receipt of any family allowance. She suffers from a type of ischaemia.

44. According to a memorandum of 10 July 2007 from the Ministry of the Interior, on 10 February 2007 the applicant married, in a Muslim marriage ceremony, a second wife, Mrs G. While officially resident in via Cefalonia, Milan, at the address occupied by Mrs V., the applicant is said to be separated *de facto* from both his wives. Since the end of 2006 he has been habitually resident in via Ulisse Dini, Milan, in a flat which he apparently shares with other Tunisians.

II. RELEVANT DOMESTIC LAW

A. Remedies against a deportation order in Italy

…

B. Reopening of a trial conducted in the defendant's absence in Tunisia

…

III. INTERNATIONAL TEXTS AND DOCUMENTS

A. The cooperation agreement on crime prevention signed by Italy and Tunisia and the association agreement between Tunisia, the European Union and its member States

…

B. Articles 1, 32 and 33 of the 1951 United Nations Convention relating to the Status of Refugees

45. Italy is a party to the 1951 United Nations Convention on the Status of Refugees. Articles 1, 32 and 33 of this Convention read as follows:

Article 1

"For the purposes of the present Convention, the term "refugee" shall apply to any person who ... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

Article 32

"1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law ..."

Article 33

"1. No Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

C. Guidelines of the Committee of Ministers of the Council of Europe

…

D. Amnesty International report on Tunisia

46. In a report concerning the situation in Tunisia in 2006 Amnesty International noted that following a large number of unfair trials at least 12 persons facing terrorism charges had been sentenced to lengthy prison sentences. Cases of torture and ill-treatment continued to be reported. Hundreds of political prisoners sentenced after unfair trials remained in prison after more than ten years and their state of health was said to have deteriorated. A group of 135 prisoners had been released as a result of an amnesty; they had been imprisoned for more than 14 years after being convicted in unfair trials of belonging to the banned Islamist organisation *Ennahda*. Some of these prisoners were in poor health as a result of harsh prison conditions and torture they had undergone before standing trial.

47. In December 2006 there had been exchanges of fire to the south of Tunis between the police and alleged members of the Salafist Group for Preaching and Combat. Dozens of people had been killed and police officers had been injured.

48. In June 2006 the European Parliament had called for a meeting of the European Union and Tunisia to discuss the human-rights situation in the country. In October 2006 the European Union had criticised the Tunisian Government for cancelling an international conference on the right to work.

49. As regards the "war on terror", Amnesty International noted that no answer had been given by the Tunisian authorities to a request to visit the country made by the UN Special

Rapporteur on the promotion and protection of human rights. Persons suspected of terrorist activities had been arrested and tried under what was described as the "controversial" 2003 anti-terrorism law. This anti-terrorism law and the Code of Military Justice had been used against Tunisians repatriated against their will from Bosnia-Herzegovina, Bulgaria and Italy, who were accused of belonging to terrorist organisations operating abroad. In such cases, sometimes decided by the military courts, lawyers' contact with their clients had been subjected to constantly increasing restrictions. The report mentioned cases of prisoners being held incommunicado or being tortured while in police custody; those referred to included Mr Hicham Saadi, Mr Badreddine Ferchichi (who had been deported from Bosnia-Herzegovina) and six members of the "Zarzis group".

50. Amnesty International went on to criticise severe restrictions of the right to freedom of expression and a risk of harassment and violence against human rights defenders and their families, women wearing Islamic headscarves and opponents and critics of the government.

51. On the question of the independence of the judiciary, Amnesty International noted that lawyers had publicly protested against a bill then before parliament creating the "Higher Institute for Lawyers" to be responsible for training future lawyers (which had previously been done by the Lawyers' Association and the Association of Tunisian Judges). In October 2006 the head of the European Commission delegation in Tunis had publicly criticised the slow pace of political reform and called for better training for judges and lawyers to consolidate the independence of the judiciary. Judges required the permission of the Secretary of State for Justice to leave the country.

52. On 19 June 2007 Amnesty International issued a statement concerning the applicant which reads as follows:

> "Amnesty International is concerned that Nassim Saadi would be at risk of torture or other grave human rights violations, should he be removed to Tunisia by the Italian authorities. This concern is based upon our continuous monitoring of human rights violations in Tunisia, including violations committed against people forcibly returned from abroad within the context of the 'war on terror'.
>
> Nassim Saadi was sentenced in absentia by the Permanent Military Court in Tunis to 20 years' imprisonment on charges of belonging to a terrorist organization operating abroad at a time of peace and incitement to terrorism. Although he will be afforded a retrial before the same military court, military courts in Tunisia violate a number of guarantees for a fair trial. The military court is composed of a presiding judge and four counsellors. Only the president is a civilian judge. There are restrictions on the right to a public hearing. The location of the court in a military compound effectively limits access to the public. Individuals convicted before a military court can seek review only before the Military Court of Cassation. Civilian defendants have frequently reported that they had not been informed of their right to legal counsel or, particularly in the absence of a lawyer, have not realized that they were being questioned by an examining judge as he was in military uniform. Defence lawyers have restrictions placed on access to their clients' files and are obstructed by not being given information about the proceedings such as the dates of hearings. Unlike the ordinary criminal courts, military courts do not allow lawyers access to a register of pending cases. (for more information see Amnesty International report Tunisia: the cycle of Injustice, AI Index MDE 30/001/2003).
>
> The Tunisian authorities also continue to use the controversial 2003 anti-terrorism law to arrest, detain and try alleged terrorist suspects. Those convicted have been sentenced to long prison terms. The anti-terrorism law and provisions of the Military Justice Code have been also used against Tunisian nationals who were returned to Tunisia against their will by authorities in other countries, including Bosnia and Herzegovina, Bulgaria and Italy. Those returned from abroad were arrested by the Tunisian authorities upon arrival and many of them were charged with links to "terrorist organisations" operating outside the country. Some were referred to the military justice system.
>
> . . .

E. Report on Tunisia by Human Rights Watch

….

F. Activities of the International Committee of the Red Cross

…..

G. Report of the US State Department on human rights in Tunisia

53. In its report on "human rights practices" published on 8 March 2006, the US State Department criticised violations of fundamental rights by the Tunisian Government.

54. Although there had been no politically-motivated killings attributable to the Tunisian authorities, the report commented critically on two cases: Mr Moncef Ben Ahmed Ouachichi had died while in police custody and Mr Beddreddine Rekeii after being released from police custody.

55. Referring to the information gathered by Amnesty International, the State Department described the various forms of torture and ill-treatment inflicted by the Tunisian authorities in order to secure confessions. These included: electric shocks; forcing the victim's head under water; beatings with fists, sticks and police batons; hanging from the cell bars until loss of consciousness; and cigarette burns. In addition, police officers sexually assaulted the wives of Islamist prisoners as a means of obtaining information or imposing a punishment.

56. However, these acts of torture were very difficult to prove, because the authorities refused to allow the victims access to medical treatment until the traces of ill-treatment had faded. Moreover, the police and the judicial authorities regularly refused to follow up allegations of ill-treatment and confessions extracted under torture were regularly admitted as evidence by the courts.

….

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

57. The applicant submitted that enforcement of his deportation would expose him to the risk of treatment contrary to Article 3 of the Convention, which provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

58. The Government rejected that argument.

A. Admissibility

59. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Arguments of the parties

(a) The applicant

60. The applicant submitted that it was "a matter of common knowledge" that persons suspected of terrorist activities, in particular those connected with Islamist fundamentalism, were frequently tortured in Tunisia. He had lodged a request for political asylum which had been refused by the Milan police authority without his being interviewed by the Italian refugee status board. His attempts to obtain a residence permit had failed because the Tunisian consulate had refused to renew his passport, a document which the Italian authorities had asked him to produce. In the aggregate these circumstances amounted to "persecution".

61. In addition, the investigations conducted by Amnesty International and by the US State Department showed that torture was practised in Tunisia and that some persons deported there had quite simply disappeared. The numerous press articles and witness accounts he had produced condemned the treatment of political prisoners and their families.

62. The applicant's family had received a number of visits from the police and was constantly subject to threats and provocations. His sister had twice tried to kill herself because of this.

63. In view of the serious risks to which he would be exposed if he were to be deported, the applicant considered that a mere reminder of the treaties signed by Tunisia could not be regarded as sufficient.

(b) The Government

64. The Government considered it necessary in the first place to provide an account of the background to the case. After the attacks of 11 September 2001 on the "twin towers" in New York the Italian police, having been tipped off by intelligence services, uncovered an international network of militant Islamists, mainly composed of Tunisians, and placed it under surveillance. In May 2002 one of the leaders of this network, Mr Faraj Faraj Hassan, was arrested in London. The applicant had in the meantime left Milan for Iran, where he had spent time in an al-Qaeda training camp. He then returned to Italy, from where he frequently travelled to the Côte d'Azur. There, with the help of another Tunisian living in San Remo, Mr Imed Zarkaoui, he met his brother, Mr Fadhal Saadi.

65. Mr Zarkaoui had been given the job of finding fulminate of mercury to make detonators, while in Italy another accomplice was seeking information about night-filming cameras. Contact was established with Malaysia, where the group which was to carry out the attacks were standing by, and weapons were distributed to some militants. The Islamist cell to which the applicant belonged had embarked on a large-scale enterprise involving the production of false identity papers and their distribution to its members. The Government rejected the applicant's argument that the offence – forgery – of which he had been convicted in Italy was not linked to the activity of terrorist groups; in that connection they pointed out that although the applicant and one of his co-defendants held legal residence permits they had provided themselves with false papers.

66. In that context, in October 2002, a number of European police forces launched "Operation Bazar", as a result of which the applicant, Mr Zarkaoui and three other persons were arrested in Italy. Mr Fadhal Saadi managed to evade an attempt by the French police to

arrest him. He was later to die in a suicide bombing in Iraq. When the applicant's family informed him of this he was delighted to learn that his brother had died a "martyr" in the war against "the infidel". In the criminal proceedings against the applicant in Italy the prosecution was convinced of three things: that the cell he belonged to was associated with al-Qaeda, that it was preparing an attack against an unidentified target and that it was receiving instructions from abroad.

67. The Government next observed that a danger of death or the risk of being exposed to torture or to inhuman and degrading treatment must be corroborated by appropriate evidence. However, in the present case the applicant had neither produced precise information in that regard nor supplied detailed explanations, confining himself to describing an allegedly general situation in Tunisia. The "international sources" cited by the applicant were indeterminate and irrelevant. The same was true of the press articles he had produced, which came from unofficial circles with a particular ideological and political slant. As this information had not been checked, nor had an explanation been requested from the Tunisian Government, it had no probative value. The provocations that the applicant's family had allegedly suffered at the hands of the Tunisian police had nothing to do with what the applicant sought to prove before the Court.

…

68. The Government also noted that Tunisia had ratified numerous international instruments for the protection of human rights, including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, all adopted by the United Nations. Under Article 32 of the Tunisian Constitution, international treaties took precedence over statute law. In addition, Italy and Tunisia had signed bilateral agreements on the question of emigration and combating transnational crime, including terrorism (see paragraph 61 above). That presupposed a common basis of respect for fundamental rights. The effectiveness of the agreements concerned would be jeopardised if the Court were to assert as a principle that Tunisians could not be deported.

69. Tunisia had also signed an association agreement with the European Union. A precondition for implementation of that agreement was respect for fundamental freedoms and democratic principles (see paragraph 62 above). The European Union was an international organisation which, according to the Court's case-law, was presumed to provide a level of protection of fundamental rights "equivalent" to that provided by the Convention. Moreover, the Tunisian authorities permitted the International Red Cross and "other international bodies" to visit prisons (see paragraphs 80 and 81 above). In the Government's submission, it could be presumed that Tunisia would not default on its obligations under international treaties.

70. In Tunisia the terrorist danger was a grim reality, as shown by the explosion on Djerba on 11 April 2002, for which al-Qaeda had claimed responsibility. To meet that danger the Tunisian authorities had, like some European States, enacted a law for the prevention of terrorism.

71. In these circumstances, the "benefit of the doubt" should be given to the State which intended to deport the applicant and whose national interests were threatened by his presence. In that connection, account had to be taken of the scale of the terrorist threat in the world of today and of the objective difficulties of combating it effectively, regard being had not only to the risks in the event of deportation but also to those which would arise in the absence of deportation. In any event, the Italian legal system provided safeguards for the individual –

including the possibility of obtaining refugee status – which made expulsion contrary to the requirements of the Convention "practically impossible".

72. At the hearing before the Court the Government had agreed in substance with the arguments of the third-party intervener (see paragraphs 117-123 below), observing that, before the order for the applicant's deportation was made, the applicant had neither mentioned the risk of ill-treatment in Tunisia, although he must have been aware of it, nor requested political asylum. His allegations had accordingly come too late to be credible.

73. Lastly, the Government observed that, even though there was no extradition request or a situation raising concern regarding respect for human rights (like, for example, the one described in the *Chahal v. the United Kingdom* judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V), Italy had sought diplomatic assurances from Tunisia (see paragraphs 51 and 52 above). In response, Tunisia had given an undertaking to apply in the present case the relevant Tunisian law (see paragraphs 54 and 55 above), which provided for severe punishment of acts of torture or ill-treatment and extensive visiting rights for a prisoner's lawyer and family.

2. The third-party intervener

74. The United Kingdom Government observed that in the *Chahal* case (cited above, § 81) the Court had stated the principle that in view of the absolute nature of the prohibition of treatment contrary to Article 3 of the Convention, the risk of such treatment could not be weighed against the reasons (including the protection of national security) put forward by the respondent State to justify expulsion. Yet because of its rigidity that principle had caused many difficulties for the Contracting States by preventing them in practice from enforcing expulsion measures. The Government observed in that connection that it was unlikely that any State other than the one of which the applicant was a national would be prepared to receive into its territory a person suspected of terrorist activities. In addition, the possibility of having recourse to criminal sanctions against the suspect did not provide sufficient protection for the community.

75. The individual concerned might not commit any offence (or else, before a terrorist attack, only minor ones) and it could prove difficult to establish his involvement in terrorism beyond a reasonable doubt, since it was frequently impossible to use confidential sources or information supplied by intelligence services. Other measures, such as detention pending expulsion, placing the suspect under surveillance or restricting his freedom of movement provided only partial protection.

76. Terrorism seriously endangered the right to life, which was the necessary precondition for enjoyment of all other fundamental rights. According to a well-established principle of international law, States could use immigration legislation to protect themselves from external threats to their national security. The Convention did not guarantee the right to political asylum. This was governed by the 1951 Convention relating to the Status of Refugees, which explicitly provided that there was no entitlement to asylum where there was a risk for national security or where the asylum seeker had been responsible for acts contrary to the principles of the United Nations. Moreover, Article 5 § 1 (f) of the Convention authorised the arrest of a person "against whom action is being taken with a view to deportation...", and thus recognised the right of States to deport aliens.

77. It was true that the protection against torture and inhuman or degrading treatment or punishment provided by Article 3 of the Convention was absolute. However, in the event of expulsion, the treatment in question would be inflicted not by the signatory State but by the

authorities of another State. The signatory State was then bound by a positive obligation of protection against torture implicitly derived from Article 3. Yet in the field of implied positive obligations the Court had accepted that the applicant's rights must be weighed against the interests of the community as a whole.

78. In expulsion cases the degree of risk in the receiving country depended on a speculative assessment. The level required to accept the existence of the risk was relatively low and difficult to apply consistently. Moreover, Article 3 of the Convention prohibited not only extremely serious forms of treatment, such as torture, but also conduct covered by the relatively general concept of "degrading treatment". And the nature of the threat presented by an individual to the signatory State also varied significantly.

79. In the light of the foregoing considerations, the United Kingdom argued that, in cases concerning the threat created by international terrorism, the approach followed by the Court in the *Chahal* case (which did not reflect a universally recognised moral imperative and was in contradiction with the intentions of the original signatories of the Convention) had to be altered and clarified. In the first place, the threat presented by the person to be deported must be a factor to be assessed in relation to the possibility and the nature of the potential ill-treatment. That would make it possible to take into consideration all the particular circumstances of each case and weigh the rights secured to the applicant by Article 3 of the Convention against those secured to all other members of the community by Article 2. Secondly, national-security considerations must influence the standard of proof required from the applicant. In other words, if the respondent State adduced evidence that there was a threat to national security, stronger evidence had to be adduced to prove that the applicant would be at risk of ill-treatment in the receiving country. In particular, the individual concerned must prove that it was "more likely than not" that he would be subjected to treatment prohibited by Article 3. That interpretation was compatible with the wording of Article 3 of the United Nations Convention against Torture, which had been based on the case-law of the Court itself, and took account of the fact that in expulsion cases it was necessary to assess a possible future risk.

80. Lastly, the United Kingdom Government emphasised that Contracting States could obtain diplomatic assurances that an applicant would not be subjected to treatment contrary to the Convention. Although, in the above-mentioned *Chahal* case, the Court had considered it necessary to examine whether such assurances provided sufficient protection, it was probable, as had been shown by the opinions of the majority and the minority of the Court in that case, that identical assurances could be interpreted differently.

3. The Court's assessment

(a) General principles

i. Responsibility of Contracting States in the event of expulsion

81. It is the Court's settled case-law that as a matter of well-established international law, and subject to their treaty obligations, including those arising from the Convention, Contracting States have the right to control the entry, residence and removal of aliens (see, among many other authorities, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, § 67, and *Boujlifa v. France*, judgment of 21 October 1997, *Reports of Judgments and Decisions* 1997-VI, § 42). In addition, neither the Convention nor its Protocols confer the right to political asylum (see *Vilvarajah and Others v.*

the United Kingdom, judgment of 30 October 1991, Series A no. 215, § 102, and *Ahmed v. Austria*, judgment of 17 December 1996, *Reports* 1996-VI, § 38).

82. However, expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3. In such a case Article 3 implies an obligation not to deport the person in question to that country (see *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161, §§ 90-91; *Vilvarajah and Others*, cited above, § 103; *Ahmed*, cited above, § 39; *H.L.R. v. France*, judgment of 29 April 1997, *Reports* 1997-III, § 34; *Jabari v. Turkey*, no. 40035/98, § 38, ECHR 2000-VIII; and *Salah Sheekh v. the Netherlands*, no. 1948/04, § 135, 11 January 2007).

83. In this type of case the Court is therefore called upon to assess the situation in the receiving country in the light of the requirements of Article 3. Nonetheless, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the Contracting State, by reason of its having taken action which has as a direct consequence the exposure of an individual to the risk of proscribed ill-treatment (see *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 67, ECHR 2005-I).

84. Article 3, which prohibits in absolute terms torture and inhuman or degrading treatment or punishment, enshrines one of the fundamental values of democratic societies. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15, even in the event of a public emergency threatening the life of the nation (see *Ireland v. the United Kingdom*, judgment of 8 January 1978, Series A no. 25, § 163; *Chahal*, cited above, § 79; *Selmouni v. France* [GC], no. 25803/94, § 95, ECHR 1999-V; *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 59, ECHR 2001-XI; and *Shamayev and Others v. Georgia and Russia,* no. 36378/02, § 335, ECHR 2005-III). As the prohibition of torture and of inhuman or degrading treatment or punishment is absolute, irrespective of the victim's conduct (see *Chahal,* cited above, § 79), the nature of the offence allegedly committed by the applicant is therefore irrelevant for the purposes of Article 3 (see *Indelicato v. Italy*, no. 31143/96, § 30, 18 October 2001, and *Ramirez Sanchez v. France* [GC], no. 59450/00, §§ 115-116, 4 July 2006).

ii. Material used to assess the risk of exposure to treatment contrary to Article 3 of the Convention

85. In determining whether substantial grounds have been shown for believing that there is a real risk of treatment incompatible with Article 3, the Court will take as its basis all the material placed before it or, if necessary, material obtained *proprio motu* (see *H.L.R. v. France*, cited above, § 37, and *Hilal v. the United Kingdom*, no. 45276/99, § 60, ECHR 2001-II). In cases such as the present the Court's examination of the existence of a real risk must necessarily be a rigorous one (see *Chahal*, cited above, § 96).

86. It is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3 (see *N. v. Finland*, no. 38885/02, § 167, 26 July 2005). Where such evidence is adduced, it is for the Government to dispel any doubts about it.

87. In order to determine whether there is a risk of ill-treatment, the Court must examine the foreseeable consequences of sending the applicant to the receiving country, bearing in

mind the general situation there and his personal circumstances (see *Vilvarajah and Others*, cited above, § 108 *in fine*).

88. To that end, as regards the general situation in a particular country, the Court has often attached importance to the information contained in recent reports from independent international human-rights-protection associations such as Amnesty International, or governmental sources, including the US State Department (see, for example, *Chahal*, cited above, §§ 99-100; *Müslim v. Turkey*, no.°53566/99, § 67, 26 April 2005; *Said v. the Netherlands*, no. 2345/02, § 54, 5 July 2005; and *Al-Moayad v. Germany* (dec.), no.°35865/03, §§ 65-66, 20 February 2007). At the same time, it has held that the mere possibility of ill-treatment on account of an unsettled situation in the receiving country does not in itself give rise to a breach of Article 3 (see *Vilvarajah and Others*, cited above, § 111, and *Fatgan Katani and Others v. Germany* (dec.), no. 67679/01, 31 May 2001) and that, where the sources available to it describe a general situation, an applicant's specific allegations in a particular case require corroboration by other evidence (see *Mamatkulov and Askarov*, cited above, § 73, and *Müslim*, cited above, § 68).

89. In cases where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment, the Court considers that the protection of Article 3 of the Convention enters into play when the applicant establishes, where necessary on the basis of the sources mentioned in the previous paragraph, that there are serious reasons to believe in the existence of the practice in question and his or her membership of the group concerned (see, *mutatis mutandis*, *Salah Sheekh*, cited above, §§ 138-149).

90. With regard to the material date, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of expulsion. However, if the applicant has not yet been extradited or deported when the Court examines the case, the relevant time will be that of the proceedings before the Court (see *Chahal*, cited above, §§ 85 and 86, and *Venkadajalasarma v. the Netherlands*, no. 58510/00, § 63, 17 February 2004). This situation typically arises when, as in the present case, deportation or extradition is delayed as a result of an indication by the Court of an interim measure under Rule 39 of the Rules of Court (see *Mamatkulov and Askarov*, cited above, § 69). Accordingly, while it is true that historical facts are of interest in so far as they shed light on the current situation and the way it is likely to develop, the present circumstances are decisive.

iii. The concepts of "torture" and "inhuman or degrading treatment"

91. According to the Court's settled case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see, among other authorities, *Price v. the United Kingdom,* no. 33394/96, § 24, ECHR 2001-VII; *Mouisel v. France*, no. 67263/01, § 37, ECHR 2002-IX; and *Jalloh v. Germany* [GC], no. 54810/00, § 67, 11 July 2006).

92. In order for a punishment or treatment associated with it to be "inhuman" or "degrading", the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment (see *Labita v. Italy* [GC], no. 26772/95, § 120, ECHR 2000-IV).

93. In order to determine whether any particular form of ill-treatment should be qualified as torture, regard must be had to the distinction drawn in Article 3 between this notion and that of inhuman or degrading treatment. This distinction would appear to have been embodied

in the Convention to allow the special stigma of "torture" to attach only to deliberate inhuman treatment causing very serious and cruel suffering (see *Aydin v. Turkey*, judgment of 25 September 1997, *Reports* 1997-VI, § 82, and *Selmouni*, cited above, § 96).

(b) Application of the above principles to the present case

94. The Court notes first of all that States face immense difficulties in modern times in protecting their communities from terrorist violence (see *Chahal*, cited above, § 79, and S*hamayev and Others*, cited above, § 335). It cannot therefore underestimate the scale of the danger of terrorism today and the threat it presents to the community. That must not, however, call into question the absolute nature of Article 3.

95. Accordingly, the Court cannot accept the argument of the United Kingdom Government, supported by the respondent Government, that a distinction must be drawn under Article 3 between treatment inflicted directly by a signatory State and treatment that might be inflicted by the authorities of another State, and that protection against this latter form of ill-treatment should be weighed against the interests of the community as a whole (see paragraphs 120 and 122 above). Since protection against the treatment prohibited by Article 3 is absolute, that provision imposes an obligation not to extradite or expel any person who, in the receiving country, would run the real risk of being subjected to such treatment. As the Court has repeatedly held, there can be no derogation from that rule (see the case-law cited in paragraph 127 above). It must therefore reaffirm the principle stated in the *Chahal* judgment (cited above, § 81) that it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to determine whether the responsibility of a State is engaged under Article 3, even where such treatment is inflicted by another State. In that connection, the conduct of the person concerned, however undesirable or dangerous, cannot be taken into account, with the consequence that the protection afforded by Article 3 is broader than that provided for in Articles 32 and 33 of the 1951 United Nations Convention relating to the Status of Refugees (see *Chahal*, cited above, § 80 and paragraph 63 above). Moreover, that conclusion is in line with points IV and XII of the guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism (see paragraph 64 above).

96. The Court considers that the argument based on the balancing of the risk of harm if the person is sent back against the dangerousness he or she represents to the community if not sent back is misconceived. The concepts of "risk" and "dangerousness" in this context do not lend themselves to a balancing test because they are notions that can only be assessed independently of each other. Either the evidence adduced before the Court reveals that there is a substantial risk if the person is sent back or it does not. The prospect that he may pose a serious threat to the community if not returned does not reduce in any way the degree of risk of ill treatment that the person may be subject to on return. For that reason it would be incorrect to require a higher standard of proof, as submitted by the intervener, where the person is considered to represent a serious danger to the community, since assessment of the level of risk is independent of such a test.

97. With regard to the second branch of the United Kingdom Government's arguments, to the effect that where an applicant presents a threat to national security, stronger evidence must be adduced to prove that there is a risk of ill-treatment (see paragraph 122 above), the Court observes that such an approach is not compatible with the absolute nature of the protection afforded by Article 3 either. It amounts to asserting that, in the absence of evidence meeting a higher standard, protection of national security justifies accepting more readily a risk of ill-treatment for the individual. The Court therefore sees no reason to modify the relevant

standard of proof, as suggested by the third-party intervener, by requiring in cases like the present that it be proved that subjection to ill-treatment is "more likely than not". On the contrary, it reaffirms that for a planned forcible expulsion to be in breach of the Convention it is necessary – and sufficient – for substantial grounds to have been shown for believing that there is a real risk that the person concerned will be subjected in the receiving country to treatment prohibited by Article 3 (see paragraphs 125 and 132 above and the case-law cited in those paragraphs).

98. The Court further observes that similar arguments to those put forward by the third-party intervener in the present case have already been rejected in the *Chahal* judgment cited above. Even if, as the Italian and United Kingdom Governments asserted, the terrorist threat has increased since that time, that circumstance would not call into question the conclusions of the *Chahal* judgment concerning the consequences of the absolute nature of Article 3.

99. Furthermore, the Court has frequently indicated that it applies rigorous criteria and exercises close scrutiny when assessing the existence of a real risk of ill-treatment (see *Jabari*, cited above, § 39) in the event of a person being removed from the territory of the respondent State by extradition, expulsion or any other measure pursuing that aim. Although assessment of that risk is to some degree speculative, the Court has always been very cautious, examining carefully the material placed before it in the light of the requisite standard of proof (see paragraphs 128 and 132 above) before indicating an interim measure under Rule 39 or finding that the enforcement of removal from the territory would be contrary to Article 3 of the Convention. As a result, since adopting the *Chahal* judgment it has only rarely reached such a conclusion.

100. In the present case the Court has had regard, firstly, to the reports of Amnesty International and Human Rights Watch on Tunisia (see paragraphs 65-79 above), which describe a disturbing situation. The conclusions of those reports are corroborated by the report of the US State Department (see paragraphs 82-93 above). In particular, these reports mention numerous and regular cases of torture and ill-treatment meted out to persons accused under the 2003 Prevention of Terrorism Act. The practices reported – said to be often inflicted on persons in police custody with the aim of extorting confessions – include hanging from the ceiling, threats of rape, administration of electric shocks, immersion of the head in water, beatings and cigarette burns, all of these being practices which undoubtedly reach the level of severity required by Article 3. It is reported that allegations of torture and ill-treatment are not investigated by the competent Tunisian authorities, that they refuse to follow up complaints and that they regularly use confessions obtained under duress to secure convictions (see paragraphs 68, 71, 73-75, 84 and 86 above). Bearing in mind the authority and reputation of the authors of these reports, the seriousness of the investigations by means of which they were compiled, the fact that on the points in question their conclusions are consistent with each other and that those conclusions are corroborated in substance by numerous other sources (see paragraph 94 above), the Court does not doubt their reliability. Moreover, the respondent Government have not adduced any evidence or reports capable of rebutting the assertions made in the sources cited by the applicant.

101. The applicant was prosecuted in Italy for participation in international terrorism and the deportation order against him was issued by virtue of Legislative decree no. 144 of 27 July 2005 entitled "urgent measures to combat international terrorism" (see paragraph 32 above). He was also sentenced in Tunisia, in his absence, to twenty years' imprisonment for membership of a terrorist organisation operating abroad in time of peace and for incitement to terrorism. The existence of that sentence was confirmed by Amnesty International's statement of 19 June 2007 (see paragraph 71 above).

102. The Court further notes that the parties do not agree on the question whether the applicant's trial in Tunisia could be reopened. The applicant asserted that it was not possible for him to appeal against his conviction with suspensive effect, and that, even if he could, the Tunisian authorities could imprison him as a precautionary measure (see paragraph 154 below).

103. In these circumstances, the Court considers that in the present case substantial grounds have been shown for believing that there is a real risk that the applicant would be subjected to treatment contrary to Article 3 of the Convention if he were to be deported to Tunisia. That risk cannot be excluded on the basis of other material available to the Court. In particular, although it is true that the International Committee of the Red Cross has been able to visit Tunisian prisons, that humanitarian organisation is required to maintain confidentiality about its fieldwork (see paragraph 80 above) and, in spite of an undertaking given in April 2005, similar visiting rights have been refused to the independent human-rights-protection organisation Human Rights Watch (see paragraphs 76 and 90 above). Moreover, some of the acts of torture reported allegedly took place while the victims were in police custody or pre-trial detention on the premises of the Ministry of the Interior (see paragraphs 86 and 94 above). Consequently, the visits by the International Committee of the Red Cross cannot exclude the risk of subjection to treatment contrary to Article 3 in the present case.

104. The Court further notes that on 29 May 2007, while the present application was pending before it, the Italian Government asked the Tunisian Government, through the Italian embassy in Tunis, for diplomatic assurances that the applicant would not be subjected to treatment contrary to Article 3 of the Convention (see paragraphs 51 and 52 above). However, the Tunisian authorities did not provide such assurances. At first they merely stated that they were prepared to accept the transfer to Tunisia of Tunisians detained abroad (see paragraph 54 above). It was only in a second note verbale, dated 10 July 2007 (that is, the day before the Grand Chamber hearing), that the Tunisian Ministry of Foreign Affairs observed that Tunisian laws guaranteed prisoners' rights and that Tunisia had acceded to "the relevant international treaties and conventions" (see paragraph 55 above). In that connection, the Court observes that the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention.

105. Furthermore, it should be pointed out that even if, as they did not do in the present case, the Tunisian authorities had given the diplomatic assurances requested by Italy, that would not have absolved the Court from the obligation to examine whether such assurances provided, in their practical application, a sufficient guarantee that the applicant would be protected against the risk of treatment prohibited by the Convention (see *Chahal*, cited above, § 105). The weight to be given to assurances from the receiving State depends, in each case, on the circumstances prevailing at the material time.

106. Consequently, the decision to deport the applicant to Tunisia would breach Article 3 of the Convention if it were enforced.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

107. The applicant alleged that his expulsion to Tunisia would deprive his partner and his son of his presence and assistance. He relied on Article 8 of the Convention, which provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

108. The Government rejected that argument.

….

2. The Court's assessment

109. The Court recalls its finding that the deportation of the applicant to Tunisia would constitute a violation of Article 3 of the Convention (see paragraph 149 above). Having no reason to doubt that the respondent Government will comply with the present judgment, it considers that it is not necessary to decide the hypothetical question whether, in the event of expulsion to Tunisia, there would also be a violation of Article 8 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 7

110. The applicant submitted that his expulsion would be neither "necessary in the interests of public order" nor "grounded on reasons of national security". He alleged a violation of Article 1 of Protocol No. 7, which provides:

> "1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:
>
> (a) to submit reasons against his expulsion,
>
> (b) to have his case reviewed, and
>
> (c) to be represented for these purposes before the competent authority or a person or persons designated by that authority.
>
> 2. An alien may be expelled before the exercise of his rights under paragraph 1 (a), (b) and (c) of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security."

111. The Government rejected that argument.

….

2. The Court's assessment

112. The Court recalls its finding that the deportation of the applicant to Tunisia would constitute a violation of Article 3 of the Convention (see paragraph 149 above). Having no reason to doubt that the respondent Government will comply with the present judgment, it

considers that it is not necessary to decide the hypothetical question whether, in the event of expulsion to Tunisia, there would also be a violation of Article 1 of Protocol No. 7.

…..

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that, if the decision to deport the applicant to Tunisia were to be enforced, there would be a violation of Article 3 of the Convention;

3. *Holds* that it is not necessary to examine whether enforcement of the decision to deport the applicant to Tunisia would also be in breach of Articles 6 and 8 of the Convention and Article 1 of Protocol No. 7;

4. *Holds* that the finding of a violation constitutes sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;

5. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, EUR 8,000 (eight thousand euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicant;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 28 February 2008.

Vincent BERGER
Jurisconsult

Jean-Paul COSTA
President

CONCURRING OPINION OF JUDGE MYJER, JOINED BY JUDGE ZAGREBELSKY

I voted with the other judges that, if the decision to deport the applicant to Tunisia were to be enforced, there would be a violation of Article 3 of the Convention. I also fully agree with the reasoning which is contained in paragraphs 124-148 of the judgment.

Still, I would like to add the following remarks.

….

As far as the question itself is concerned:

Paragraph 137 of the judgment gives the answer in a nutshell: *"the Court notes first of all that States face immense difficulties in modern times in protecting their communities from terrorist violence. It cannot therefore underestimate the scale of the danger of terrorism today and the threat it presents to the community. That must not, however, call into question the absolute nature of Article 3."*

I would not be surprised if some readers of the judgment– at first sight - find it difficult to understand that the Court by emphasising the absolute nature of Article 3 seems to afford more protection to the non-national applicant who has been found guilty of terrorist related crimes than to the protection of the community as a whole from terrorist violence. Their reasoning may be assumed to run as follows: it is one thing not to expel non-nationals – including people who have sought political asylum – where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country (see for instance the judgment of 11 January 2007 in the case of *Salah Sheek v. the Netherlands*) or even not to expel non-nationals who fall in the category of Article 1F of the Convention on the Status of Refugees of 28 July 1951 (decision of 15 September 2005 in the case of *Teshome Goraga Bonger v. the Netherlands*) as long as these people pose no potential danger for the lives of the citizens of the State, but it makes a difference to be told that a non-national who has posed (and maybe still poses) a possible terrorist threat to the citizens cannot be expelled.

Indeed, the Convention (and the protocols thereto) contain legal human rights standards which must be secured to everyone within the jurisdiction of the High Contracting Parties (Article 1). Everyone means everyone: not just terrorists and the like. The States also have a positive obligation to protect the life of their citizens. They should do all that could be reasonably expected from them to avoid a real and immediate risk to life of which they have or ought to have knowledge (judgment of 28 October 1998 in the *Osman v. the United Kingdom* case, §§ 115-116). They have, as was laid down in the preamble of the Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism (adopted on 11 July 2002), "*the imperative duty"* to protect their populations against possible terrorist acts. I even daresay that the Convention obliges the High Contracting States to ensure as far as possible that citizens can live without fear that their life or goods will be at risk. In that respect I recall that *Freedom from Fear* ranks among the Four Freedoms mentioned in Roosevelt's famous speech.

However, States are not allowed to combat international terrorism at all costs. They must not resort to methods which undermine the very values they seek to protect. And this applies the more to those "absolute" rights from which no derogation may be made even in times of emergency (Article 15). During a high level seminar on *Protecting human rights while fighting terrorism* (Strasbourg 13-14 June 2005) the former French Minister of Justice Robert Badinter rightly spoke of a dual threat which terrorism poses for human rights; a direct threat posed by acts of terrorism and an indirect threat because anti-terror measures themselves risk

violating human rights. Upholding human rights in the fight against terrorism is first and foremost a matter of upholding our values, even with regard to those who may seek to destroy them. There is nothing more counterproductive than to fight fire with fire, to give terrorists the perfect pretext for martyrdom and for accusing democracies of using double standards. Such a course of action would only serve to create fertile breeding grounds for further radicalisation and the recruitment of future terrorists.

After the events of 11 September 2001 the Committee of Ministers of the Council of Europe reaffirmed in the preamble of the abovementioned guideline the States' obligation to respect, in their fight against terrorism, the international instruments for the protection of human rights and, for the member States in particular, the Convention for the Protection of Human Rights and Fundamental Freedoms and the case-law of the European Court of Human Rights. Guideline 14.2 makes it clear that it is the duty of a State that intends to expel a person to his or her country of origin or to another country, not to expose him or her to the death penalty, to torture or to inhuman or degrading treatment or punishment.

The Court found that in this case substantial grounds have been shown for believing that the applicant would risk being subjected to treatment contrary to Article 3 of the Convention, if he were to be deported to Tunisia.

Then there is only one (unanimous) answer possible.